

Report on Practices for the Hiring of Outside Counsel for the North Carolina Department of Transportation



2014

**By the North Carolina Department of Transportation for the NC General Assembly Joint Legislative
Transportation Oversight Committee and the Joint Legislative Justice and Public Safety Oversight Committee
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This document reports on the NC Department of Transportation's plans and procedures for meeting the mandate for the hiring of outside legal counsel pursuant to S.L 2014-100, Section 34.24.

This report is presented to the Joint Legislative Transportation Oversight Committee (JLTOC) and the Joint Legislative Justice and Public Safety Oversight Committee (JLPSOC) in compliance with the legislative mandate set forth in Section 34.24 of Session Law 2014-100. Contained herein is summary of requirements laid forth by the NC General Assembly (NCGA), a summary of the process the North Carolina Department of Transportation (NCDOT or Department) has implemented for the hiring of outside counsel, and a brief overview of the metrics the Department will be using to evaluate its utilization of outside counsel.

I. Summary of Legislative Mandate

Section 34.24(a) of Session Law 2014-100 reads in pertinent part: *“The Department of Transportation may engage the services of private counsel with the pertinent expertise to provide legal services related to transportation projects undertaken by the Department. The Department shall supervise and manage the private counsel engaged under this section and shall not be required to obtain written permission or approval from the Attorney General under G.S. 114-2.3.”*

The NCGA clarified in Section 34.24(b) its intent that the NCDOT exercise the authority granted by subsection (a) *“to maximize operational and project delivery benefits attributed to the avoidance or successful defense of litigation”* and that, in order to accomplish this intent, the NCDOT *“is directed to increase its utilization of external counsel to no less than ten percent (10%) of new cases arising during the 2014-2015 fiscal year.”*

The NCGA further mandated that the NCDOT *“shall develop performance metrics to evaluate its utilization of in-house and outside counsel, to include the following:*

- (1) A summary of new matters opened by legal area.*
- (2) Case cycle times.*
- (3) Resolution of cases.*
- (4) A comparison of in-house costs to billable rates for external counsel. (5) The process for procurement for legal services.”*

In addition, Session Law 2014-100 changed the language of N.C. Gen. Stat. § 136-103.1 to read, *“The Secretary of Transportation is authorized to employ outside counsel as the Secretary deems necessary for the purpose of obtaining title abstracts and title certificates for transportation system rights-of-way and for assistance in the trial of condemnation cases involving the acquisition of rights-of-way and other interests in land for the purpose of transportation construction.”*

II. Summary of Process for Procurement of Legal Services

At the outset, the NCDOT wishes to bring to the attention of the Joint Legislative Committees that Session Law 2014-100 does not make clear whether the NCDOT’s processes and procedures for the hiring of outside counsel for the purposes of title work and the acquisition of rights-of-way, and the subsequent performance metrics to evaluate utilization, must to be included in this report. While Sections 34.24(a)-(c) of Session Law 2014-100 seem to be specifically applicable to “legal services related to transportation projects”, it is not clear that the mandate for this report in subsection (c) is also applicable to the employment of outside counsel for the assistance in the prosecution and trial of condemnation cases involving the acquisition of rights-of-way. In the interests of thoroughness, the NCDOT has prepared this report to include the processes and procedures for the hiring of outside

counsel in matters to include the prosecution and trial of condemnation cases.

The process for the hiring of outside counsel will differ slightly from case to case, based on the area of the law for which the NCDOT is hiring counsel. The NCDOT anticipates using outside counsel for the litigation of cases directly related to “operational and project delivery”. Specifically, the NCDOT has already begun using outside counsel in the one new environmental law case that has arisen since the adoption of Session Law 2014-100 and anticipates hiring outside counsel in certain condemnation cases in the near future. The NCDOT anticipates implementing a more streamlined process for the hiring of outside counsel in condemnation/right-of-way cases, while the hiring of counsel for more complex matters will likely require more diligence on a case-by-case basis.

As mentioned above, the NCDOT has already hired outside counsel to assist in environmental litigation related to the proposed Monroe Bypass. In that instance, the NCDOT identified four firms that met the following criteria: (1) had a practice group dedicated to the area of the law at issue, (2) had offices convenient to the location of the litigation, (3) had a lead attorney with significant experience litigating in the specific subset of the area of the law at issue, and (4) did not have significant conflicts of interest against the NCDOT that could not be waived by the Department.

After identifying these four firms, the NCDOT solicited proposals from each firm, which included a proposed hourly rate structure, a summary of the resumes of the attorneys the firms anticipated staffing on the matter, and an estimate of the likely overall costs required to litigate the case. Once these bids were received, the NCDOT engaged in phone interviews with the lead attorneys from each firm and identified the two candidates that were most likely to best serve the State’s interests in the litigation, based on the above criteria. The NCDOT then negotiated with those firms regarding their billing rates and fee structures. The information was forwarded to the Governor’s General Counsel and once NCDOT received approval, entered into a retention agreement with the firm that best suited the Department’s needs.

