

<b>POLICY OF THE STATE OF DELAWARE DEPARTMENT OF JUSTICE</b>		<b>PAGE NUMBER</b>  1 of 7
<b>SUBJECT: PROCUREMENT OF SPECIAL COUNSEL</b>		
<b>APPROVED BY: ATTORNEY GENERAL MATT DENN</b>		
<b>EFFECTIVE DATE: APRIL 13, 2016</b>		

- I.           **AUTHORITY:** 29 *Del. C.* §§ 2504(2), (3); 2505(a), (b); 2507; 6902(19).
  
- II.           **PURPOSE:** To establish a consistent method for responding to agency requests for special counsel, to ensure maximum transparency in the selection of the most qualified special counsel, and to ensure the least fiscally burdensome manner to retain and engage special counsel.
  
- III.          **APPLICABILITY:** All Deputy Attorneys General who provide legal advice to entities within the scope of 29 *Del. C.* § 2504(2).
  
- IV.          **POLICY:**

**A) Scope of Policy and Decision to Appoint Special Counsel.**

The following policy will govern all approvals of appointment of special counsel by the Attorney General, under Title 29, Chapter 25 of the Delaware Code. Special counsel may be appointed to handle or provide advice respecting a matter or project under the following circumstances:

- (1) when the matter or project requires technical or legal knowledge, expertise or experience that is beyond that possessed by Department of Justice attorneys (e.g., intellectual property matters, complex regulatory matters), or would be enhanced by the supplemental technical or legal knowledge, expertise or experience of special counsel;
  
- (2) when the matter or project is on a sufficiently expedited timeline or is sufficiently resource-intensive that it is beyond the capacity of the Department of Justice, given available attorney and staff time and resources, to handle internally, or if the handling of the matter or project would be materially

enhanced by the use of special counsel, or if special counsel can handle the matter more efficiently;

(3) when representation by the Department of Justice would present a conflict of interest (other than those appointments made pursuant to 10 *Del. C.* § 3925 and the procedures set forth therein);

(4) when the matter or project involves litigation or a dispute in a jurisdiction outside the State of Delaware or involves the law of another state or jurisdiction; or

(5) under other unique or unanticipated circumstances, with the approval of the Chief Deputy Attorney General.

**B) Appointment of Special Counsel Subject to Competitive Proposals.**

Subject to the exceptions set forth in Section V.(D) of this policy, the Attorney General will not approve the appointment of special counsel unless:

(1) written applications for the appointment in question have been publicly solicited;

(2) those applications have been reviewed by a committee meeting the requirements of this policy; and

(3) the committee has made a recommendation to the Chief Deputy Attorney General regarding the choice of special counsel and the terms under which special counsel should be retained.

**C) Special Counsel Billing and Fee Arrangements.**

(1) **Contingent Fee Agreements.** The Attorney General will not contract with special counsel on a contingent fee basis unless the following conditions are explicitly included in the retention agreement:

(a) The Attorney General shall consult with a client agency whose interests may be affected by the matter, but in any event shall retain control over the course and conduct of the matter.

(b) The Attorney General shall be permitted active oversight of the matter.

(c) The Attorney General shall retain veto power over any decisions made by special counsel, subject to the special counsel's right to seek court protection for any alleged conflict with the special counsel's ethical duties.

(d) The Attorney General shall attend all settlement conferences.

(e) The decision to settle a matter shall occur only after consultation with a client agency whose interests may be affected by the matter, but in any event shall be reserved exclusively to the discretion of the Attorney General, subject to the special counsel's right to seek court protection for any alleged conflict with the special counsel's ethical duties.

(2) **Non-Contingent-Fee Arrangements.** All non-contingent-fee arrangements will be subject to the then-current Delaware Department of Justice Outside Counsel Billing Policy, which will be annexed as an exhibit to all special counsel retention agreements.

V. **PROCEDURES:** In the event a state agency or a Deputy Attorney General requests the retention of special counsel, the following procedures shall apply and shall be carried out, subject to the exceptions in Section (D), below. The Deputy State Solicitor shall be the Special Counsel Coordinator for the Delaware Department of Justice and shall be the main point of contact for all special counsel procurements. When addressing any need to engage special counsel, the following are the core requirements and obligations for Deputy Attorneys General:

**A) Statement of Need Required.** Any request for special counsel must be supported by a written statement of the requesting agency's assigned Deputy Attorney General that explains the need for special counsel, when the need arose, and why the Delaware Department of Justice cannot fully support the agency's legal service needs. All statements of need will be submitted to the requesting Deputy's Unit Head for review and submission to the Deputy State Solicitor.

**B) Contents of Competitive Bid Solicitation.** Any written solicitation for applications to serve as special counsel shall contain, at a minimum, the following:

(i) a description of the type of work for which special counsel is sought;

(ii) the identities of all known or likely related and/or adverse parties, as well as of all potential clients on whose behalf the special counsel will or may pursue similar legal relief;

(iii) any minimum qualifications that will be required of special counsel, including bar memberships, specialized expertise, and years of experience;

(iv) the nature and minimum amount of professional liability insurance required of special counsel;

(v) the information regarding past disciplinary proceedings or past allegations of legal malpractice required to be submitted;

(vi) any requirements or restrictions with respect to the manner in which the special counsel will be compensated for his or her services and related requirements or restrictions; and

(vii) if the solicitation proposes to compensate special counsel based on a contingent fee agreement, an express statement of the conditions enumerated in Section IV.(C)(1) of this policy.

