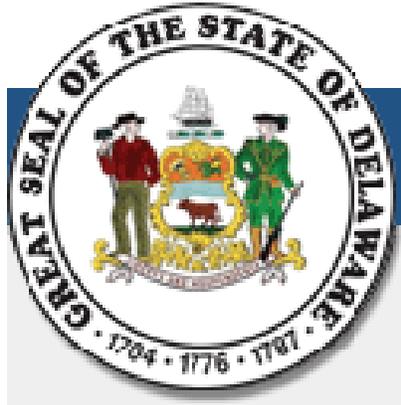


# STATE OF DELAWARE



## Office of the Governor

Carvel State Office Building, 12<sup>th</sup> Floor  
820 N. French Street  
Wilmington, DE 19801

## Request For Proposals For Special Litigation Counsel

**Bid Number: GO-SLC07172012**

**Bid Closing: July 17, 2012; 3:00 p.m. ET**

**REQUEST FOR PROPOSALS FOR  
SPECIAL LITIGATION COUNSEL  
ISSUED BY THE STATE OF DELAWARE**

**Executive Summary**

The Office of the Governor (“Office”) is issuing this Request for Proposals (“RFP”). The Office seeks to engage a law firm to act as Special Litigation Counsel (“Special Litigation Counsel”) to represent the Governor in *Nichols, et al. v. Markell, et al.*, C.A. No. 1:12-cv-00777-CJB, pending in the United States District Court for the District of Delaware (the "Litigation").

The Office anticipates that it will select at least one vendor (“Vendor”) to act on behalf of the Governor as Special Litigation Counsel. The Office reserves the right to award multiple contracts if it determines that such an award is in the best interest of the State of Delaware (“State”).

This RFP will define the scope of the work to be performed, the requirements the vendor (“Vendor”) must address in its response, the method for response, and the administrative requirements that must be followed. The Office will advise potential Vendors of changes to any dates as may be necessary. The Office also reserves the right to modify and/or cancel this solicitation at any time during the RFP process.

**RFP Schedule**

ID	Date/Time	Activity
1	July 9, 2012	Request for Proposal issued, posted on the State’s website at <a href="http://bids.delaware.gov">http://bids.delaware.gov</a> and the Attorney General’s website at <a href="http://attorneygeneral.delaware.gov">http://attorneygeneral.delaware.gov</a> .
2	<b>July 17, 2012 - 3:00 p.m. ET</b>	<b>RFP Response due date</b> (the "Closing Date")
3	July 18, 2012	Contract awarded (subject to change)

All interested firms should submit: (1) an original and 5 copies of their proposals (“Proposal”) and (2) one electronic version to the contact person. Proposals may be mailed or hand-delivered for receipt no later than 3:00 p.m. ET on the Closing Date. All timely Proposals become the property of the State. Any proposal or request for modification received after 3:00 p.m. on the Closing Date is late and may not be considered. The Proposals may be delivered by Express Delivery (e.g., FedEx, UPS, etc.), U.S. Mail, or by hand. Proposals shall be submitted to:

Cynthia L. Collins  
Director of Outside Counsel  
Deputy Attorney General  
Carvel State Building  
820 N. French Street, 6<sup>th</sup> Floor  
Wilmington, Delaware 19801

Direct Dial: (302) 577-8405  
Fax: (302) 577-6630  
Email: [Cynthia.Collins@state.de.us](mailto:Cynthia.Collins@state.de.us)

Each proposal must be accompanied by a transmittal letter that briefly summarizes the proposing firm's interest in providing the required professional services. The transmittal letter must also clearly state and justify any exceptions to the requirements of the RFP, which the applicant may have taken in presenting the Proposal. The Office reserves the right to deny any and all exceptions taken to the RFP requirements.

The cost of preparing Proposals will be borne solely by the offerors. Proposals shall address all the questions posed by the Issuers in the order in which they appear in this request.

RFP Designated Contact:

Cynthia L. Collins  
Director of Outside Counsel  
Deputy Attorney General  
Carvel State Building  
820 N. French Street, 6<sup>th</sup> Floor  
Wilmington, Delaware 19801  
Direct Dial: (302) 577-8405  
Fax: (302) 577-6630  
Email: [Cynthia.Collins@state.de.us](mailto:Cynthia.Collins@state.de.us)

## **1.0 GENERAL INFORMATION**

### **1.01 Project Scope and Objectives**

The Office seeks a qualified firm or firms to provide legal counsel to and representation for the Governor in the Litigation. In the Litigation, plaintiffs John A. Nichols and FuelCell Energy, Inc. (the "Plaintiffs") assert claims for declaratory and injunctive relief against the Governor and the executive director and commissioners of the Delaware Public Service Commission (the "PSC"). In addition to Governor Jack Markell, the individual defendants are William O'Brien, in his capacity as Executive Director of the PSC, and individual commissioners of the PSC, Jaymes B. Lester, Joann Conaway, Dallas Winslow and Jeffrey Clark (collectively, the "Defendants").

