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FISCAL IMPACT REPORT

ORIGINAL DATE 02/17/11
 SPONSOR Ingle LAST UPDATED 03/18/11 HB _____
 SHORT TITLE AG Contingency Fee Contracts SB 404/aHJC
 ANALYST Haug/Aubel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		See Narrative	See Narrative			

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with CS/HB 386/HJCS and SB 461/SJCS
 Relates to SB 86, SB 269, and HB 38

SOURCES OF INFORMATION

LFC Files

Responses Received From (Original bill)

Attorney General (AGO)
 Educational Retirement Board (ERB)
 State Investment Council (SIC)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to Senate Bill 404 makes several changes to the bill, as follows:

1. The number of tiers for fee caps is reduced to three:
 - \$10,000,000 or less, fees are capped at \$2,500,000 or 25%;
 - \$10MM-\$15MM, fees are capped at \$2,500,000 plus up to 20% over \$10MM (Maximum \$3.5 million or 23.33%); and
 - Over \$15MM, fees are capped at \$3,500,000 plus up to 15% over \$15MM.

2. A provision is added that subjects the contingent fee contracts to the Procurement Code and disallows such contracts pursuant to the following sections:
 - Section 13-1-126 (sole source);
 - Section 13-1-127 (emergency); and
 - Section 13-1-129 (amending existing contracts).

3. Another provision adds contingency contracts to the list of procurement exemptions to the four-year contract limit. This allows the contingency fee contract to continue until the litigation for which it was executed has been resolved, which could reasonably take longer than four years. By their nature, contingent fee contracts have no set term.
4. A new provision is added requiring the Attorney General post any executed contingent fee contract and payment of fees on its website. The language clearly requires the paid fees be posted within 15 days and keep the posting of the fees for at least 365 days. However, the language specific to the executed contracts leaves that part uncertain as to the posting requirements. This language can be compared to the similar posting requirement in House Judiciary Committee substitute for the Business and Industry Committee substitute for House Bill 386.

SJC Amendment:

Copies of any executed contingent fee contract and payment of contingency fees shall be posted on the web site maintained by the attorney general for public inspection within fifteen days after the payment of the contingency fees to the private attorney and shall remain posted on the web site for at least three hundred sixty-five days thereafter.

CS/HB 386/HJCS:

Copies of any executed contingent fee contract shall be posted on the web site maintained by the attorney general for public inspection within five business days after the date on which the contract is executed and shall remain posted on the web site for the duration of the contingent fee contract, including any extensions or amendments thereto. Any payment of contingency fees shall be posted on the web site within fifteen days after the payment of the contingency fees to the private attorney and shall remain posted on the web site for at least three hundred sixty-five days thereafter.

5. The amendment includes a provision for promoting transparency by requiring the Attorney General (AG) submit a report by February 1st of each year to the President Pro Tempore of the Senate and the Speaker of the House that, at a minimum, includes the following:
 - All new contingency fee contracts entered into the preceding calendar year;
 - All contingency contracts that remain current during any part of the year;
 - The name of the private attorney and name of the law firm;
 - The nature of and status of the legal matter;
 - The name of the parties to the action;
 - The amount of any recovery; and
 - The amount of the contingency fee paid.
6. The amendment strikes the section restricting campaign contributions for attorneys who have entered into contingent fee contracts with the Attorney General. Thus, language mitigating the possibility for “pay-to-play” transactions has been eliminated.

CONFLICTS

As amended, SB 204 conflicts with CS/HB386/HJCS and SB 461/SJCS. Both retain the campaign restrictions and differ in the fee structure.

Synopsis of Original Bill

Senate Bill 404 would allow the Attorney General's office to enter into contingent fee contracts if appropriate. It creates a suspense fund for the fees prior to payment, to avoid potential constitutional conflict of the legislature not approving a specific budgetary expenditure of those fees, but rather authorizing a finite but undefined amount to be paid from the fund.

The bill defines amounts allowable for contingent fees by placing caps, levels of which are determined by total dollar amounts recovered on behalf of the state, and are outlined by recoveries and contingent fee & fee sharing percentages as follows:

- \$10,000,000 or less, fees are capped at \$2,500,000 or 25%
- \$10MM-\$15MM, fees are capped at \$2,500,000 plus up to 20% over \$10MM (Maximum \$3.5 million or 23.33%)
- \$15MM-\$20MM, fees are capped at \$3,500,000 plus up to 15% over \$15MM (Maximum \$4.25 million or 21.25%)
- \$20MM-\$25MM, fees are capped at \$4,250,000 plus up to 10% over \$20MM (Maximum \$4.75 million or 19%)
- Greater than \$25MM, fees are capped at \$4,750,000 plus up to 5% over \$25MM, but not more than \$20MM total (sliding scale from 19% to 6.56% on \$305MM recovery for the state, which would result in a \$20MM contingency fee for attorneys. Recoveries above that, which are highly unlikely, would result in a lesser contingent fee payment percentage.)

