

**RETENTION OF OUTSIDE COUNSEL, EXPERT
WITNESSES, AND LITIGATION SUPPORT SERVICES**

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: J. Stuart Adams

House Sponsor: Daniel McCay

LONG TITLE

General Description:

This bill enacts provisions relating to the attorney general's procurement of litigation related services.

Highlighted Provisions:

This bill:

- ▶ enacts provisions relating to the procurement of outside counsel, expert witness, and litigation support services by the attorney general;
- ▶ establishes a process through which the attorney general may procure those services;
- ▶ authorizes the attorney general to waive certain provisions under specified conditions;
- ▶ enacts provisions relating to contracts the attorney general enters into for litigation related services; and
- ▶ establishes limits on the amount of contingency fees for outside counsel.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:



28 ENACTS:

29 [67-5-501](#), Utah Code Annotated 1953

30 [67-5-502](#), Utah Code Annotated 1953

31 [67-5-503](#), Utah Code Annotated 1953

32 [67-5-504](#), Utah Code Annotated 1953

33 [67-5-505](#), Utah Code Annotated 1953

34 [67-5-506](#), Utah Code Annotated 1953

35 [67-5-507](#), Utah Code Annotated 1953

36 [67-5-508](#), Utah Code Annotated 1953

37 [67-5-509](#), Utah Code Annotated 1953

38 [67-5-510](#), Utah Code Annotated 1953

39 [67-5-511](#), Utah Code Annotated 1953

40

41 *Be it enacted by the Legislature of the state of Utah:*

42 Section 1. Section [67-5-501](#) is enacted to read:

43 **Part 5. Retention of Outside Counsel and Litigation Services**

44 **[67-5-501](#). Title.**

45 This part is known as "Retention of Outside Counsel and Litigation Services."

46 Section 2. Section [67-5-502](#) is enacted to read:

47 **[67-5-502](#). Definitions.**

48 As used in this part:

49 (1) "Agency" has the same meaning as defined in Section [67-5-3](#).

50 (2) "Attorney general" means the attorney general of the state or the attorney general's

51 designee.

52 (3) "Chief procurement officer" has the same meaning as defined in Section

53 [63G-6a-103](#).

54 (4) "Division" means the Division of Purchasing and General Services created in

55 Section [63A-2-101](#).

56 (5) "Expert witness" means an individual whose knowledge, skill, experience, training,

57 or education in a scientific, technical, or other specialized area enables the individual to give

58 testimony under Rule 702 of the Utah Rules of Evidence.

59 (6) "Government records law" means Title 63G, Chapter 2, Government Records
60 Access and Management Act.

61 (7) "Invitation for bids" means an invitation, as described in Section [63G-6a-603](#), by
62 which bids for a procurement item are solicited.

63 (8) "Litigation support service" means a good, service, software, or technology for use
64 in connection with litigation being handled by the attorney general's office or outside counsel.

65 (9) "Outside counsel":

66 (a) means an attorney or law firm hired by the attorney general to handle a legal matter
67 for which the attorney general has responsibility to provide legal representation; and

68 (b) does not include an attorney who is not, or a law firm whose attorneys are not:

69 (i) employed by the attorney general's office under Sections [67-5-7](#) through [67-5-13](#); or

70 (ii) appointed by the attorney general under Section [67-5-5](#) to represent or provide legal
71 advice or counsel to an agency.

72 (10) "Procure" has the same meaning as defined in Section [63G-6a-103](#).

73 (11) "Procurement" has the same meaning as defined in Section [63G-6a-103](#).

74 (12) "Procurement code" means Title 63G, Chapter 6a, Utah Procurement Code.

75 (13) "Procurement service" means:

76 (a) the services of outside counsel or an expert witness; or

77 (b) a professional litigation support service or a litigation support service.

78 (14) "Professional litigation support service" means a service:

79 (a) provided by a person with advanced or specialized training, knowledge, expertise,
80 or experience; and

81 (b) for use in connection with litigation being handled by the attorney general's office
82 or outside counsel.

83 (15) "Request for proposals" has the same meaning as provided in Section [63G-6a-103](#).

84 (16) "Small purchase" means:

85 (a) a contract for outside counsel, an expert witness, or professional litigation support
86 service under which the total fee or charge is \$100,000 or less;

87 (b) a purchase of a litigation support service costing \$50,000 or less; or

88 (c) a procurement, within the dollar limit of Subsection (16)(a) or (b), as applicable,

89 that the chief procurement officer delegates to the attorney general under the procurement code.

90 (17) "Sole source procurement" means a procurement:

91 (a) of a procurement service; and

92 (b) that meets the criteria stated in Subsection [63G-6a-802\(2\)\(a\)](#) or (b).

