

SB0264S01 compared with SB0264

~~{deleted text}~~ shows text that was in SB0264 but was deleted in SB0264S01.

inserted text shows text that was not in SB0264 but was inserted into SB0264S01.

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Senator J. Stuart Adams proposes the following substitute bill:

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}~~ modifies a provision relating to the attorney general's procurement of litigation related services.

Highlighted Provisions:

This bill:

- ▶ ~~{enacts provisions}~~ modifies a provision relating to attorney general rules on 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;~~

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- authorizes} and other litigation services;
 - requires 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;} submit proposed rules to a legislative interim committee;
 - requires review of the proposed rules by a legislative interim committee; and
 - modifies the required contents of proposed rules.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

{ENACTS} AMENDS:

- ~~67-5-501, Utah Code Annotated 1953~~
- ~~67-5-502, Utah Code Annotated 1953~~
- ~~67-5-503, Utah Code Annotated 1953~~
- ~~67-5-504, Utah Code Annotated 1953~~
- ~~67-5-505, Utah Code Annotated 1953~~
- ~~67-5-506, Utah Code Annotated 1953~~
- ~~67-5-507, Utah Code Annotated 1953~~
- ~~67-5-508, Utah Code Annotated 1953~~
- ~~67-5-509, Utah Code Annotated 1953~~
- ~~67-5-510, Utah Code Annotated 1953~~
- ~~67-5-511, Utah Code Annotated 1953~~} 67-5-32, as enacted by Laws of Utah 2012, Fourth Special Session, Chapter 2

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

Section 1. Section 67-5-32 is amended to read:

67-5-32. Rulemaking authority regarding the procurement of outside counsel,

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expert witnesses, and other litigation support services.

(1) (a) The attorney ~~[general's office]~~ general shall, ~~[on or before August 1, 2012]~~ in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules to establish public disclosure, transparency, accountability, reasonable fees and limits on fees, and reporting in relation to the procurement of outside counsel, expert witnesses, and other litigation support services.

(b) On or before May 30, 2014, the attorney general shall submit to the Business and Labor Interim Committee, for its review, comment, and recommendations, the attorney general's proposed rules under Subsection (1)(a) relating to fee limits for outside counsel, including any provisions relating to exceptions to or a waiver of the fee limits.

(c) Before September 1, 2014, the Business and Labor Interim Committee shall include the attorney general's proposed rules described in Subsection (1)(b) on a committee agenda for the purpose of allowing the committee to review, comment, and make recommendations on the proposed rules.

(2) The rules described in Subsection (1) shall:

(a) ensure that a procurement for outside counsel is supported by a determination by the attorney general that the procurement is in the best interests of the state, in light of available resources of the attorney general's office;

(b) provide for the fair and equitable treatment of all potential providers of outside counsel, expert witnesses, and other litigation support services;

(c) ensure a competitive process, to the greatest extent possible, for the procurement of outside counsel, expert witnesses, and other litigation support services;

~~[(d)]~~ (d) ensure that fees for outside counsel, whether based on an hourly rate, contingency fee, or other arrangement, are reasonable and consistent with industry standards;

(e) ensure that contingency fee arrangements do not encourage high risk litigation that is not in the best interests of the citizens of the state;

~~[(d)]~~ (f) provide for oversight and control, by the attorney general's office, in relation to outside counsel [hired under a contingency], regardless of the type of fee arrangement;

~~(e)]~~ under which outside counsel is hired;

(g) prohibit outside counsel from adding a party to a lawsuit or causing a new party to be served with process without the express written authorization of the attorney general's

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office:

~~[(e)]~~ [(h)] establish for transparency regarding the procurement of outside counsel, expert witnesses, and other litigation support services, subject to:

- (i) Title 63G, Chapter 2, Government Records Access and Management Act; and
- (ii) other applicable provisions of law and the Utah Rules of Professional Conduct;

~~[(f)]~~ [(i)] establish standard contractual terms for the procurement of outside counsel, expert witnesses, and other litigation support services; and

~~[(g)]~~ [(i)] provide for the retention of records relating to the procurement of outside counsel, expert witnesses, and other litigation support services.

