

SUBJECT: Expanding oversight over political subdivisions' contingent fee contracts

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Leach, Krause, Meyer, Smith, White

4 nays — Farrar, Y. Davis, Julie Johnson, Neave

WITNESSES: For — Carson Fisk, Andrews Myers PC; Jeffrey Brannen, Balfour Beatty Construction; TJ Rogers, Bartlett Cocke General Contractors; Lee Parsley, Texans for Lawsuit Reform; Luis Figueroa, Texas Society of Architects; Stephanie Cook; Mark McCaig; Timothy Mickunas; (*Registered, but did not testify*: Scott Stewart, American Council of Engineering Companies Texas; Steven Albright, Association of General Contractors of Texas, Highway Heavy Branch; Perry Vaughn, Association of General Contractors, Rio Grande Valley Chapter; Corbin Van Arsdale, Association of General Contractors, Texas Building Branch; Joe Woods, American Property Casualty Insurance Association; Jon Fisher, Associated Builders and Contractors of Texas; James Grace Jr., CNA Insurance Companies; Samantha Omev, ExxonMobil; Annie Spilman, National Federation of Independent Business; Stephen Minick, Republic Services; Sandy Hoy, Texas Apartment Association; Ned Munoz, Texas Association of Builders; James Hines, Texas Association of Business; George Christian and Carol Sims, Texas Civil Justice League; Jennifer Fagan, Texas Construction Association; Jack Baxley, TEXO The Construction Association; Cary Roberts, U.S. Chamber Institute for Legal Reform; Cathy DeWitt, USAA; Tara Snowden, Zachry Corporation)

Against — Charles Reed, Dallas County Judge Clay Jenkins; John Odam, Harris County Attorney's Office; Jimmy Hannon, Highland Park ISD; Cyrus Reed, Lone Star Chapter Sierra Club; Barry Haenisch, Texas Association of Community Schools; Craig Eiland and Michael Gallagher, Texas Trial Lawyers Association; (*Registered, but did not testify*: Brie Franco, City of Austin; Luke Metzger, Environment Texas; James Hernandez, Harris County; Aimee Bertrand, Harris County Commissioners Court; Bill Kelly, City of Houston Mayor's Office; Jim

Short, National Cutting Horse Association; Robin Schneider, Texas Campaign for the Environment; John Dahill, Texas Conference of Urban Counties; Shanna Igo, Texas Municipal League; Aryn James, Travis County Commissioners Court)

On — Joshua Godbey, Office of the Attorney General

BACKGROUND: Government Code sec. 403.0305 prohibits certain public entities from entering into a contingency fee contract for legal services without review and approval by the comptroller. Public entities subject to this requirement include districts, cities, or other political subdivisions or agencies of the state that have the power to own and operate waste collection, transportation, treatment or disposal facilities or systems, and certain joint boards.

DIGEST: CSHB 2826 would change the approval process for certain public subdivisions seeking to enter into contingent fee contracts for legal services by requiring that these contracts be reviewed and approved by the attorney general rather than by the comptroller.

Political subdivisions covered by the bill would include districts, authorities, counties, municipalities, other political subdivisions of the state, and local government corporations or other entities acting on behalf of a political subdivision in the planning and design of construction projects.

The bill would impose additional requirements on political subdivisions relating to the selection of outside attorneys for such contracts, acceptable indemnification provisions, the political subdivision's approval process for these contracts. Political subdivisions and attorneys hired under contingent fee contracts also would be subject to the requirements that currently apply to such contracts when entered into by state governmental bodies.

Selection. Political subdivisions would be required to select well qualified attorneys for these contracts on the basis of demonstrated competence,

qualifications, and experience in the requested services and would have to attempt to negotiate a contract for a fair and reasonable price. Attorneys could not be selected for a contingent fee contract on the basis of competitive bids.

Indemnification. A political subdivision could require attorneys under contingent fee contracts to indemnify or hold harmless the political subdivision from claims and liabilities resulting from the negligent acts or omissions of the attorney or law firm. However, attorneys could not be required to indemnify, hold harmless, or defend public subdivisions for claims or liabilities resulting from negligent acts or omissions of the subdivisions unless the contract was for such defense.