Plaintiffs allege that amendments to the Delaware Renewable Energy Portfolio Standards Act (the "REPSA") enacted in 2011 discriminate against out-of-state companies in violation of the Dormant Commerce Clause of the U.S. Constitution and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Plaintiffs seek a declaratory judgment declaring certain provisions of the REPSA, the rules implementing the REPSA, and certain orders of the PSC as unconstitutional and unenforceable, a permanent injunction barring enforcement of those provisions, and such other relief as the court deems just and proper. Further details about the allegations made by Plaintiffs may be obtained by review of the complaint filed June 20, 2012 in the Litigation.

### **1.02 Representation**

Selected Special Litigation Counsel will work with the staff in the Office of the Governor in defending the Governor in the Litigation. Special Litigation Counsel will be expected to work cooperatively with the other defendants in defense of the Litigation, including the deputy attorneys general assigned to the PSC and outside counsel to the PSC. All advice is to be provided directly to the Governor or to one of the employees of the Office on his behalf.

## **2.0 MINIMUM REQUIRED QUALIFICATIONS**

### **2.01 Experience**

- A. The Vendor must have been in business at least one (1) year.
- B. The Vendor's attorneys should have at least three (3) or more years of prior experience in representing clients before the federal courts.
- C. The Vendor's attorneys should have experience representing clients in matters pending before the United States District Court for the District of Delaware.

- D. The Vendor's attorneys should have a thorough understanding of dormant commerce clause and equal protection claims and the defenses and immunities available in response to such claims;
- E. The Vendor must designate a lead attorney licensed to practice law with three (3) or more years of experience.

## **2.02 Professional Liability Insurance**

The Vendor shall agree to maintain in full force and effect during the term of the engagement professional liability insurance in an aggregate amount of not less than \$2 million. In order to satisfy this requirement, the Vendor must:

- A. Include a statement in its Proposal affirmatively responding to this requirement; and
- B. Include in its Proposal either:
  - 1) A certificate of insurance or letter from its insurer demonstrating that the Vendor meets this requirement, or
  - 2) A commitment letter or other evidence, satisfactory to the contact person, that Vendor will have such coverage as of the date the engagement commences.

If the Vendor is a joint venture, and one party of the joint venture does not presently have such liability insurance, this requirement may be satisfied if the members of the joint venture include in their proposal evidence, satisfactory to the contact person, that all members of the joint venture will have such coverage as of the date the engagement commences, either through actual insurance policies or an indemnity agreement by the properly insured firm, in form and substance acceptable to the Office.

## **2.03 Vendor's Capacity**

Each Vendor must demonstrate the capacity to perform the type of services needed by the Office described in Section 1 above. The Vendor must be available at all times to render services required under the engagement.

## **3.0 TECHNICAL PROPOSAL FORMAT**

The following information shall be provided in each proposal in the order listed below. A Vendor is expected to provide a response for each requirement listed in this RFP. Failure to respond to any request for information within this proposal may result in rejection of the proposal at the sole discretion of the Office.

### 3.01 General

All technical proposals shall be prepared with a concise description of the Vendor's capabilities to satisfy the minimum qualifications of Section 2 above and the information requested under Section 3 below. Vendors should organize their proposals so that their responses correspond to the specific subsections to the extent possible without unnecessary repetition.

### 3.02 Required Information

The proposal shall contain the information described below. Joint ventures should provide the information separately for each firm.

A. Vendor's Prior Experience

1. General Information:

- (i) Please provide a list of the jurisdictions the members of your firm are licensed in and the status of their licenses (only list those who are expected to be assigned to this engagement).
- (ii) Please provide a statement attesting to the fact that the Vendor is in compliance with all federal, state and local laws and regulations and all tax obligations.
- (iii) Within the past three years, have there been any significant developments in your firm such as changes in ownership or restructuring? Do you anticipate any significant changes in the future? Please describe.
- (iv) Has your firm or an attorney in your firm's employ even been disciplined or censured by any regulatory body? If so, describe the principal facts.
- (v) Within the last three years, has your firm, or a partner or attorney in your firm, been involved in litigation or other legal proceedings relating to provision of legal services? If so, provide an explanation and indicate the current status or disposition.
- (iv) Please describe your firm's backup procedures in the event one or more attorneys assigned to the

Office leave the firm. Identify the key attorney who will be the primary contact and lead counsel in providing services to the Office, whose continuing status as such is an essential element of this contract.