93 Section 3. Section **67-5-503** is enacted to read:

94 **67-5-503. Procurement of outside counsel and other litigation services.**

95 (1) As provided in this part, the attorney general may procure:

96 (a) the services of outside counsel;

97 (b) an expert witness;

98 (c) a professional litigation support service; or

99 (d) a litigation support service.

100 (2) Except as provided in this part, a procurement under this part is governed by and
101 subject to the procurement code and administrative rules adopted by the division.

102 (3) The attorney general shall provide for the fair and equitable treatment of all
103 potential providers of a procurement service.

104 (4) The attorney general may procure a procurement service by means of:

105 (a) a request for bids;

106 (b) a request for proposals;

107 (c) a sole source procurement; or

108 (d) a small purchase.

109 (5) The attorney general shall support a procurement with a determination that the
110 procurement is in the best interests of the state, in light of resources available to the attorney
111 general.

112 Section 4. Section **67-5-504** is enacted to read:

113 **67-5-504. Request for proposals.**

114 (1) The attorney general may issue a request for proposals for a procurement service
115 instead of a request for bids if the procurement is for professional services or includes a factor
116 other than price.

117 (2) The attorney general may issue a request for proposals:

118 (a) in stages; or

119 (b) following a request for information, as defined in Section [63G-6a-103](#), or other
120 procurement process allowed by the procurement code.

- 121 (3) A request for proposals shall include:
122 (a) a description of the matter for which the procurement service is sought;
123 (b) a description of any fee arrangement;
124 (c) an indication of the individuals or entities being sought, including whether an
125 individual, firm, or association of firms may respond;
126 (d) the qualification criteria, including, as applicable:
127 (i) identification by name and experience of the proposed provider;
128 (ii) a description of the duties and responsibilities of each individual providing the
129 service; and
130 (iii) the ability of each individual providing service to meet the needs of the matter,
131 including the consideration of any association with another individual, expert witness, or firm;
132 (e) the relative importance of the qualification criteria;
133 (f) a copy of the proposed contract or another writing showing the contractual
134 requirements;
135 (g) a request for a conflicts analysis, including any potential conflict of interest or any
136 other related matter concerning the potential provider's ability to perform ethically the
137 requested services;
138 (h) an explanation of the requirements regarding submission of proposals, including
139 the date, time, place, and method of submission and the form of the proposals;
140 (i) a statement that the attorney general reserves the right to reject proposals that are
141 filed late or do not conform to applicable requirements; and
142 (j) a statement that the attorney general reserves the right to modify the request for
143 proposals, cancel the request for proposals, with or without issuing a new request for proposals,
144 or reject all proposals.

145 Section 5. Section **67-5-505** is enacted to read:

146 **67-5-505. Sole source procurement.**

147 (1) The attorney general may procure a procurement service through a sole source
148 procurement if the attorney general determines in writing, after reasonable efforts to locate
149 providers for the procurement service, that a sole source procurement meets applicable criteria
150 under Section [63G-6a-802](#).

151 (2) The attorney general may publish notice of the sole source procurement on the

152 state's procurement website or by another means in order to learn whether there is any other
153 qualified provider of the procurement service.

154 (3) The attorney general shall negotiate with the sole source provider to ensure that the
155 terms of the contract, including price and delivery, are in the best interests of the state.

156 Section 6. Section **67-5-506** is enacted to read:

157 **67-5-506. Small purchases.**

158 (1) The attorney general may make a small purchase if the attorney general finds in
159 writing that the proposed procurement meets the definition of a small purchase.

160 (2) In making a small purchase, the attorney general may use:

161 (a) a request for quotes; or

162 (b) a rotational system among qualified providers, in accordance with policies that the
163 attorney general establishes.

164 (3) The attorney general shall ensure that a small purchase is made with as much
165 competition as reasonably practicable, while avoiding harm or a risk of harm to public health,
166 safety, welfare, or property.

167 Section 7. Section **67-5-507** is enacted to read:

168 **67-5-507. Emergencies.**

169 (1) The attorney general may waive an applicable provision of this part or the
170 procurement code:

171 (a) if the attorney general determines in writing that a condition or set of conditions
172 requires a provision of this part or the procurement code to be waived due to a need to:

173 (i) be timely;

174 (ii) meet a litigation deadline;

175 (iii) preserve confidentiality; or

176 (iv) address some other circumstance requiring expedited attention;

177 (b) in order to eliminate or reduce the impact of the condition or set of conditions; and

178 (c) as necessary to enable the timely procurement of a procurement service.

179 (2) A written determination under Subsection (1)(a) shall state the condition or set of
180 conditions requiring a waiver.

181 (3) To the extent that provisions of this part and the procurement code are not waived,
182 a procurement under this section shall comply with this part and the procurement code.

183 (4) The attorney general shall make a procurement under this section with as much
184 competition as reasonably practicable, while avoiding harm or risk of harm to public health,
185 safety, welfare, or property.