~~{~~ Section 1. Section ~~67-5-501~~ is enacted to read:

~~Part 5. Retention of Outside Counsel and Litigation Services~~

~~67-5-501. Title:~~

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

~~Section 2. Section 67-5-502 is enacted to read:~~

~~67-5-502. Definitions:~~

~~As used in this part:~~

~~(1) "Agency" has the same meaning as defined in Section 67-5-3.~~

~~(2) "Attorney general" means the attorney general of the state or the attorney general's designee.~~

~~(3) "Chief procurement officer" has the same meaning as defined in Section 63G-6a-103.~~

~~(4) "Division" means the Division of Purchasing and General Services created in Section 63A-2-101.~~

~~(5) "Expert witness" means an individual whose knowledge, skill, experience, training, or education in a scientific, technical, or other specialized area enables the individual to give testimony under Rule 702 of the Utah Rules of Evidence.~~

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

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

~~(8) "Litigation support service" means a good, service, software, or technology for use~~

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~~in connection with litigation being handled by the attorney general's office or outside counsel:~~

~~—— (9) "Outside counsel":~~

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

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

~~—— (i) employed by the attorney general's office under Sections 67-5-7 through 67-5-13; or~~

~~—— (ii) appointed by the attorney general under Section 67-5-5 to represent or provide legal advice or counsel to an agency.~~

~~—— (10) "Procure" has the same meaning as defined in Section 63G-6a-103.~~

~~—— (11) "Procurement" has the same meaning as defined in Section 63G-6a-103.~~

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

~~—— (13) "Procurement service" means:~~

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

~~—— (b) a professional litigation support service or a litigation support service.~~

~~—— (14) "Professional litigation support service" means a service:~~

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

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

~~—— (15) "Request for proposals" has the same meaning as provided in Section 63G-6a-103.~~

~~—— (16) "Small purchase" means:~~

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

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

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

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

~~—— (17) "Sole source procurement" means a procurement:~~

~~—— (a) of a procurement service; and~~

~~—— (b) that meets the criteria stated in Subsection 63G-6a-802(2)(a) or (b).~~

~~—— Section 3. Section 67-5-503 is enacted to read:~~

~~—— **67-5-503. Procurement of outside counsel and other litigation services:**~~

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- ~~—— (1) As provided in this part, the attorney general may procure:~~
 - ~~—— (a) the services of outside counsel;~~
 - ~~—— (b) an expert witness;~~
 - ~~—— (c) a professional litigation support service; or~~
 - ~~—— (d) a litigation support service.~~
- ~~—— (2) Except as provided in this part, a procurement under this part is governed by and subject to the procurement code and administrative rules adopted by the division.~~
- ~~—— (3) The attorney general shall provide for the fair and equitable treatment of all potential providers of a procurement service.~~
- ~~—— (4) The attorney general may procure a procurement service by means of:~~
 - ~~—— (a) a request for bids;~~
 - ~~—— (b) a request for proposals;~~
 - ~~—— (c) a sole source procurement; or~~
 - ~~—— (d) a small purchase.~~
- ~~—— (5) The attorney general shall support a procurement with a determination that the procurement is in the best interests of the state, in light of resources available to the attorney general.~~
- ~~—— Section 4. Section ~~67-5-504~~ is enacted to read:~~
- ~~—— **67-5-504. Request for proposals:**~~
 - ~~—— (1) The attorney general may issue a request for proposals for a procurement service instead of a request for bids if the procurement is for professional services or includes a factor other than price.~~
 - ~~—— (2) The attorney general may issue a request for proposals:~~
 - ~~—— (a) in stages; or~~
 - ~~—— (b) following a request for information, as defined in Section 63G-6a-103, or other procurement process allowed by the procurement code.~~
 - ~~—— (3) A request for proposals shall include:~~
 - ~~—— (a) a description of the matter for which the procurement service is sought;~~
 - ~~—— (b) a description of any fee arrangement;~~
 - ~~—— (c) an indication of the individuals or entities being sought, including whether an individual, firm, or association of firms may respond;~~

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- ~~_____ (d) the qualification criteria, including, as applicable:~~
- ~~_____ (i) identification by name and experience of the proposed provider;~~
- ~~_____ (ii) a description of the duties and responsibilities of each individual providing the service; and~~
- ~~_____ (iii) the ability of each individual providing service to meet the needs of the matter, including the consideration of any association with another individual, expert witness, or firm;~~
- ~~_____ (e) the relative importance of the qualification criteria;~~
- ~~_____ (f) a copy of the proposed contract or another writing showing the contractual requirements;~~
- ~~_____ (g) a request for a conflicts analysis, including any potential conflict of interest or any other related matter concerning the potential provider's ability to perform ethically the requested services;~~
- ~~_____ (h) an explanation of the requirements regarding submission of proposals, including the date, time, place, and method of submission and the form of the proposals;~~
- ~~_____ (i) a statement that the attorney general reserves the right to reject proposals that are filed late or do not conform to applicable requirements; and~~
- ~~_____ (j) a statement that the attorney general reserves the right to modify the request for proposals, cancel the request for proposals, with or without issuing a new request for proposals, or reject all proposals;~~

