

SB0233S01 compared with SB0233

~~deleted text~~ shows text that was in SB0233 but was deleted in SB0233S01.

inserted text shows text that was not in SB0233 but was inserted into SB0233S01.

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Senator J. Stuart Adams proposes the following substitute bill:

ATTORNEY GENERAL CONTINGENT FEE CONTRACTS

2015 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: J. Stuart Adams

House Sponsor: _____

LONG TITLE

General Description:

This bill enacts provisions relating to contingent fee contracts between the attorney general and private attorneys.

Highlighted Provisions:

This bill:

- ▶ imposes requirements on the attorney general related to entering into contingent fee contracts with private attorneys;
- ▶ places limits on the amount of contingent fees that can be paid under a contingent fee contract;
- ▶ imposes other requirements on contingent fee contracts between the attorney general and private attorneys; and
- ▶ makes conforming changes.

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Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

63G-6a-106, as last amended by Laws of Utah 2014, Chapter 196

ENACTS:

67-5-33, Utah Code Annotated 1953

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

Section 1. Section **63G-6a-106** is amended to read:

63G-6a-106. Procurement units with specific statutory procurement authority --

Independent procurement authority.

(1) A procurement unit with procurement authority under the following provisions has independent procurement authority to the extent of the applicable provisions and for the procurement items specified in the applicable provisions:

- (a) Title 53B, State System of Higher Education;
- (b) Title 63A, Chapter 5, State Building Board - Division of Facilities Construction and Management;
- (c) Title 67, Chapter 5, Attorney General;
- (d) Title 72, Transportation Code; and
- (e) Title 78A, Chapter 5, District Court.

(2) Except as otherwise provided in Sections 63G-6a-105 and 63G-6a-107, a procurement unit shall conduct a procurement in accordance with this chapter.

(3) (a) The Department of Transportation may make rules governing the procurement of highway construction or improvement.

(b) The applicable rulemaking authority for a public transit district may make rules governing the procurement of a transit construction project or a transit improvement project.

(c) This Subsection (3) supersedes Subsections (1) and (2).

(4) (a) A procurement unit listed in Subsection (4)(b) may, without the supervision,

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interference, oversight, control, or involvement of the division or the chief procurement officer, but in accordance with the requirements of this chapter:

- (i) engage in a standard procurement process;
- (ii) procure an item under an exception, as provided in this chapter, to the requirement

to use a standard procurement process; or

- (iii) otherwise engage in an act authorized or required by this chapter.

(b) The procurement units to which Subsection (4)(a) applies are:

- (i) a legislative procurement unit;
- (ii) a judicial procurement unit;
- (iii) an educational procurement unit;
- (iv) a local government procurement unit;
- (v) a conservation district;
- (vi) a local building authority;
- (vii) a local district;
- (viii) a public corporation;
- (ix) a special service district;
- (x) a public transit district; and
- (xi) a procurement unit referred to in Subsection (1), to the extent authorized in

Subsection (1).

(c) A procurement unit with independent procurement authority shall comply with the requirements of this chapter.

(d) Notwithstanding Subsection (4)(a), a procurement unit with independent procurement authority may agree in writing with the division to extend the authority of the division or the chief procurement officer to the procurement unit, as provided in the agreement.

(5) (a) The attorney general may, in accordance with the provisions of this chapter, but without involvement by the division or the chief procurement officer:

(i) retain outside counsel, subject to Section 67-5-33 if the attorney general retains outside counsel under a contingent fee contract, as defined in that section; or

- (ii) procure litigation support services, including retaining an expert witness.

(b) A procurement unit with independent procurement authority that is not represented by the attorney general's office may, in accordance with the provisions of this chapter, but

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without involvement by the division or the chief procurement officer:

- (i) retain outside counsel; or
- (ii) procure litigation support services, including retaining an expert witness.

(6) The state auditor's office may, in accordance with the provisions of this chapter, but without involvement by the division or the chief procurement officer, procure audit services.