186 Section 8. Section **67-5-508** is enacted to read:

187 **67-5-508. Procurement contract.**

188 (1) A procurement of a procurement service shall be memorialized in a written contract
189 between the attorney general and the provider of the procurement service.

190 (2) A written contract under Subsection (1) shall include:

191 (a) all material terms set forth in:

192 (i) the procurement invitation or request that the attorney general issued; and

193 (ii) the response that the provider submitted, to the extent that the terms are accepted
194 by the attorney general;

195 (b) a clause allowing termination of the contract for cause or for convenience; and

196 (c) any terms required by law.

197 Section 9. Section **67-5-509** is enacted to read:

198 **67-5-509. Contract with outside counsel.**

199 (1) A contract that the attorney general enters into with outside counsel shall require
200 that the attorney general:

201 (a) retain complete oversight and control over the course and conduct of the litigation
202 or anticipated litigation for which outside counsel is hired;

203 (b) appoint a member of the attorney general's office to personally oversee the
204 litigation;

205 (c) retain the ability to override any decision relating to the litigation that outside
206 counsel makes;

207 (d) be made aware of and allowed to attend and participate in any settlement
208 conference held relating to the litigation; and

209 (e) make all decisions relating to settlement of the litigation.

210 (2) Subsection (1) does not apply to the hiring of outside counsel who is bond counsel.

211 Section 10. Section **67-5-510** is enacted to read:

212 **67-5-510. Contract with contingency fee provision.**

213 (1) The attorney general may not enter into a contract with outside counsel that

214 provides for the outside counsel to receive a contingency fee in excess of:

215 (a) 25% of the amount recovered, if the amount recovered is no more than

216 \$10,000,000;

217 (b) 25% of the first \$10,000,000 recovered, plus 20% of the amount recovered that

218 exceeds \$10,000,000, if the amount recovered is over \$10,000,000 but no more than

219 \$15,000,000;

220 (c) 25% of the first \$10,000,000 recovered, plus 20% of the next \$5,000,000 recovered,

221 plus 15% of the amount recovered that exceeds \$15,000,000, if the amount recovered is over

222 \$15,000,000 but no more than \$20,000,000;

223 (d) 25% of the first \$10,000,000 recovered, plus 20% of the next \$5,000,000

224 recovered, plus 15% of the next \$5,000,000 recovered, plus 10% of the amount recovered that

225 exceeds \$20,000,000, if the amount recovered is over \$20,000,000 but no more than

226 \$25,000,000; or

227 (e) 25% of the first \$10,000,000 recovered, plus 20% of the next \$5,000,000 recovered,

228 plus 15% of the next \$5,000,000 recovered, plus 10% of the next \$5,000,000 recovered, plus

229 5% of any portion of the recovery that exceeds \$25,000,000, if the amount recovered is over

230 \$25,000,000.

231 (2) Except as provided by the government records law or the Rules of Professional

232 Conduct promulgated by the Utah Supreme Court, the attorney general shall make a copy of an

233 executed contingency fee contract with outside counsel available for public inspection in

234 accordance with the government records law.

235 (3) The attorney general shall make a record of any payment to outside counsel under a

236 contract with a contingency fee provision available for public inspection in accordance with the

237 government records law.

238 (4) (a) Upon request of the president of the Senate or the speaker of the House of

239 Representatives, the attorney general shall make available to the president or the speaker:

240 (i) each contract with outside counsel that:

241 (A) contains a contingency fee provision; and

242 (B) was executed during the year before the request;

243 (ii) the name of any known party to the litigation that the outside counsel is handling

244 under the contract;

- 245 (iii) the amount of any recovery in the litigation; and
- 246 (iv) the amount of any contingency fee paid under the contract.
- 247 (b) Notwithstanding Subsection (4)(a), the attorney general may withhold information
- 248 that is private, controlled, or protected under the government records law, Rules of Professional
- 249 Conduct, or other applicable law, unless the attorney general determines that the protection
- 250 from public disclosure afforded the information under the government records law may be
- 251 adequately preserved through a confidentiality agreement or other means.

252 Section 11. Section **67-5-511** is enacted to read:

253 **67-5-511. Procurement records.**

254 (1) A proposal submitted to the attorney general under this part becomes property of

255 the attorney general and the state.

256 (2) (a) The attorney general shall place a proposal and any related information in a file

257 relating to the procurement service for which the proposal was submitted.

258 (b) A file under Subsection (2)(a) shall contain:

259 (i) if applicable, a copy of each written determination made by the attorney general

260 under this part or the procurement code;

261 (ii) a copy of all documents relating to the procurement service, including documents

262 indicating compliance with applicable notice requirements; and

263 (iii) all responses to the procurement invitation or request, including, if applicable, any

264 modification to the procurement invitation or request.

Legislative Review Note
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Office of Legislative Research and General Counsel