

## TERMS OF ENGAGEMENT FOR OUTSIDE COUNSEL

These Terms of Engagement set forth billing, case management and other requirements for the Law Firm (referred to herein as "the Firm"). The [Name] Contractor ("Contractor") is subject to the Department of Energy Contractor Legal Management Requirements prescribed at 10 CFR Part 719, and the requirements herein document the Firm's agreement to assist Contractor in complying with this regulation, and in particular, the cost guidelines in subpart D of the rule and in any supplemental guidance distributed by DOE thereunder.

Requirements below for deliveries or notices to Contractor will be deemed complied with by deliveries or notices to the Office of the General Counsel's supervising attorney assigned to the matter ("[Contractor] Legal"). Required approvals or authorizations should be obtained from the supervising attorney prior to proceeding, and significant matters, such as settlements, should be approved in writing, signed by the cognizant Contractor attorney.

### GENERAL STATEMENT

It is Contractor's policy to manage litigation and other legal matters in an efficient and cost-effective manner and to ensure that the interests of Contractor and the Government are appropriately protected. Contractor expects the Firm to be accountable for management decisions that are cost effective and in accordance with prevailing codes of professional conduct. Consequently, the Firm will avoid:

- Overstaffing a matter;
- Shifting and rotating personnel assigned to a matter;
- Inappropriately staffing a matter with overqualified or under qualified individuals;
- Authorizing premature, peripheral or unfocused legal or factual research;
- Holding unnecessary internal conferences about a matter;
- Unnecessary polishing of work;
- In the case of litigation, permitting routine digesting of documents or depositions, preparation of unnecessary motions or motions with low probability of being granted, and premature preparation for trial; and
- In the case of a corporate transaction, permitting the creation of 'due diligence' memoranda of unnecessary length or content.

Contractor's philosophy with respect to litigation is to pursue an approach that is aggressive, but consistent with the policy above. Consequently, the Firm shall avoid extreme advocacy positions that are not likely to have a substantive impact on the outcome to the litigation, and avoid coercive, dilatory or obstructive tactics. Dispute resolution methods other than litigation, and non-monetary settlement options, shall be given early, frequent, and thoughtful consideration.

### STAFFING AND MANAGEMENT

#### Staffing

1. When Contractor selects an attorney (or team of attorneys) to represent it, it is to be considered as the engagement of that attorney (or attorneys) personally even though technically Contractor may be engaging the services of the Firm. Thus, the lead attorney for the Firm shall personally exercise active control over all aspects of the assignment or litigation and be directly involved in all major decisions.

2. While staffing is, in general, the prerogative of the Firm's managing attorney, consideration must be given to whether some of the work can be performed efficiently by lawyers, paralegals or clerks employed by Contractor and whether there are other ways in which the time required of the Firm can be minimized without compromising the quality of representation. It may, for example, be more efficient for Contractor

personnel to collect and review information in files. Where trade or market data or information on the business in which Contractor is engaged is required, Contractor should be utilized as the primary source.

3. All tasks will be staffed at the most cost-effective level, *i.e.*, the lowest billing rate consistent with required skills needed, efficiency and quality. Contractor has a strong preference for use of senior level associates and mid-level partners to perform the majority of the work over arrangements pairing a senior level partner with new associates. Generally, assignment of first year associates, summer associates, summer clerks, or other personnel new to the Firm will not be approved.

4. Contractor has retained the Firm because of its expertise, and accordingly does not pay for the training of the Firm's personnel. In particular, time spent educating junior lawyers in the substantive law applicable to the matter assigned will not be billed. Likewise, Contractor will not pay for the 'learning time' that may result from staffing changes.

5. Consistent with our objective to achieve cost-effective results, only attorneys knowledgeable concerning the Contractor Site, DOE and Contractor should be used, unless approved in writing by Contractor.

6. Intra-office conferences on Contractor matters shall be held only when they are the most cost effective manner in which to convey information or discuss strategy.

7. Only one attorney or representative from the Firm shall attend external meetings, depositions, and arguments unless the attendance of more than one is justified to, and approved by, the Contractor supervising attorney.

8. Contractor pre-approval is required for any research project expected to take in excess of ten hours.

### Management

1. Contractor, through its supervising attorney, retains primary responsibility for managing the legal assignment or litigation assumed by the Firm. This means all strategic or tactical decisions associated with an assignment or litigation must be approved by Contractor's supervising attorney. The Firm will not look to any other Contractor personnel for decisions, although the Firm may contact other personnel, with the approval of Contractor counsel, as part of the fact-gathering process or pursuant to a deposition or other similar interaction.