2. Litigation Experience:

- (i) Describe the Vendor's experience in representing clients in proceedings in the federal courts and the United States District Court for the District of Delaware during the last five (5) years;
- (ii) Describe the Vendor's experience in representing clients in constitutional claims generally during the last five (5) years;
- (iii) Describe the Vendor's experience in representing clients in claims relating to the dormant commerce clause or equal protection clause of the U.S. Constitution during the last five (5) years;
- (iv) Describe the Vendor's experience in representing clients in complex litigation during the last five (5) years;
- (v) Describe the Vendor's experience in representing government officials or governments in litigation, or participating in litigation involving government officials or governments, during the last five (5) years.
- (vi) Describe any other experience relevant to the defense of the Litigation in which the Vendor has an expertise not already addressed.

B. Conflicts of Interest.

1. The Office is interested in avoiding even the appearance of impropriety or conflict and, therefore, any doubts in this regard must be resolved in favor of full disclosure. The successful firm(s) shall be required to conform in all respects to the provisions of the Delaware Lawyers' Rules of Professional Conduct, including those relating to conflicts of interest. Even though the firm's employees are not State employees, the firm should read and be familiar

with the terms of 29 Del.C. c. 58 “Laws Regulating the Conduct of Officers and Employees of the State” so as to assist the Office’s employees in avoiding any improper conduct.

2. Prior to submitting its Proposal each Vendor shall complete a conflicts check for the State and its agencies, including the Public Service Commission and its individual commissioners, who are named defendants in the Litigation. Each Vendor shall also complete a conflicts check for the plaintiffs in the Litigation, John A. Nichols and FuelCell Energy, Inc., and any of its affiliates or subsidiaries. Each Vendor shall also complete a conflicts check for Delmarva Power & Light and Bloom Energy, Inc., interested parties to the Litigation. As to each entity, Vendor shall identify any conflicts of interest that may arise if the Vendor serves as Special Litigation Counsel and shall describe in its Proposal how it proposes to deal with such conflicts. Conflicts may arise not only from attorneys names on the contract but also from representation of parties involved in the transactions or other matters involving the State, by any member of the firm, regardless of whether that attorney is in the same office or a different office of the firm.
3. In general, if a conflict of interest arises, the Vendor should be willing to continue to represent the Office and be in a position to inform other existing or potential clients that they must find representation elsewhere in particular situations. The State may entertain a request for a waiver of a Vendor’s representation of a party in litigation involving a unit of State government other than the Defendants, but does not expect to waive any other conflicts. The State, reserves the right, in its sole discretion, to select another approved law firm to work on a particular matter if a conflict is not resolved to its satisfaction.
4. The State recognizes that Vendors may have conflicts due to previous representations. The State encourages Vendors with conflicts to submit proposals, identify the conflicts and describe recommended resolutions

#### **4.0 PRICE PROPOSAL FORMAT**

The proposal shall contain the information described below.

**4.01 Billing Rates**

- A. Current billing rates for all attorneys assigned to represent the Governor pursuant to this RFP and any applicable discounts;
- B. Current billing rates for all paraprofessionals assigned to represent the Governor pursuant to this RFP and any applicable discounts;
- C. No compensation will be permitted for the services of law clerks and law school graduates not admitted to practice.

**4.02 Alternative Pricing Proposals**

Although each Vendor is required to submit a price proposal containing the information set forth in Part 4.1, the Office will also accept proposals for alternative billing arrangements that enhance the value and efficiency of the services to be provided. The Vendor may submit a statement, not more than one page in length, with respect to any alternative pricing proposal.

**5.0 EVALUATION OF PROPOSALS**

The Office will evaluate the proposals. During the evaluation process, the Office may, at its discretion, request any or all firms to make oral presentations or participate in an interview. Such presentation or interviews will provide firms with an opportunity to answer questions about a firm's Proposal. Not all firms may be asked to make an oral presentation or to attend an interview.

**5.01 Selection Criteria**

The selection of the firm to provide legal services will be based on an evaluation of the Proposals to determine which Proposal reflects the best value to the Office and the State, with technical factors generally being considered more important than cost of services. The selection of the firm to provide legal services will be based upon the following technical factors in descending order of importance.

- A. Experience of the firm and the individual attorneys in representing clients in proceedings in the federal courts and the United States District Court for the District of Delaware;
- B. Experience of the firm and the individual attorneys representing clients in constitutional claims generally;

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- C. Experience of the firm and the individual attorneys representing clients in claims relating to the dormant commerce clause or equal protection clause;
  - D. Experience of the firm and the individual attorneys representing clients in complex litigation;
  - E. Experience of the firm and the individual attorneys representing government officials or governments in litigation, or participating in litigation involving government officials or governments;
  - F. Any other experience relevant to the defense of the Litigation;
  - G. Administrative structure of representation (*i.e.*, proposed staffing assignments), soundness of approach to representation and understanding of the needs of the Office;
  - H. Demonstrated ability to perform the services referred to under Project Scope and Objectives, and
  - I. References and recommendations of other clients.