(7) The state treasurer may, in accordance with the provisions of this chapter, but without involvement by the division or the chief procurement officer, procure:

- (a) deposit and investment services; and
- (b) services related to issuing bonds.

Section 2. Section **67-5-33** is enacted to read:

67-5-33. Contingent fee contracts.

(1) As used in this section:

(a) "Contingent fee case" means a legal matter for which legal services are provided under a contingent fee contract.

(b) "Contingent fee contract" means a contract for legal services under which the compensation for legal services is a percentage of the amount recovered in the legal matter for which the legal services are provided.

(c) "Government attorney" means the attorney general or an assistant attorney general.

(d) "Legal matter" means a legal issue or administrative or judicial proceeding within the scope of the attorney general's authority.

(e) "Private attorney" means an attorney or law firm in the private sector.

(f) "Securities class action" means an action brought as a class action alleging a violation of federal securities law, including a violation of the Securities Act of 1933, 15 U.S.C. Sec. 77a et seq., or the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78a et seq.

(2) Subsections (3) through ~~(10)~~(9):

(a) do not apply to a contingent fee contract in existence before May 12, 2015, or to any renewal **or modification** of a contingent fee contract in existence before that date;

(b) do not apply to a contingent fee contract with a private attorney that the attorney general hires to collect a debt that the attorney general is authorized by law to collect; and

(c) with respect to a contingent fee contract with a private attorney in a securities class action in which the state is appointed as lead plaintiff under Section 27(a)(3)(B)(i) of the

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Securities Act of 1933 or Section 21D(a)(3)(B)(i) of the Securities Exchange Act of 1934 or in which any state is a class representative, or in any other action in which the state is participating with one or more other states:

(i) apply only with respect to the state's share of any judgment, settlement amount, or common fund; and

(ii) do not apply to attorney fees awarded to a private attorney for representing other members of a class certified under Rule 23 of the Federal Rules of Civil Procedure or applicable state class action procedural rules.

(3) (a) The attorney general may not enter into a contingent fee contract with a private attorney unless the attorney general or the attorney general's designee makes a written determination that the contingent fee contract is cost-effective and in the public interest.

(b) A written determination under Subsection (3)(a) shall:

(i) be made before or within a reasonable time after the attorney general enters into a contingent fee contract; and

(ii) include specific findings regarding:

(A) whether sufficient and appropriate legal and financial resources exist in the attorney general's office to handle the legal matter that is the subject of the contingent fee contract; and

(B) the nature of the legal matter, unless information conveyed in the findings would violate an ethical responsibility of the attorney general or a privilege held by the state.

(4) The attorney general or attorney general's designee shall request qualifications from a private attorney being considered to provide services under a contingent fee contract unless the attorney general or attorney general's designee:

(a) determines that requesting qualifications is not feasible under the circumstances; and

(b) sets forth the basis for the determination under Subsection (4)(a) in writing.

(5) (a) The attorney general may not enter into a contingent fee contract with a private attorney that provides for the private attorney to receive a contingent fee, exclusive of reasonable costs and expenses, that exceeds:

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

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(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 \$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; and

(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; or

(i) \$50,000,000.

(b) ~~{The amount of a contingent fee provided for in}~~ ~~A provision of~~ a contingent fee contract ~~{may exceed the limit described in Subsection (5)(a) only with the written consent of}~~ ~~that is inconsistent with a provision of this section is invalid unless, before the contract is executed, the contingent fee contract provision is approved by~~ a majority of the ~~{governor}~~ ~~attorney general~~, ~~{lieutenant governor}~~ ~~state treasurer~~, and state auditor.

(c) A contingent fee under a contingent fee contract may not be based on the imposition or amount of a penalty or civil fine.

(d) A contingent fee under a contingent fee contract may be paid only on amounts actually recovered by the state.