For each matter assigned to the Firm, Contractor will:

- define the objectives to be achieved;
- outline the roles and duties expected of the Firm;
- develop, in conjunction with the Firm, appropriate transaction/case management strategies and budget estimates;
- review invoices for compliance with the guidance set forth herein;
- approve changes in planning documents, staffing assignments, and fee schedules;
- provide appropriate and timely authorization of matters requiring pre-approval; and
- expedite necessary DOE approvals.

2. If the matter covered by this engagement letter does not involve litigation, (*e.g.*, "white paper studies, legal opinions, permit applications, *etc.*), Contractor may require the Firm to prepare a **work plan** that outlines the major areas of research for the assignment, the issues to be addressed, the actual product to be delivered and the time frame for when the product is to be delivered. The level of detail for each work plan will depend on the circumstances of each assignment.

3. If the matter involves the Firm's representation of Contractor in connection with a litigation matter, as soon as practicable, but not later than the close of pleadings, the Firm will provide Contractor with an assessment of the case. Contractor also may require the Firm to prepare a **litigation plan**, identifying

alternative strategies for disposing of the case, including appropriate alternative dispute resolution mechanisms. The plan shall outline the proposed course of litigation, including pretrial motions, dispositive motions, the scope of discovery and a trial strategy. The scope and degree of detail included in the litigation plan is to be commensurate with the significance of the matter.

4. If the matter is a "significant matter" as defined in Department of Energy regulations at 10 CFR Part 719.2 (*i.e.*, involves significant issues as determined by Department of Energy counsel, or legal costs over the life of the matter are expected to exceed \$100,000), the Firm agrees to prepare a **Staffing and Resource Plan** (S&RP) in addition to a work plan or litigation plan. The S&RP shall be prepared in accordance with 10 CFR 719, Subpart B, section 719.15. The Plan shall be submitted within twenty days of the filing of an answer or a dispositive motion in lieu of an answer, or within twenty days of a determination that the cost of a matter is expected to exceed \$100,000. The scope and degree of detail shall be commensurate with the significance of the matter.

Contractor and the Firm shall review the S&RP semi-annually. Changes in strategy and variances in excess of 10% of budget require prior Contractor approval. Updates will be prepared by the Firm each succeeding year or within 30 days of any significant change in the matter. The annual update is due in August to conform to Contractor's budgeting cycle and to assist in preparing its annual budget.

5. The Firm shall prepare a comprehensive analysis of the case at the close of discovery, including any recommendations for settlement or additional dispute resolution mechanisms. Settlement terms other than the payment of money should be considered (*e.g.*, the resumption of a business relationship on favorable terms).

6. Any documents not otherwise routine or insignificant that are to be provided to third parties, including a court or administrative agency, will be sent to Contractor in draft with enough time for meaningful review by Contractor Legal. All final copies of documents and memoranda for which Contractor is charged will be sent to Contractor.

#### USE OF EXPERTS AND CONSULTANTS

1. The Firm may not retain experts or consultants on behalf of Contractor without authorization. If the Firm proposes to retain an employee of another contractor of the Department of Energy, Contractor will attempt to furnish the expert directly through the contractor that currently employs the potential consultant.

2. Any retention of outside experts or consultants will be through a meaningful competitive bidding procedure, or on such other terms that are acceptable to Contractor, if fees are anticipated to exceed \$2,000.

3. All experts and consultants will be required to submit a billing statement similar to the format for outside counsel. The Firm shall provide Contractor's billing guidelines to the experts and/or consultants prior their commencement of work and their invoices must be reviewed for compliance with these billing guidelines prior to payment by the Firm or submission to Contractor for approval.

#### BILLING RATES

1. Before assigning a lawyer or paralegal to a Contractor matter, the Firm will identify the individual, and his/her billing rate and years in practice or service to the Firm, and obtain Contractor approval.

2. In negotiating compensation rates at the outset of a particular matter, Contractor will consider the number of engagements Contractor is able to offer the Firm and the current competitiveness of other law firms as to both quality and rates, as well as the factors listed in 10 CFR 719.10(c). Notwithstanding the foregoing, the billing rates charged to Contractor will be the lowest billing rates charged to any of the Firm's commercial clients with a similar volume of work. Billing rates will apply for periods of no less than

two years. Proposed changes to rates (whether by general increase or by virtue of a professional progressing to the next level) will be provided to Contractor for approval 60 days before they are to become effective.

