

SUBJECT: Restricting contingency fee contracts entered into by local government

COMMITTEE: Civil Practices — favorable, as amended

VOTE: 6 ayes — Nixon, Rose, King, Madden, Strama, Woolley
2 nays — Raymond, Talton
1 absent — Martinez Fischer

WITNESSES: For — Robert Bass, Texas Building Branch Associated General Contractors; Ken Hausenfluck; Hugh Rice Kelly, Texans for Lawsuit Reform; Joe Williamson, Joe Williamson Construction Company
Against — Dickie Hile, Texas Trial Lawyers Association
On — Jim Collins, Perdue, Brandon, Fielder, Collins, & Mott

DIGEST: HB 3356, as amended, would add Subch. I, Contingent Fee Contract for Legal Services, to ch. 271 of the Local Government Code. The bill would establish requirements for contingency fee contracts entered into by a local government entity, which would include any political subdivision of the state.

The bill would require that in contracts for contingency fees with an attorney or a law firm, local government entities would have to state an hourly rate to be paid under the contract and that the hourly rate would have to be based on the reasonable and customary rate in the relevant geographical area for the type of work to be performed. The maximum allowable hourly rate for anyone performing work under the contract would be \$1,000 per hour. The total number of hours worked multiplied by the hourly rate established in the contract of each person who performed work would be the base fee. The contingent fee would be determined by multiplying the base fee by a multiplier to be established in the contract. The multiplier could not exceed four. The bill would require that the multiplier be based on expected difficulties in performing the contract, the expenses expected to be risked by the contractor, the expected risk of no recovery, and any expected long delays in recovery. The bill would require that the total contingent fee be limited to a

percentage of the recovery specified in the contract. The amount paid to the attorney under the contract would be the lesser of the percentage listed in the contract or the amount reached by multiplying the base fee by the multiplier.

The bill would require that the contracting attorney keep accurate time and expense records that described money spent each day in performing the contract. The attorney would have to permit the local government entity to inspect the time and expense records. Upon conclusion of the legal matter, the attorney would have to provide a final report to the local government entity that described the outcome of the matter, stated the amount of the recovery, showed the attorney's computation of the amount of the contingent fee, and contained the final time and expense records.

All information in the final report would be public information and could be withheld only if it involved information relating to litigation to which the local government entity was or could be a party and if the local government entity determined that withholding the information was necessary to protect its strategy or position in pending or anticipated litigation.

The bill would require that the contract:

- establish the method by which the contingent fee would be computed;
- state the differences, if any, in the method by which the contingent fee would be computed if the matter were settled, tried, or appealed;
- state how expenses would be paid, and if reimbursement of any expense were contingent on the outcome of the matter;
- state whether the amount recovered for purposes of the contingent fee computation was considered to be the amount obtained before or after expenses were deducted; and
- state that any work contracted out by the attorney was an expense subject to reimbursement like other expenses under the contract.

The requirements relating to contingent contracts would not apply to contracts for the collection of delinquent taxes; the collection of debts and accounts receivable, such as unpaid fines; the collection of receivables owed to a local government entity; and legal representation to a school district in an audit, protest, or appeal of school district property values.

The bill would take effect September 1, 2005, and would apply to any contingent fee contract entered into by a local government entity on or after that date.

**SUPPORTERS
SAY:**

No legal limits now are set on the amount a local government entity may agree to pay an attorney in a contract for contingency fees. It is not unusual for a contingency fee to be so high that, even if the local government entity prevails in the suit, after the attorney collects the fee and deducts expenses from the award, no money is left for the entity to collect. HB 3356 would protect the public against such contracts. The bill would make such contracts subject to open records so that the public could find out the details of contingency fee contracts entered into by local government entities.

The bill would not ban contingency contracts but simply would place common sense limits on how much a local government entity could agree to in such a contract. It would require the contracting attorney to keep accurate records of the time spent on the matter and would allow a multiplier of up to four to take into account risks associated with pursuing the suit.

HB 3356 is similar to limitations placed on contingent contracts entered by the state under Government Code sec. 2254.106.

**OPPONENTS
SAY:**

The state should not interfere with the right of consumers – including local government entities – to contract for legal services. Contingency fee contracts entered into by local government entities already are records open to the public, so requiring these contracts be open to the public would serve no purpose.

An attorney who believed he or she would lose money on a contract would not accept the work. HB 3356 would establish limits on contingency fee contracts that would dissuade many attorneys from accepting such a contract with a local government entity because of the high likelihood of losing money litigating the case. While the limits proposed by the bill may seem reasonable at first glance, in practice they would not be. Although the bill would allow an hourly fee of up to \$1,000 per hour, it also would require the hourly rate be based on the reasonable rate of the geographical region. Only in very large cities and in very complex litigation would the reasonable hourly rate ever be near \$1,000. Thus, local government entities would not be able to agree in a contingency fee

contract to a fee of \$1000 per hour. Because attorneys entering contingency fee contracts are paid only if their client prevails, it is important that the hourly rate be high enough to account for the risk of losing and collecting nothing.

The bill also would allow a multiplier of up to four to compensate for risks in the litigation that would be assumed by the attorney. Politically, however, a local government entity could have difficulty agreeing to a multiplier of four because it could seem unreasonably high to a public not familiar with the risks of litigation. Attorneys would stand a good chance of losing money on contracts involving complex litigation because of the high expense costs of preparing the suit and therefore would be unlikely to enter into such contracts with local government entities in the future. Local government entities would have a difficult time, and sometimes would be unable, to obtain legal representation to litigate complex matters.

NOTES:

The committee amendment would add that the requirements for contingent contracts would not apply to contracts for the collection of delinquent taxes; the collection of debts and accounts receivable such as unpaid fines; the collection of receivables owed to a local government entity; and legal representation to a school district in audit, protest, or appeal of school district property values.

The companion bill, SB 458 by Fraser, has been referred to the Senate State Affairs Committee.