



Audit of Outside Legal Costs

Audit #00-07

**Prepared by
Office of Inspector General**

**Allen Vann, Inspector General
Dan Sooker, Lead Consulting Auditor**



SOUTH FLORIDA WATER MANAGEMENT DISTRICT

3301 Gun Club Road, West Palm Beach, Florida 33406 • (561) 686-8800 • FL WATS 1-800-432-2045 • TDD (561) 697-2574
Mailing Address: P.O. Box 24680, West Palm Beach, FL 33416-4680 • www.sfwmd.gov

MGT 08-06F

November 16, 2000

Audit Committee Members:

Mr. Mitchell W. Berger, Chairman
Mr. Michael D. Minton, Member
Mr. Gerardo B. Fernandez, Member
Mr. Patrick J. Gleason, Member
Mr. Nicolas J. Gutierrez, Jr., Member
Mr. Harkley R. Thornton, Member
Ms. Trudi K. Williams, Member

RE: Audit of Outside
Legal Costs –
Audit # 00-07

This audit was performed pursuant to the Inspector General's authority set forth in Chapter 20.055, F.S. The audit focused on verifying that outside legal representation is being contracted in a fair and equitable manner, in the best interest of the District and appropriate controls are in place to administer outside services being rendered. Fieldwork was conducted June 2000 through September 2000. This report was prepared by Dan Sooker.

Sincerely,

Allen Vann
Inspector General

AV/ds
Enclosure

c: Frank Finch
James E. Blount

GOVERNING BOARD

Michael Collins, *Chairman*
Michael D. Minton, *Vice Chairman*
Mitchell W. Berger

Vera M. Carter
Gerardo B. Fernandez
Patrick J. Gleason

Nicolas J. Gutierrez, Jr.
Harkley R. Thornton
Trudi K. Williams

EXECUTIVE OFFICE

Frank R. Finch, P.E., *Executive Director*
James E. Blount, *Chief of Staff*

TABLE OF CONTENTS

BACKGROUND	1
OBJECTIVES, SCOPE, AND METHODOLOGY	3
FINDINGS AND RECOMMENDATIONS	
Summary	4
Document the Selection Process	6
• Results of Water Management Districts And State Agencies Survey	8
Establish Guidelines for Amending Outside Attorney Contracts	12
Improve Compliance with Contract	15

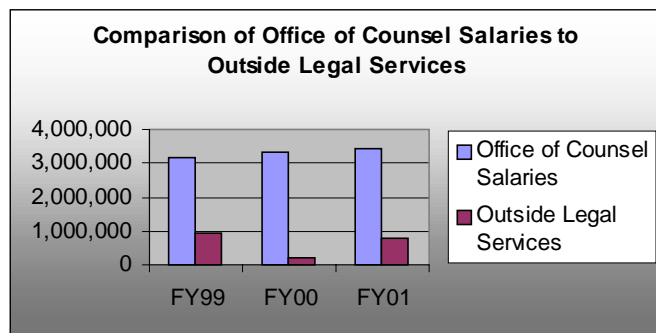
BACKGROUND

The Office of Counsel is assigned responsibility to manage District legal matters. As of October 2000, there are approximately seventy-two open State and Federal cases. The Office expects another two hundred and sixteen to be filed within the next three to twelve months. In addition to managing cases, in-house attorneys provide a variety of legal services for the District such as reviewing and approving contracts, drafting rules, performing legal research for issues facing the District and providing legal assistance for land acquisitions. General Counsel also provides legal advice and services to the Executive Director and Governing Board.

The overall philosophy of the District's General Counsel is to deliver the highest possible level of service in an efficient manner. To achieve this objective, General Counsel manages legal matters, which may include litigation, with Office of Counsel staff and thus, depend less on outside counsel. It is intended to use outside legal firms to supplement in-house attorneys, when needed, unless an unusually large or complex case or workload warrants engaging outside counsel to take on a larger role. When selecting outside counsel to represent the District, General Counsel's philosophy is to hire a particular attorney to work on a matter rather than choose a law firm and leave the selection of an attorney to work on the District's matter with the firm.

In October of 1999, the District's Governing Board appointed a new General Counsel. Over the following three months, General Counsel put together a management team and reorganized Office of Counsel into three practice groups. In the aggregate, staff consists of twenty-two Attorneys, nine Legal Research Assistants, fourteen Administrative Associates and two Operations Analysts. Internal procedures for hiring outside counsel have also been revised.

The chart to the right illustrates the relationship between Office of Counsel salaries and outside legal costs for FY 99 and FY 00 and budgeted amounts for FY 01. Much of the \$740,000 decrease in expenditures from FY 99 to FY 00 can be



attributed to the absence of legal costs related to the Talisman acquisition. Decreases in Everglades legal activities and the winding down of inverse condemnation cases have also contributed to the decrease.