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

~~_____ **67-5-505. Sole source procurement.**~~

- ~~_____ (1) The attorney general may procure a procurement service through a sole source procurement if the attorney general determines in writing, after reasonable efforts to locate providers for the procurement service, that a sole source procurement meets applicable criteria under Section 63G-6a-802.~~
- ~~_____ (2) The attorney general may publish notice of the sole source procurement on the state's procurement website or by another means in order to learn whether there is any other qualified provider of the procurement service.~~
- ~~_____ (3) The attorney general shall negotiate with the sole source provider to ensure that the terms of the contract, including price and delivery, are in the best interests of the state.~~

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

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~~67-5-506. Small purchases:~~

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

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

~~(a) a request for quotes; or~~

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

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

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

~~67-5-507. Emergencies:~~

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

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

~~(i) be timely;~~

~~(ii) meet a litigation deadline;~~

~~(iii) preserve confidentiality; or~~

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

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

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

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

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

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

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

~~67-5-508. Procurement contract:~~

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

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

~~(a) all material terms set forth in:~~

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

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

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

~~(c) any terms required by law.~~

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

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

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

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

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

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

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

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

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

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

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

~~(1) The attorney general may not enter into a contract with outside counsel that provides for the outside counsel to receive a contingency fee in excess of:~~

~~(a) 25% of the amount recovered, if the amount recovered is no more than \$10,000,000;~~

~~(b) 25% of the first \$10,000,000 recovered, plus 20% of the amount recovered that exceeds \$10,000,000, if the amount recovered is over \$10,000,000 but no more than~~

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~~\$15,000,000;~~

~~—— (c) 25% of the first \$10,000,000 recovered, plus 20% of the next \$5,000,000 recovered, plus 15% of the amount recovered that exceeds \$15,000,000, if the amount recovered is over \$15,000,000 but no more than \$20,000,000;~~

~~—— (d) 25% of the first \$10,000,000 recovered, plus 20% of the next \$5,000,000 recovered, plus 15% of the next \$5,000,000 recovered, plus 10% of the amount recovered that exceeds \$20,000,000, if the amount recovered is over \$20,000,000 but no more than \$25,000,000; or~~

~~—— (e) 25% of the first \$10,000,000 recovered, plus 20% of the next \$5,000,000 recovered, plus 15% of the next \$5,000,000 recovered, plus 10% of the next \$5,000,000 recovered, plus 5% of any portion of the recovery that exceeds \$25,000,000, if the amount recovered is over \$25,000,000.~~

~~—— (2) Except as provided by the government records law or the Rules of Professional Conduct promulgated by the Utah Supreme Court, the attorney general shall make a copy of an executed contingency fee contract with outside counsel available for public inspection in accordance with the government records law.~~

~~—— (3) The attorney general shall make a record of any payment to outside counsel under a contract with a contingency fee provision available for public inspection in accordance with the government records law.~~

~~—— (4) (a) Upon request of the president of the Senate or the speaker of the House of Representatives, the attorney general shall make available to the president or the speaker:~~

~~—— (i) each contract with outside counsel that:~~

~~—— (A) contains a contingency fee provision; and~~

~~—— (B) was executed during the year before the request;~~

~~—— (ii) the name of any known party to the litigation that the outside counsel is handling under the contract;~~

~~—— (iii) the amount of any recovery in the litigation; and~~

~~—— (iv) the amount of any contingency fee paid under the contract.~~

~~—— (b) Notwithstanding Subsection (4)(a), the attorney general may withhold information that is private, controlled, or protected under the government records law, Rules of Professional Conduct, or other applicable law, unless the attorney general determines that the protection~~

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~~from public disclosure afforded the information under the government records law may be adequately preserved through a confidentiality agreement or other means.~~

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

~~**67-5-511. Procurement records:**~~

~~(1) A proposal submitted to the attorney general under this part becomes property of the attorney general and the state.~~

~~(2) (a) The attorney general shall place a proposal and any related information in a file relating to the procurement service for which the proposal was submitted.~~

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

~~(i) if applicable, a copy of each written determination made by the attorney general under this part or the procurement code;~~

~~(ii) a copy of all documents relating to the procurement service, including documents indicating compliance with applicable notice requirements; and~~

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

Legislative Review Note

~~as of 2-27-14 2:47 PM~~

~~Office of Legislative Research and General Counsel}~~