SUBJECT: Setting requirements for contingent fee contracts with local governments

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 6 ayes — Marchant, Madden, J. Davis, B. Cook, Gattis, Villarreal

0 nays

3 absent — Elkins, Goodman, Lewis

WITNESSES: For — James Davis, Texans for Lawsuit Reform; William Nikolis, Texas Eastern Products Pipeline Company

Against — None

BACKGROUND: Government Code, ch. 2254 addresses the procurement of professional services by state governmental entities. Sec. 2254.101 defines a contingent fee contract as one in which the amount of payment for the services is contingent in whole or part on the outcome. Sec. 2254.103 specifies conditions under which state governmental entities may enter into contingent fee contracts.

Chapter 271, Local Government Code addresses a local governmental entity's ability to contract for services, but does not contain a provision regulating its ability to use a contingent fee contract.

DIGEST: CSHB 2550 would add Subchapter I to Local Government Code, ch. 271, and would regulate contingent fee contracts for legal service by local government entities. It broadly would define "local governmental entity" to mean a municipality, county, school district, or any number of other local districts or political subdivisions.

The bill would require that the contracting attorney or law firm to a contingent fee contract keep current, complete time and expense records. These records would be public, except for those parts that could give away the legal strategy of the case.

The contract would have to provide for the method of calculation of the fees, including any differences in the fees that might occur if based on the result of the case, state how the expenses would be paid, and state that any non-attorney support and the amount of contingent fees and expenses would be subject to this subchapter.

The contract would have to state a reasonable hourly rate that could not exceed $1,000 per hour for work performed by an attorney, law clerk or paralegal based on that persons's experience, ability, standard rate, and reasonable and customary rate in the relevant locality of the governmental entity.

The contract would establish a base fee, and any contingent fee would be computed by multiplying the base fee by a multiplier not to exceed four. The multiplier would be determined based on any expected difficulties in performing the contract, expenses that might be incurred, expected risk of no recovery, and any expected long delay in recovery. In addition, the contract would have to limit the amount of contingency fee to a stated percentage of the amount recovered, and could state different percentages for different amounts recovered.

The contract could limit the amount of reimbursable expenses and provide that payment, or full payment, would be contingent on the outcome. The fee collected by a contractor would be the lesser of the stated percentage of the amount recovered or the amount computed using the base fee and multiplier.

This bill would take effect September 1, 2003.

SUPPORTERS SAY:

The purpose of CSHB 2550 is to prevent attorneys suing on behalf of local governmental entities from receiving windfall fees by placing restrictions on these legal contract arrangements. It would apply to a few types of cases — product liability cases, for example — where an attorney might litigate a relatively simple case on behalf of several cities, charge fees on a percentage basis that are excessive in proportion to the actual work required, and collect a windfall at the successful conclusion of the case. The recent tobacco litigation created such windfalls for many attorneys, prompting the 76th Legislature to enact limitations in contracts with state entities similar to those contained in this bill. CSHB 2550 would prevent such windfalls by requiring attorneys to

contract for reasonable fees in dealings with local government entities, while still ensuring that attorneys received reasonable compensation for work performed.

It would be reasonable to calculate contingency fees at the outset so that both parties knew up front what they were contracting for. This is necessary for contracts with local governmental entities that must be approved through a governmental process, and therefore must fit within a certain budget. A similar up-front calculation provision enacted for state government contracts in 1999 has not caused problems. Experienced outside lawyers retained for such cases typically would know the amount of risk involved and the other necessary factors to determine fees up front.

The bill would not cause attorneys to focus on their billable hours at the expense of the client's best interests. Attorneys are required under the Texas Disciplinary Rules of Conduct to seek the best possible recovery for their clients and not to pad their billable hours.

OPPONENTS SAY:

CSHB 2550 would discourage attorneys from taking complicated cases on behalf of local governmental entities and could hinder cities from recovering damages to which they were entitled. Local government entities hire private attorneys to take difficult cases, such as product liability cases, because they do not have the adequate resources or experience necessary to wage such legal battles. An example of such a case concerns a group of Texas cities that are currently suing Ford Motor Company over an alleged defect in their Crown Victoria automobile that has been linked to injuries and deaths of police officers and others. This bill likely would cause attorneys to refuse such cases because the substantial risk involved could outweigh their potential recovery, leaving cities to attempt such cases on their own without the expertise and resources necessary to procure even a mild recovery.

CSHB 2550 also could reduce the amount of the government's recovery through the application of a contingency fee formula that might cause the attorney to focus on billable hours at the expense of getting the best recovery for the client. Under a plain contingent fee contract, the incentive for attorneys is to recover the maximum amount possible for their clients.

Calculating the fees at the outset of the case inevitably would fail to account

for changes that occur during the course of a case. Normally, these fees are calculated at the end so that parties can assess factors that should increase or decrease the fee, such as evidence discovered or difficulty in proving a certain fact. Although experienced attorneys have some idea of what course a case might take, it is impossible to predict exactly what will be required to obtain recovery. This provision in the bill would further discourage attorneys from taking cases, to the detriment of local government entities.

NOTES:

The committee substitute differs from the bill as introduced by conforming it to Texas Legislative Council drafting style.