(6) (a) Throughout the period covered by a contingent fee contract, including any extension of the contingent fee contract:

(i) the private attorney that is a party to the contingent fee contract shall acknowledge that the government attorney retains complete control over the course and conduct of the contingent fee case for which the private attorney provides legal services under the contingent fee contract;

(ii) a government attorney with supervisory authority shall oversee any litigation involved in the contingent fee case;

(iii) a government attorney ~~{shall retain the}~~ ~~retains final~~ authority ~~{to reject}~~ ~~over~~ any ~~{decision made by}~~ ~~pleading or other document that~~ the private attorney ~~submits to court~~;

(iv) an opposing party in a contingent fee case may contact the lead government attorney directly, without having to confer with the private attorney;

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(v) a government attorney with supervisory authority over the contingent fee case may attend all settlement conferences; and

(vi) the private attorney shall acknowledge that final approval regarding settlement of the contingent fee case is reserved exclusively to the discretion of the attorney general.

(b) Nothing in Subsection (6)(a) may be construed to limit the authority of the client regarding the course, conduct, or settlement of the contingent fee case.

~~{ (7) The attorney general may not enter into a contingent fee contract with a private attorney located outside the state unless the attorney general determines that:~~

~~—— (a) there is no private attorney in the state willing to provide legal services with respect to the legal matter;~~

~~—— (b) all private attorneys in the state with the necessary expertise or capability to provide legal services with respect to the legal matter are prevented from providing legal services because of a professional ethical conflict;~~

~~—— (c) the attorney general is prevented from engaging a private attorney located in the state under rules of the controlling board regarding waiver of competitive selection; or~~

~~—— (d) there is no private attorney with an office in the state with the necessary experience, capability, or capacity required by the contemplated engagement.~~

~~‡~~ ~~{8}7~~ (a) Within five business days after entering into a contingent fee contract, the attorney general shall post on the attorney general's website:

(i) the contingent fee contract;

(ii) the written determination under Subsection (3) relating to that contingent fee contract; and

(iii) if applicable, any written determination made under Subsection (4)(b) relating to that contingent fee contract.

(b) The attorney general shall keep the contingent fee contract and written determination posted on the attorney general's website throughout the term of the contingent fee contract.

~~{9}8~~ (a) A private attorney that enters into a contingent fee contract with the attorney general shall:

(a) from the time the contingent fee contract is entered into until three years after the contract expires, maintain detailed records relating to the legal services provided by the private

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attorney under the contingent fee contract, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that relate to the legal services provided by the private attorney; and

(b) maintain detailed contemporaneous time records for the attorneys and paralegals working on the contingent fee case and promptly provide the records to the attorney general upon request.

(~~10~~9) (a) After June 30 but on or before September 1 of each year, the attorney general shall submit a written report to the president of the Senate and the speaker of the House of Representatives describing the attorney general's use of contingent fee contracts with private attorneys during the fiscal year that ends the immediately preceding June 30.

(b) A report under Subsection (~~10~~9)(a) shall:

(i) identify:

(A) each contingent fee contract the attorney general entered into during the fiscal year that ends the immediately preceding June 30; and

(B) each contingent fee contract the attorney general entered into during any earlier fiscal year if the contract remained in effect for any part of the fiscal year that ends the immediately preceding June 30;

(ii) for each contingent fee contract identified under Subsection (~~10~~9)(b)(i):

(A) state the name of the private attorney that is a party to the contingent fee contract, including the name of the private attorney's law firm if the private attorney is an individual;

(B) describe the nature of the legal matter that is the subject of the contingent fee contract, unless describing the nature of the legal matter would violate an ethical responsibility of the attorney general or a privilege held by the state;

(C) identify the state agency which the private attorney was engaged to represent or counsel; and

(D) state the total amount of attorney fees approved by the attorney general for payment to a private attorney for legal services under a contingent fee contract during the fiscal year that ends the immediately preceding June 30; and

(iii) be accompanied by each written determination under Subsection (3) or (4)(b) made during the fiscal year that ends the immediately preceding June 30.

(~~11~~10) Nothing in this section may be construed to expand the authority of a state

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department, division, or other agency to enter into a contract if that authority does not otherwise exist.

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Legislative Review Note

~~as of 2-12-15 11:12 AM~~

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