There is a provision for terminating the law firm should it or one of its principals be found to violate campaign contribution laws under Section 1-19-34.8 NMSA 1978, which is new material under SB 404. This new language bars campaign contributions, or solicitation for contributions to any Attorney General candidates or their political or campaign committees, by those who would seek to work for the AG under a contingent fee contract.

FISCAL IMPLICATIONS

Estimating potential fiscal impact related to Senate Bill 404 is dependent on the cases that will be brought in the future, the validity of the claims, and the outcome of such efforts. These variables make such estimates indeterminate.

The SIC comments:

As with all contingent fee legislation, SB404 seeks to lessen the state's level of risk and up-front costs associated with litigation, in exchange for what is typically a smaller share of recovery assets post trial or settlement.

Typically, contingent fee arrangements with attorneys can be attractive due to a lack of:

- Resources required for large cases
- Expertise specific to complex types of litigation
- Budget availability to the agency
- Support from legislative, executive and public bodies
- Appetite for up-front cost expenditure/risk inherent in any litigation

- And distaste for or sticker shock over high hourly lawyer fees

These factors and other practical considerations in recent years and during this current legislative session have led multiple state agencies to seek legal authority to enter into appropriate agreements with external attorneys when seeking recovery of state dollars. The Taxation and Revenue Department is among the state agencies which already have this authority with respect to collections.

The alternatives unfortunately are not very attractive. For litigation requiring specialized experience, often attorneys' fees are several hundred dollars or even more than a thousand dollars per hour. The state's qui tam, or fraud against taxpayers, act allows private attorneys to pursue litigation on behalf of the state, but does not provide any resources to those attorneys. In some cases, the resources needed to carry a case on through to trial or settlement will be very significant, and may be impossible for an attorney facing significant opposition or a defendant with "deep pockets". There is also not a statutory requirement that qui tam attorneys have the experience, expertise or ability necessary to realistically make recoveries for the state.

SIGNIFICANT ISSUES

The SIC states:

The issues at hand with both this bill and several companion bills seeking the same authority are threefold:

- Will the state profit more by paying the bills for attorneys on an hourly basis or through a contingent fee arrangement?
- Can the Legislature authorize these non-specific but limited payments without violating the Constitution?
- Are there safeguards in place that will prevent such potentially lucrative arrangements from being abused (i.e. directed to supporters) by the AG and/or other agencies under this authority?

There are no black and white answers to these questions, but SB404 does go a long way towards addressing the concerns at hand.

First, the AG must be able to justify the limited use of contingent fee arrangements, and to aid this effort, SB 404 has created guidelines which appear to construct a reasonable fee schedule that should allow the state to attract quality firms with appropriate expertise to handle highly specialized litigation (i.e. financial fraud, investment malfeasance, etc), which oftentimes requires significant resources, experience and talent not available in most places across the country, including New Mexico. By using a structured fee schedule such as this, the state avoids paying a risk premium on litigation that may or *may not* result in recoveries for the state. In exchange for lowering the state's 'skin in the game' it is a simple reality that it must incentivize those who would represent New Mexico's interests through the potential for added benefits down the road.

Second, the bill creates a suspense fund that while not allocating a specific dollar amount to be authorized by the legislature, does create a specific vehicle to address the logistical complications associated with pre-authorizing a non-specific, but finite expenditure from a

non-reverting fund. There is precedent which seems to satisfy Constitutional concerns.

Thirdly, SB404 puts in place a framework to help prevent ‘pay to play’ situations that would encourage the AG to hire “friendly” law firms over those which might be more qualified.

The ERB states:

Contingency Fee Agreements allow agencies to utilize sophisticated firms, with greater experience and resources, to prosecute claims without governmental appropriations or direct payment of litigation costs. ERB therefore supports SB 404’s grant of authority to the Attorney General for the use of contingency fee contracts.

The ERB has requested it be granted similar authority through enactment of SB 329 (Educational Retirement Board Bank and Attorneys). Granting the ERB such authority would not conflict with the authority granted the Attorney General by SB 404. It also would allow the ERB, which has an independent fiduciary duty under the New Mexico constitution and law, to pursue meritorious litigation in cases where for some reason the Attorney General decided not to pursue a matter. Because ERB has first-hand knowledge of its investment-related losses and areas of potential litigation, it may, in certain circumstances, be in a better position than the Attorney General’s office to evaluate whether it is cost effective and in the best interest of the Educational Retirement Fund to pursue a case on a contingency fee basis versus an hourly basis. Passing both SB 404 and SB 329 would give the State a broad range of options to insure that appropriate cases are pursued on a contingency fee basis where warranted.

RELATIONSHIP

Senate Bill 404 provides similar authority to the Attorney General as the authority sought by the State Investment Council in Senate Bill 86 and the Public Employees Retirement Board in House Bill and ERB in Senate Bill 269.

GH/bym