If candidates are solicited on an informal basis pursuant to this policy, the Deputy State Solicitor shall provide notice of this policy and shall seek to ascertain as much of the foregoing information as may be consistent with the interests of the state or the client agency.

**C) Selection of Special Counsel.** The selection process for retention of special counsel under this procedure shall be as follows:

(1) A committee shall be formed to make recommendations respecting the selection of special counsel and the terms of the engagement. The committee shall consist of three to five

members and shall, wherever possible, include one or more members not employed by the State of Delaware.

(2) No member of the committee shall have any conflict of interest with respect to the selection of special counsel in a specific case.

(3) It is expected that the committee will consider the following factors when selecting special counsel:

(a) the experience and reputation of the firm and relevant attorneys with respect to the subject matter of the anticipated litigation, dispute or engagement;

(b) if applicable, the performance of the firm and relevant attorneys on past special counsel engagements by the State of Delaware;

(c) the firm's proposed approach to the dispute or litigation in question;

(d) the cost to the state of the firm's services and strategy, relative to that of other bidders and relative to the experience and qualifications of the bidder;

(e) references and recommendations from former clients or members of the bar in the jurisdiction(s) in which the firm will provide legal services;

(f) the experience and reputation of the firm and relevant attorneys in the jurisdiction(s) in which the firm will provide legal services;

(g) any potential or actual conflicts of interest and the potential for securing a waiver from relevant parties;

(h) the extent and success of the firm's efforts to encourage the hiring, promotion and inclusion of women and minority attorneys, including its ability and commitment to include women and minority attorneys in the project under bid; and

(i) such other factors as may be relevant to the subject matter of the anticipated litigation or dispute.

(4) Decisions regarding the selection and terms of engagement of special counsel on the part of the Delaware Department of Justice shall be made by the Chief Deputy Attorney General, State Solicitor, or Deputy State Solicitor, who shall have received recommendations from the committee. The Attorney General will not receive information on the bidding process, including the identity of persons or firms that have submitted proposals, until proposals have been awarded.

**D) Exceptions to Competitive Bidding Requirements.**

(1) The Attorney General may approve the appointment of special counsel without following one or more of the procedures enumerated in Section V.(C) of this policy if one or more of the conditions listed below exists:

(a) the need for legal services is of a sufficiently exigent nature that legal rights or responsibilities of the state would likely be jeopardized;

(b) the privacy interests or objectives of the state or a DOJ client would be jeopardized by the use of a competitive bidding process;

(c) the special counsel has previously been engaged on an identical or substantially similar matter;

(d) the special counsel will receive no compensation of any kind, contingent or otherwise, for his, her or its service, other than reimbursement of out-of-pocket expenses, and separately retained local counsel to support the special counsel is not required; or

(e) other unique or unanticipated circumstances exist such that competitive bidding is not warranted or may be adverse to the state's interest.

(2) Where competitive bidding is not required, the Department of Justice will consider as many of the criteria listed in Section V.(B) as may be appropriate under the circumstances. The Attorney General will not receive information concerning the identity of any persons or firms under consideration until the selection has been made.

**E) Written Engagement Agreements Required.** All retentions of

special counsel shall be by written engagement agreement unless such requirement is specifically waived by the Chief Deputy Attorney General and State Solicitor. All engagement agreements with special counsel shall be in a form approved by the Delaware Department of Justice and shall include the then-current version of the Delaware Department of Justice Outside Counsel Billing Policy as an exhibit. The retention of special counsel and written engagement agreement must also be approved by the Office of the Governor in accordance with 29 *Del. C.* §2507. All retention agreements shall be executed with original signatures on four fully-executed originals for each of the following: (1) the Office of the Governor, (2) the Delaware Department of Justice, (3) the applicable state agency, and (4) special counsel.

**F) Invoice Review and Approval.** Any and all invoices for legal services shall be reviewed by the Deputy Attorney(s) General most closely associated with the invoiced services. Such review shall include: 1) an analysis of whether the services listed in the invoice are within the scope of services set forth in the engagement agreement, 2) whether the invoice is compliant with the then-current version of the Delaware Department of Justice Outside Counsel Billing Policy, 3) whether the services are accurately stated in the invoice, and 4) whether the invoice is recommended for payment with or without exceptions. Any additional procedures adopted by the Delaware Department of Justice respecting the review and approval of invoices shall also be followed.

**G) Special Counsel Coordination.** The Deputy State Solicitor shall act as Special Counsel Coordinator and shall be notified at each stage (as set forth herein) of any special counsel procurement process. Further, any invoice which is disputed in any manner shall be forwarded to the Deputy State Solicitor for further action. The Deputy State Solicitor shall be available as a resource to all Deputy Attorneys General to advise upon and direct the conduct of any special counsel procurement or any dispute relating to the invoicing for special counsel services.