



INVESTIGATIVE REPORT

Lori Torres, Inspector General

OFFICE: INDIANA DEPARTMENT OF REVENUE

TITLE: CONTINGENCY FEE CONTRACT

CASE ID: 2017-10-0223

DATE: October 13, 2017

DEPARTMENT OF REVENUE CONTINGENCY FEE CONTRACT

After examination and review, Office of Inspector General Staff Attorney Kelly Haltom reports as follows:

The purpose of this Report is to fulfill the statutory requirements of Ind. Code § 4-6-3-2.5 regarding contingency fee contracts. This statute requires the Inspector General (“IG”) to review contingency fee contracts for possible conflicts of interests and potential Code of Ethics violations. Under this statute, an agency may not enter into a contingency fee contract unless the IG has made a written determination that entering into the contract would not violate the Indiana Code of Ethics set forth in Ind. Code 4-2-6 and 42 IAC 1-5 (“Code of Ethics”) or any statute or agency rule concerning conflicts of interests.

On October 11, 2017, the Indiana Department of Revenue (“DOR”) notified the IG that it wished to enter into a contingency fee contract with Mattingly Burke Cohen & Biederman LLP, an Indianapolis based law firm (“the Firm”). The DOR’s request explains that the State will utilize the Firm primarily to undertake the litigation of cases involving the La Carreta, El Rodeo, and El

Jaripeo restaurants (the “Restaurant Cases”) before the Indiana Tax Court. The DOR seeks to collect monetary recovery in tax liabilities in the Restaurant Cases. Total liability in these cases was approximately six million dollars. The request further explains that the State will use the Firm in similar situated cases before the Indiana Tax Court. The State will compensate the Firm through a contingency fee in the amount of 15% of the amount recovered. The Firm will also charge the State a reduced hourly rate of \$225 an hour, as opposed to their normal hourly rate of \$365 an hour.

Pursuant to Ind. Code § 4-6-3-2.5(b), the DOR is required to make a written determination before entering into the contract that contingency fee representation is cost effective and in the public interest. The DOR must consider five factors when making this determination as outlined by Ind. Code § 4-6-3-2.5(c). The DOR made such a determination and considered all of the factors outlined in the statute.

The DOR’s determination explains that it is not cost-effective or in the public’s interest for the DOR to undertake the litigation of the Restaurant Cases based upon the volume and complexity of the Restaurant Cases and the lack of resources available to the State to effectively litigate these matters.

The DOR’s determination notes that the Restaurant Cases present complex issues arising under sales, food and beverage, corporate income, and individual income tax laws. The Restaurant Cases also raise novel issues arising out of the underlying criminal investigations and plea agreements. Additionally, the Restaurant Cases present a great deal of multifaceted discovery disputes. As such, DOR’s determination explains that the dozens of Restaurant Cases will require enormous effort to effectively litigate these cases that surpasses the current legal resources available to DOR.

The DOR's determination further notes that experienced and skilled litigators are needed to address such complex issues and discovery disputes. Such skilled and experienced litigators are needed to vigorously litigate these contentious matters in an effort to obtain the greatest monetary recovery available to the State. The DOR's determination explains that the Firm is comprised of such situated litigators who have well-established skills and experience in discovery disputes.

Furthermore, Ind. Code § 4-6-3-2.5(d) requires the DOR to request proposals from private attorneys wishing to provide services on a contingency fee basis, unless the agency, in this case the DOR, determines in writing that that requesting proposals is not feasible under the circumstance. The DOR did not request proposals from private attorneys wishing to provide services on a contingency basis; however, they conducted a search of Marion County litigators before selecting the Firm. The DOR's determination explains that requesting such proposals was not feasible under the circumstances due to the unique needs and urgency of the DOR for purposes of effectively litigating the Restaurant Cases and the complex issues and discovery disputes that they contain.

After careful examination and review, the IG has determined that the contract will not violate the Code of Ethics or any statute or agency rule concerning conflicts of interests. First, according to the DOR, the Firm does not employ anyone involved in the contracting decisions for the DOR. Likewise, DOR represents that there is no DOR employee or immediate family member of a DOR employee who has a financial interest in the Firm or the contract itself. Because of that, it also does not appear that any DOR employee is contracting with or will be supervising the work of a business entity in which a relative is a partner, executive officer or sole proprietor.

Based on the information provided, we find that entering into the contract will not violate the Code of Ethics or any statute or agency rule concerning conflicts of interest. This Report is issued in compliance with the above noted statutory requirements.

Dated October 13, 2017.

APPROVED BY:

A handwritten signature in black ink that reads "Lori Torres". The signature is written in a cursive, flowing style.

Lori Torres, Inspector General