Approval by political subdivision. Before entering into a contingent fee contract, political subdivisions would have to provide public notice and hold an open meeting to consider and approve the contract. The public notice would state:

- the reasons for pursuing the matter for which the attorney would be retained and the desired outcome;
- the competence, qualifications, and experience demonstrated by the attorney;
- the nature of any relationship between the political subdivision and the attorney;
- the reasons the political subdivision was unable to pursue the matter by itself without retaining an attorney on a contingent fee basis;
- the reasons the legal services reasonably could not be obtained from an attorney under a hourly fee contract; and
- the reasons that entering into a contingent fee contract would be in the best interest of the political subdivision's residents.

The meeting to approve the contract would be called to consider the need for obtaining the legal services; the contract's terms; the competence, qualifications, and experience of the attorney; and the reasons the contract was in the best interest of the political subdivision's residents.

On approval, the governing body of the public subdivision would be required to state in writing that the political subdivision had found that:

- there was a substantial need for the legal services;
- the legal services could not be performed adequately by the political subdivision;
- the legal services reasonably could not be obtained from an attorney under an hourly fee contract because of the nature of the matter or because of lack of funds to pay the estimated fees under an hourly fee contract; and
- the relationship between the political subdivision and the attorney was not improper and would not appear improper to a reasonable person.

Public information. Contingent fee contracts approved by political subdivisions would be subject to the Public Information Act and could not be withheld from requestors under any exception from disclosure.

Review and approval by attorney general. Contingent fee contracts approved by political subdivisions would not become effective until the contracts received attorney general approval. Expedited review of the contract could be requested by the political subdivision.

Political subdivisions would be required to file the contracts with the attorney general along with:

- a description of the matter to be pursued by the political subdivision;
- a description of the interest that the state or any other governmental entity might have in the matter;
- a copy of the public notice described above and a statement regarding the method and date of providing notice;
- a copy of the governing body's statement upon approval of the contract; and
- any supporting documentation required by the attorney general.

The attorney general could refuse to approve a contract if a matter presented questions of law or fact in common with a matter the state had addressed or was pursuing and the political subdivision's pursuit of the matter would not promote a just and efficient resolution. The attorney general also could refuse approval if a political subdivision failed to comply with all requirements relating to the political subdivision's approval of the contract or made findings in connection with such approval that were not supported by the documents provided to the attorney general.

A contract submitted to the attorney general would be considered to be approved unless the attorney general sent notification of refusal within 90 days of receiving the request for approval.

Exceptions. Political subdivisions would not have to obtain attorney general approval of contingent fee contracts for the collection of delinquent property taxes or the issuance of public securities. However, these contracts would be subject to the above requirements relating to the selection of attorneys, indemnification, political subdivision approval, and public information.

Void contract. A contract entered into in violation of this bill would be void as against public policy, and no fees could be paid under the contract.

The bill would take effect September 1, 2019, and would apply only to a contract entered into on or after that date.

SUPPORTERS
SAY:

CSHB 2826 would promote public transparency and accountability by strengthening the approval process for political subdivisions seeking to enter into contingent fee contracts for legal services.

Political subdivisions enter into these contracts with very little public oversight. The bill would give the public the ability to monitor whether particular litigation was worthwhile, whether the best attorneys were hired

at a fair rate, and whether any improper relationships existed between a political subdivisions and attorneys.

The attorney general would be better positioned to evaluate contingent fee contracts than the comptroller because the comptroller does not have the litigation expertise to review the increasing number of these contracts that are being submitted for approval. The attorney general already reviews and approves contingent fee contracts for many state agencies.

The attorney general would be able to ensure not only that these contracts complied with state law but that actions taken by political subdivisions would not interfere with statewide efforts to address a particular matter, saving resources. The attorney general also would be able to let political subdivisions know what other political subdivisions were receiving in their contracts, which could save taxpayer money and help taxpayers get the best deal possible.

OPPONENTS
SAY:

CSHB 2826 would limit local control by requiring attorney general approval before local governments entered into contingent fee contracts.

The bill would allow the attorney general to go beyond the current requirements for approval and allow the attorney general to refuse approval of contracts based on a subjective determination about whether pursuit of specific litigation was appropriate. The bill would not allow for an appeal of the attorney general's refusal to approve a contract and would provide no way of knowing the basis for this refusal.

Some political subdivisions cannot afford to pay hourly fee contracts and might not attempt to address local problems through contingent fee contracts because of the additional hurdles created by this bill.