### **5.02 Contract Negotiation**

The Office intends to open negotiations with Vendors that the Office determines have a reasonable likelihood of being awarded a contract based on the proposals that are submitted. Negotiations will focus on any technical weaknesses or deficiencies in proposals as well as cost and pricing issues.

A written contract with each of the selected the Vendors will be required. Each Vendor will be required to comply with the Delaware Department of Justice Outside Counsel Billing Policy, attached hereto as Exhibit A. Each contract must be approved by the Governor of the State of Delaware and the Attorney General of the State of Delaware pursuant to 29 *Del. C.* § 2507.

### **5.03 Contract Award**

The Office reserves the right to award all, part, or none of this contract. The Office intends to award a contract to more than one law firm if deemed appropriate and desirable.

**EXHIBIT A**

**State of Delaware Department of Justice  
Outside Counsel Billing Policy**

I. Budgeting, billing and staffing

A. Billing rates will be in effect for entire matter as provided for in the outside counsel contract. Any change must be approved by the Coordinating Attorney in writing 60 days in advance of the effective date of the change in a billing rate.

B. General Billing practices

1. Bills to be rendered monthly within 30 days after end of month for entire month. No carry-over billing (example cannot bill from May 1 – June 15).
2. Details of fees by lawyer, paralegal, number of hours by task, description.
3. Expenses/disbursements detail and charges by category.
4. Block Billing of Services is unacceptable. All bills shall be billed in increments of no less than 0.1 billing hour (6 minutes).
5. Time billed for each activity should be identified separately. Do not combine different types of activities in one entry on the invoice. “Block billing” of fees is not acceptable, even if the same individual performed the activities.
6. The description of services or activity should be brief and informative. For example merely listing “Research” is not an acceptable billing entry. An acceptable entry would be "Legal research on statute of limitations issues related to [Insert issue]. An other example would be merely listing “Telephone calls" would not be acceptable, instead "Telephone calls to J. James of [Firm] and M. Smith [of firm] re: motion to dismiss." Be sure to identify the who, what and where.
7. No more than 2 outside counsel attorneys at meetings, depositions, mediations, negotiations, and/or hearings unless pre-approved by the Coordinating Attorney.
8. No firm paralegals at meetings, depositions, mediations, negotiations, and/or hearings unless pre-approved by the Coordinating Attorney.
9. Billable hours for summer interns/clerks will not be allowed unless pre-approved by the Coordinating Attorney.

10. More than 12 hours per day by one member of outside counsel staff will be closely reviewed.
11. Internal conferences accounting for more than 10% total monthly billings closely reviewed. Excessive intra-office conferences between attorneys or paralegals for the purpose of providing instruction or status will be closely reviewed.
12. Excessive number of attorneys performing services in a matter will be closely reviewed, unless prior approval is received from the Coordinating Attorney in writing.
13. Billing for research on general legal issues which should be within the knowledge of the firm and/or associate will be closely reviewed.
14. Billing of hours for work done by multiple attorneys in the firm for similar work on the same issue will be closely reviewed.
15. Billing attorney and/or paralegal time for invoice preparation, review, or for corrections to the invoice is not acceptable.
16. Excessive time spent in “file review” will be closely reviewed.
17. Excessive time spent in “review and revision” of documents that you prepare will be closely reviewed.
18. Charging attorney time for tasks that should be performed efficiently and effectively at less expense by a paralegal or secretary, or charging paralegal time for tasks that should be performed by clerical workers will be closely reviewed. For example charging attorney time for arranging logistics for a deposition.
19. Hours charged at a more senior attorney rate when a matter should be handled by a less senior attorney will be closely reviewed.
20. Charging for secretarial time, and or overtime or other staff members is not acceptable.

C. Expenses/Disbursements

1. Reasonable expenses and fees will be reimbursed. Should you have any questions or concerns whether or not a fee or expense falls within the reasonable expense range or will be reimbursed please contact your Coordinating Attorney for an approval.
2. Examples of non-reimbursable overhead
  - a) Computer, e-mail, word processing charges

- b) Conference room charges, rent
- c) Supplies
- d) Library use, staff
- e) Clerks
- f) Proofreaders charges
- g) Support salaries
- h) Local telephone calls
- i) Fax charges

D. Use of Outside Consultants, Experts and Contract Attorneys. There may be instances where the use of consultants, experts and contract attorneys may be required to staff a case. This should be done as part of the case planning in conjunction with your Coordinating Attorney. These fees should be reasonable and necessary and are subject to approval by the Delaware Department of Justice.