3. Contractor may agree to an alternative fee arrangement (*e.g.*, contingency, fixed fee, blended rate) for a particular matter if such arrangement would result in overall efficiencies and cost savings. Regardless of the billing arrangement actually used, all fee arrangements must be clearly understood and approved in writing by Contractor prior to the rendering of services.

4. The Firm understands that Contractor will apply the standard for cost reasonableness contained in the Federal Acquisition Regulation (FAR) at 48 CFR 31.201-3 as one criterion for allowability of costs. The Firm also understands that various categories of expenses identified in 48 CFR Part 31 are unallowable under government regulations, *e.g.*, entertainment and alcohol expenses, or interest charges on unpaid bills.

## INVOICES AND DISBURSEMENTS

### Invoices

1. The Firm will submit invoices on a monthly basis. If the Firm represents Contractor in multiple matters, a separate billing statement shall be submitted for each matter, if possible on the same date.

2. Each invoice will set forth the project number, as well as the following in summary form:

- current fees and disbursements;
- aggregate fees and disbursements to date;
- status of a matter (*e.g.*, pending, closed);
- Contractor supervising attorney;
- name, status (*e.g.*, partner, associate or paralegal) and billing rates of each.

3. Invoices must reflect the detailed time journal entries of each timekeeper (attorney, paralegal or others), organized by date and by individual timekeeper.<sup>1</sup> Detailed time records are to be prepared on the day services were performed for Contractor and should be completed throughout the day rather than at the end of the day. Timekeepers will not bill in increments greater than six (6) minutes. "Block" billing (assigning a block of time to more than one task) will not be reimbursed.

The detailed time journal entries must be separately itemized for each task and for each timekeeper, showing the date performed, the timekeeper performing the task, a descriptive explanation of the task performed, and the time spent.

Time journal entries must identify each task in a manner that permits Contractor to ascertain the benefit derived from such services. For example, time entries that simply show "telephone conference" or "draft correspondence" will not suffice. Time entries for conferences and telephone calls will identify the participants and the substance of the communication. Time entries for drafting or reviewing correspondence will identify the subject matter of the correspondence. Time entries for drafting or reviewing other documents will identify the document by title or subject matter, as applicable.

4. All disbursements must be separately itemized. Each disbursement must identify the date incurred and the attorney who authorized it. Contractor will not reimburse expenses described merely as "miscellaneous" or "other."

Copies of original source receipts shall be included with the invoice for disbursements in excess of \$75.00. For internal copying charges, itemization, *e.g.*, ## pages @ .10/pg. is sufficient.

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<sup>1</sup> See Model Bill Format, attached.

5. The following certification will accompany any invoice for services and expenses:

*“Under penalty of law, this law firm acknowledges the expectation that the bill will be paid by the contractor and that the contractor will be reimbursed by the Federal Government through the U.S. Department of Energy and, based on personal knowledge and a good faith belief, certifies that the bill is true and accurate, that the services and charges set forth herein comply with the terms of engagement and policies set forth in Contractor’s Legal Management Plan, and the costs and charges set forth herein are necessary.*

*We acknowledge that the Department of Energy and the General Accounting Office have the right, upon request, at reasonable times and at reasonable locations, to inspect, copy and audit all records documenting billable fees and costs under the terms of engagement, the systems employed to capture, record, and bill the fees and costs, and any other records relevant to the representation under the terms of the engagement.”*

6. Contractor will make every effort to ensure that each invoice is processed for payment within thirty days of receipt, less disputed charges. Questioned charges will be expeditiously resolved but will not be paid by Contractor until resolution. In addition, the Firm should be aware that litigation matters require approval by the U.S. Department of Energy prior to payment, which may cause some delay.

#### Disbursements

1. Contractor will pay only the actual out of pocket expense for disbursements and will not reimburse the Firm for any mark up, allocation of overhead or other internal charges associated with the Firm's practice. Without limiting the generality of the foregoing, Contractor will not pay for:<sup>2</sup>

- Secretarial, word processing, proofreading, filing, office machine attendants (photocopy, telecopier or fax "tending"), librarian or other clerical services (normal, temporary, or overtime);
- Internal photocopying expenses at more than 10 cents per page;
- Computer time (other than computer legal research billed at cost);
- Air conditioning, lighting, conference rooms, office supplies, or other costs associated with the maintenance of the Firm;
- Parking, other than while on travel representing Contractor;
- Local telephone expenses;
- Local meals, other than expenses incurred while away from the Firm on travel representing Contractor;
- Local travel, other than that required in directly representing Contractor in a matter;
- Any incoming or outgoing fax (only the actual long distance telephone charge may be billed);
- Client development and related activity, including providing clients with social meals, hosting receptions, giving tickets to entertainment or sporting events, and gifts;
- Trade publications, books, treatises, background material and similar documents;
- Professional educational seminars and conferences;
- Fines or other penalties for illegal conduct;
- Any other expenses for internal operations or where properly chargeable to overhead or as a capital expense;
- Alcoholic beverages;
- Entertainment;
- Interest or penalties on outstanding statements;
- Charges for air travel in excess of the coach rate; and
- Time spent in preparation of bills or responding to questions about bills from either the contractor or representatives of the government.

