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SENATE BILL 461

**50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011**

INTRODUCED BY

John C. Ryan

AN ACT

RELATING TO PROCUREMENT; ENACTING THE TRANSPARENCY IN PRIVATE ATTORNEY CONTINGENCY CONTRACTS ACT; CREATING A FUND; MAKING AN APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**SECTION 1.** [NEW MATERIAL] SHORT TITLE.--Sections 1 through 5 of this act may be cited as the "Transparency in Private Attorney Contingency Contracts Act".

**SECTION 2.** [NEW MATERIAL] DEFINITIONS.--As used in the Transparency in Private Attorney Contingency Contracts Act:

A. "government attorney" means an attorney employed as a staff attorney by the state or a political subdivision thereof;

B. "political subdivision" means any political subdivision within the state, including officers, departments,

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1 boards, commissions, divisions, bureaus, councils and units of  
2 organization, however designated, of the executive branch of  
3 the political subdivision, and any of its agents;

4 C. "private attorney" means any private attorney or  
5 law firm; and

6 D. "state" means the state of New Mexico, including  
7 officers, departments, boards, commissions, divisions, bureaus,  
8 councils and units of organization, however designated, of the  
9 executive branch of state government, and any of its agents.

10 SECTION 3. [NEW MATERIAL] PROCUREMENT.--

11 A. The state or a political subdivision shall not  
12 enter into a contingency fee contract with a private attorney  
13 unless the attorney general or the chief legal officer for the  
14 political subdivision makes a written determination prior to  
15 entering into such a contract that contingency fee  
16 representation is both cost-effective and in the public  
17 interest. Any written determination shall include specific  
18 findings regarding the following factors:

19 (1) whether there exist sufficient and  
20 appropriate legal and financial resources within the office of  
21 the attorney general or of the chief legal officer to handle  
22 the matter;

23 (2) the time and labor required;

24 (3) the novelty, complexity and difficulty of  
25 the questions involved;

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1 (4) the skill requisite to perform the legal  
2 services properly;

3 (5) the geographic area where the legal  
4 services are to be provided; and

5 (6) the amount of experience desired for the  
6 particular kind of legal services to be provided and the nature  
7 of the private attorney's experience with similar issues or  
8 cases.

9 B. If the attorney general or chief legal officer  
10 of a political subdivision makes the determination set forth in  
11 Subsection A of this section, the attorney general or chief  
12 legal officer shall request proposals from private attorneys to  
13 represent the government on a contingency fee basis unless the  
14 attorney general or chief legal officer determines that  
15 requesting proposals is not feasible under the circumstances  
16 and sets forth the basis for such determination in writing.

17 C. The state or a political subdivision shall not  
18 enter into a contingency fee contract that provides for the  
19 private attorney to receive an aggregate contingency fee in  
20 excess of:

21 (1) twenty-five percent of any damages  
22 recovered up to ten million dollars (\$10,000,000); plus

23 (2) twenty percent of any portion of any  
24 damages recovered greater than ten million dollars  
25 (\$10,000,000) up to fifteen million dollars (\$15,000,000); plus

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1 (3) fifteen percent of any portion of any  
2 damages recovered greater than fifteen million dollars  
3 (\$15,000,000) up to twenty million dollars (\$20,000,000); plus

4 (4) ten percent of any portion of any damages  
5 recovered greater than twenty million dollars (\$20,000,000) up  
6 to twenty-five million dollars (\$25,000,000); plus

7 (5) five percent of any portion of any damages  
8 recovered greater than twenty-five million dollars  
9 (\$25,000,000). In no event shall the aggregate contingency fee  
10 exceed fifty million dollars (\$50,000,000) exclusive of  
11 reasonable costs and expenses, irrespective of the number of  
12 actions filed or the number of private attorneys retained to  
13 achieve the recovery.

14 D. The state or a political subdivision and the  
15 private attorney shall comply with the following requirements  
16 throughout the course of the contract for contingency fee  
17 representation:

18 (1) government attorneys shall retain complete  
19 control over the course and conduct of the action;

20 (2) a government attorney with supervisory  
21 authority shall be personally involved in overseeing the  
22 action;

23 (3) government attorneys shall retain veto  
24 power over any decisions made by contingency fee counsel;

25 (4) any defendant that is the subject of such

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1 an action may contact the lead government attorneys directly,  
2 without having to confer with contingency fee counsel;

3 (5) a government attorney with supervisory  
4 authority for the matter shall attend and participate in all  
5 settlement conferences;

6 (6) decisions regarding settlement of the  
7 action shall be reserved exclusively to the discretion of  
8 government attorneys and the state or political subdivision;  
9 and

10 (7) a private attorney licensed to practice  
11 law in this state and whose principal place of business is in  
12 this state shall be included as counsel of record.

13 E. The attorney general or chief legal officer of a  
14 political subdivision shall develop a standard addendum to  
15 every contract for contingency fee attorney services that shall  
16 be used in all actions, describing in detail what is expected  
17 of both the contracted private attorney and the state or  
18 political subdivision, including the requirements set forth in  
19 Paragraphs (1) through (6) of Subsection D of this section.  
20 Any contract that does not include such an addendum is against  
21 public policy and is void and unenforceable.