The NCDOT anticipates using this general procurement process for hiring outside counsel to represent the NCDOT in matters involving novel or complex areas of the law, including environmental litigation. Moving forward, the NCDOT will use these specific steps in those instances:

- (1) Identify at least three attorneys/firms with significant experience and/or a devoted practice group to the area of the law at issue;
- (2) Obtain proposals from those attorneys/firms, which shall include (a) a proposed fee structure, (b) a list of the attorneys likely to work on the matter with accompanying resumes, (c) a best estimate of the total costs for litigating or handling the matter to conclusion (to include an estimate of the time from hire to conclusion), (d) the realistic goal the attorney/firm anticipates for the resolution of the matter, and (e) a list of all conflicts the attorney/firm has against the NCDOT; and
- (3) Using the proposals, identify the firm best suited for the matter, obtain approval from the Governor’s office, and seek to negotiate and finalize the fee structure to be implemented. (In the event a suitable fee arrangement cannot be agreed upon, the NCDOT will seek to negotiate with the firm submitting the second best proposal.)

Regarding the area of rights-of-way/condemnation proceedings, the NCDOT will have to face certain hurdles to hiring outside counsel. Specifically, there are very few attorneys/firms with significant experience in condemnation cases that are not actively involved in representing private interests against

the State. The Department may not be able to waive these conflicts in certain instances. It appears that the attorneys who have represented municipal entities in condemnation proceedings will be the attorneys that have experience in condemnation proceedings not adverse to the State. However, nearly all of the larger municipalities in the State have city or county attorneys that handle these matters in-house. In addition, the fees that attorneys earn when they are representing interests contrary to the State hinder the ability to hire attorneys on an hourly basis.

For the purposes of condemnation work, the NCDOT will only consider those condemnation cases in which the property owner retains counsel and/or files an answer to be “new cases”. This will ensure State funds directed to the retention of outside counsel are used in the most efficient way possible. The NCDOT anticipates identifying attorneys/firms for condemnation work using the above process and then retaining their services on a project by project basis, where multiple condemnation cases are likely to require substantial litigation.

Attached is a form (Exhibit A) that all attorneys will be asked to fill out when seeking to place a bid in order to represent the NCDOT.

III. Summary of Performance Metrics

The NCGA has requested the NCDOT provide performance metrics it will use to evaluate the utilization of outside counsel, to include (i) Case cycle times, (ii) Resolution of cases, and (iii) A comparison of in-house costs to billable rates for external counsel. Below are the metrics the NCDOT will use to evaluate performance by outside counsel:

- A. Hourly rate and adherence to total cost estimates.
 - Each attorney/firm will be retained based, in part, on its proposed rate structure. However, for more complex and large-scale cases, performance will be judged based on the attorney/firms ability to stay within the total estimates provided at the outset of the case.
 - As the NCDOT progresses in retaining outside counsel for more matters, flat fee structures for some kinds of work may be considered.
 - For larger, complex cases, each attorney/firm will be evaluated based on the percentage of total costs it went over (or under) its original estimate.
 - Unique and unforeseen circumstances that led to an increase or decrease in total costs will be noted in each evaluation.
 - Total costs will also be compared with the average costs to handle matters using in-house attorneys from the NC Department of Justice. (**It must be noted that calculating the average costs of in-house counsel will be difficult and inexact, due to the fact in-house attorneys do not bill or otherwise provide costs related to specific matters, only overall projects. This is most applicable in condemnation work, where the Attorney General’s office provides reports on the amount of time devoted to projects, but not the specific condemnation actions that are part of the project.**)
- B. Case cycle and resolution times.
 - The time from hire to resolution of each case will be recorded.
 - This will be compared to the estimated resolution time provided by counsel, with unique and unforeseen circumstances taken into account.
 - Attorneys/firms with a history of shorter average resolution times will be given

preference, especially in matters that are standard in relation to all projects (ex. Condemnation/ eminent domain matters).

- Resolution times will also be compared with the average resolution times for matters handled by in-house attorneys.

C. Value based resolution assessments.

- The resolution of each matter will be assessed against the resolution goal provided by counsel in its proposal.
- The unique circumstances of each case will be considered in determining whether the resolution of the case was unsatisfactory, satisfactory, or excellent.
- Those attorneys/firms consistently obtaining excellent results will be given preference to those obtaining unsatisfactory results.

IV. Conclusion

The NCDOT will report quarterly on the metrics laid out above for all matters in which outside counsel has been hired. The NCDOT will also report on all changes to the above-summarized procurement process as the Department gains more experience with hiring outside counsel.

EXHIBIT A

NCDOT Outside Counsel Application

This application will be used by the NCDOT to assess the qualifications of attorneys seeking to represent the Department in condemnation and eminent domain proceedings. Please provide all of the requested information, as well as any information you believe would be relevant to the Department's decision making process.

Firm/Attorney Name:

Location(s):

List of Attorneys and Applicable Experience (*please provide a list of all attorneys you anticipate will work on NCDOT condemnation cases, along with bios for each attorney focusing on applicable experience*):

Proposed Hourly Rate Structure (*please provide the hourly rate for all paralegals, associates, and partners you anticipate will be billing to any NCDOT matter(s)*):

List of All Conflicts (*list all matters in which you or your firm represents any interests that are adverse to the State of North Carolina, including all condemnation cases in which the NCDOT is the condemnor*):