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<sup>2</sup> Specific categories of unallowable costs are contained in the cost principles at 48 CFR Part 31. (See also, 41 U.S.C. § 256(e).)

2. Travel time may be billed at the full rate for that portion of time the individual actually performs work for which the Firm was retained by Contractor; any remaining travel time during normal working hours during which counsel is not working shall be reimbursed at 50 percent, except that in no event shall travel time be billed to Contractor during which work was performed for other clients. Contractor will not pay fees for an attorney's or paralegal's time in travel during non-business hours during which no work on a Contractor matter is being performed. Travel-time billings may only include time *en route* and may not include idle or vacation time away from the office or home.

Also, only the expense equivalent to the overall fastest mode of transportation will be considered reasonable.

3. Any documents that are not routine forms or otherwise insignificant, *e.g.*, transmittal letters, and that are to be provided to third parties, including a court or administrative agency, will be sent to Contractor in draft with enough time for meaningful review. All final copies of documents and memoranda for which Contractor is charged will be sent to Contractor.

4. Pre-approval by Contractor is required for:

- Any disbursement or series of disbursements in a single category in excess of \$500;
- Meal, lodging, and incidental expenses substantially in excess of the applicable U.S. Government *per diem* rate in effect at the time of travel;<sup>3</sup> (See, <http://www.fsd.Contractor.gov/perdiem.htm> )
- Computers or general application software, or non-routine computerized databases specifically created for a particular matter;
- Charges for materials or non-attorney services exceeding \$5,000;
- Attendance by more than one person at a deposition, court hearing, interview or meeting;
- Expert witnesses and consultants; and
- *Pro hac vice* admissions.

5. The Firm will consider need, economy and good sense when determining the mode of document delivery. When corresponding with Contractor, it is preferred that the Firm utilize electronic mail. If that is not feasible, then facsimile transmission may be utilized (unless time is not an issue and the document can be sent regular mail). Facsimile should not be used if the document is voluminous (exceeds 25 pages). If correspondence has been sent electronically or by facsimile, no hard copy shall be delivered unless specifically requested by Contractor. Use of local and overnight messenger services shall be limited to those documents that must be received quickly and are too long to be sent electronically or by facsimile.

## AUDITS AND RECORDS

1. Contractor reserves the right to conduct a review and audit of all billable hours and costs of outside counsel, as well as the system(s) employed by the Firm to capture and record costs billed to Contractor. Any records of such costs will be retained by the Firm for a minimum of three years following receipt of final payment. The exact scope and timing of the audit will be discussed prior to the audit performed. Areas of concern that are developed in the audit will be identified by Contractor to the Firm and resolved by the parties to their mutual satisfaction. In the performance of the audit, Contractor reserves the right to utilize the services of consultants or individuals outside the Contractor Legal Department.

2. DOE and the General Accounting Office have the right, upon reasonable notice and at reasonable times and/or locations, to inspect, copy and audit all records documenting billable fees and costs.

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<sup>3</sup> Travel and related expenses must at a minimum comply with the restrictions set forth in 48 CFR § 31.205-46 to be reimbursable.

3. The provision of records to DOE and/or the General Accounting Office is not intended to constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of those records to a third party.

#### CONFLICTS OF INTEREST

Contractor recognizes that Firm may also be called upon to provide professional services to clients with adverse competitive interests. There may even be situations in which the Firm is requested to represent another client in a matter that is directly adverse to Contractor. Any potential or actual conflict must be resolved to Contractor's satisfaction prior to representation or continued representation. The Firm shall immediately notify Contractor of any actual or apparent conflict. The notification shall include the following information: a complete list of the legal matters currently being handled for Contractor, the identity of each Contractor component involved, and the designated Contact Person for each matter. Based on the information submitted, Contractor will determine how the actual or apparent conflict will be addressed.

#### MEDIA RELATIONS

The Firm is not authorized to comment publicly on Contractor matters. All media inquiries shall be directed to Contractor.