22 F. All contingency fee contracts shall be subject  
23 to the provisions of the Procurement Code regarding competitive  
24 sealed proposals. No contingency fee contract shall be  
25 procured pursuant to the provisions of Section 13-1-126,

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1 13-1-127 or 13-1-129 NMSA 1978.

2 G. Copies of any executed contingency fee contract  
3 and the written determination to enter into a contingency fee  
4 contract with the private attorney pursuant to Subsection A of  
5 Section 3 of the Transparency in Private Attorney Contingency  
6 Contracts Act shall be posted on the web site maintained by the  
7 attorney general or the web site maintained by the executive  
8 branch of the political subdivision for public inspection  
9 within five business days after the date on which the contract  
10 is executed and shall remain posted on the web site for the  
11 duration of the contingency fee contract, including any  
12 extensions or amendments thereto. Any payment of contingency  
13 fees shall be posted on the web site within fifteen days after  
14 the payment of the contingency fees to the private attorney and  
15 shall remain posted on the web site for at least three hundred  
16 sixty-five days thereafter.

17 H. Any private attorney under contract to provide  
18 services to the state or a political subdivision on a  
19 contingency fee basis shall, from the inception of the contract  
20 until at least four years after the contract expires or is  
21 terminated, maintain detailed current records, including  
22 documentation of all expenses, disbursements, charges, credits,  
23 underlying receipts and invoices and other financial  
24 transactions that concern the provision of such attorney  
25 services. The private attorney shall make all such records

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1 available for inspection and copying upon request in accordance  
2 with Inspection of Public Records Act. In addition, the  
3 private attorney shall maintain detailed contemporaneous time  
4 records for the attorneys and legal assistants working on the  
5 matter in increments of no greater than one-tenth of an hour  
6 and shall promptly provide these records to the attorney  
7 general or chief legal officer of the political subdivision  
8 upon request.

9 I. By the first day of February of each year, the  
10 attorney general shall submit a report to the president pro  
11 tempore of the senate and the speaker of the house of  
12 representatives describing the use of contingency fee contracts  
13 with private attorneys in the preceding calendar year. The  
14 chief legal officers of any political subdivisions that entered  
15 into such contracts shall submit a report to the head of the  
16 political subdivision's legislative governing body. At a  
17 minimum, such reports shall:

18 (1) identify all new contingency fee contracts  
19 entered into during the preceding calendar year and all  
20 previously executed contingency fee contracts that remain  
21 current during any part of the year, and for each contract  
22 describe:

23 (a) the name of the private attorney  
24 with whom the state or political subdivision has contracted,  
25 including the name of the attorney's law firm;

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1 (b) the nature and status of the legal  
2 matter;

3 (c) the name of the parties to the  
4 action;

5 (d) the amount of any recovery; and

6 (e) the amount of any contingency fee  
7 paid; and

8 (2) include copies of any written  
9 determinations made pursuant to Subsection A of this section  
10 during the preceding calendar year.

11 SECTION 4. [NEW MATERIAL] STANDING.--Notwithstanding any  
12 other provision of law, persons who may file suit to enforce  
13 the provisions of the Transparency in Private Attorney  
14 Contingency Contracts Act include any party to a contract for  
15 contingency fee representation pursuant to that act and any  
16 party to the action for which the state or political  
17 subdivision has retained or is seeking to retain contingency  
18 fee representation.

19 SECTION 5. [NEW MATERIAL] NO EXPANSION OF AUTHORITY.--  
20 Nothing in the Transparency in Private Attorney Contingency  
21 Contracts Act shall be construed to expand the authority of any  
22 state agency or state agent, or any political subdivision or  
23 its agent, to enter into contracts where no such authority  
24 previously existed.

25 SECTION 6. A new section of Chapter 8, Article 5 NMSA

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1 1978 is enacted to read:

2 "[NEW MATERIAL] SUSPENSE FUND CREATED.--The "attorney  
3 general suspense fund" is created in the state treasury. Each  
4 contingency fee contract shall provide that all amounts  
5 received by the contractor as satisfaction of a claim shall be  
6 transferred to the attorney general and deposited into the  
7 attorney general suspense fund. Upon the direction of the  
8 attorney general, the compensation due to the contractor shall  
9 be disbursed from the suspense fund to the contractor. After a  
10 disbursement to a contractor, the balance of each deposit shall  
11 be distributed to the appropriate permanent fund or other  
12 appropriate fund from which the loss occurred that originated  
13 the claim pursued by the contractor."

14 SECTION 7. SEVERABILITY.--If any part of the Transparency  
15 in Private Attorney Contingency Contracts Act is held invalid,  
16 the remainder or its application to other situations or persons  
17 shall not be affected.

18 SECTION 8. EFFECTIVE DATE.--The effective date of the  
19 provisions of this act is July 1, 2011.