During FY 00, law firms under contract were reduced from thirty-two to thirteen. While some of the attorneys currently engaged may be eligible minorities, they are not certified under the District's M/WBE Contracting rule. Total Office of Counsel certified M/WBE expenditures for FY 00 was \$3,765 for office supplies and other services unrelated to outside counsel contracting. The Office of Counsel has budgeted \$765,000 primarily for anticipated real estate and eminent domain activities in FY 01.

OBJECTIVE, SCOPE AND METHODOLOGY

The objective of the audit was to verify that outside legal representation is being contracted in a fair and equitable manner; is in the best interest of the District and that the appropriate controls are in place to administer outside services being rendered. Audit procedures included the following:

- Review the District's Procurement Policy, Chapter 2.37 Florida Administrative Code; Section 287.059 F.S., and Office of Counsel internal procedures.
- Review of the Request for Information¹ entitled, "Legal Services Vendor List".
- Analysis of the Office of Counsel internal procedures, dated May 24, 2000, to select outside legal service vendors and evaluation of internal controls.
- Review of current outside legal contracts.
- Interviews with General Counsel and other Office of Counsel staff.

Our audit was conducted in accordance with generally accepted government auditing standards.

¹ Request for Information is defined as a written solicitation for general vendor information or credentials which is used to create a list of pre-qualified potential contractors.

FINDINGS AND RECOMMENDATIONS

Summary

The selection of outside counsel to represent the District is at the discretion of General Counsel. Based on our survey of two water management districts and two State agencies, this practice is common. It is also common in corporations with in-house counsel. In our opinion, the authority to hire outside counsel is fundamental to managing the District's Office of Counsel. Therefore, this responsibility appropriately resides with General Counsel. However, the District's Procurement Policy exempts legal services from competitive procurement, bypassing organizational controls. Written internal procedures were revised by General Counsel over the past year and put into place on May 24, 2000. We recommend that these internal procedures be institutionalized and the selection of outside counsel be documented.

The selection process would be strengthened by establishing criteria for determining when it would be appropriate to amend an existing contract, issue a new contract or resolicit from the RFI outside attorney listing. Internal procedures do not address this issue. We also noted that in one outside attorney contract, services were provided approximately four months prior to having a signed contract. We noted two other retroactive contracts were issued. Office of Counsel management has committed to adhering to written internal procedures and initiate competitive selection of outside counsel in these circumstances. We also recommend that Office of Counsel establish criteria for amending or issuing a new contract.

We examined outside counsel contracts for evidence of project manager and contract specialist monitoring. We found that the contract developed by the Office of Counsel plainly communicates expectations and controls expenses. We saw no evidence of multiple staffing at depositions, hearings or meetings. For prolonged representation, hourly rates for attorneys were consistent and there was no unusual acceleration. Our review of the contract and invoiced expenditures revealed that in-house attorneys and contract specialists often disallowed unsupported costs. However, we did find instances where according to the contract, attorney travel time should have been reimbursed at 50% of the hourly rate but was paid at the full hourly rate. We identified \$1,400 in travel overpayments. It appeared that other travel expenses are incurred by outside counsel but the time journals were not sufficiently detailed to determine an amount. We recommend that the District obtain reimbursement or credit for the overpayment. To identify travel time and avoid overpayments in the future,

we recommend an analysis of outside attorney time journals for travel costs.

Document the Selection Process

Contracting with outside counsel is at the discretion of the District's General Counsel. Based on our survey of two water management districts and two State agencies, this practice is common. It is also common in corporations with in-house counsel. In our opinion the authority to hire outside counsel is fundamental to managing the District's Office of Counsel and therefore this responsibility appropriately resides with General Counsel.

There are inherent weaknesses apparent with the procurement of specialized services, which includes outside counsel. Generally, organizational controls established over contracting are bypassed. Individual users select and contract for these services independent of a centralized purchasing department and therefore are not subject to the processes and procedures intended to foster fairness and competition.

The District's Procurement Policy dated 10/15/98, the Florida Administrative Code and State Statutes exempt legal services from the competitive process. Unlike most other District contracting, legal services, including outside counsel, paralegal and expert witness fees, are identified as special procurements in the District's Procurement Policy and as such are exempt from Standards for Competition.

The District is also exempt from full compliance with certain provisions of State Statutes and the Florida Administrative Code (F.A.C.) relative to procuring legal services. Section 287.059 F.S., Procurement of Personal Property and Services, mandates that State agencies obtain the State Attorney General's approval prior to engaging outside counsel. However, the statute exempts the District from obtaining this approval but requires the District head or designee to provide written approval before contracting for private attorney services.

Section 2.37 F.A.C. establishes a standard fee schedule that sets forth the maximum rates for private attorney services, which must be utilized by State agencies. Legal specialization such as copyright, patent, trademark and bond and security law may be billed at a rate of up to \$175 per hour. The maximum rate for all other attorney services is \$125 per hour. In addition, paralegal and other like services are billed at a rate of no more than \$40 per hour. Although the scheduled fees may be exceeded, the agency head must sign a waiver that demonstrates the need to exceed the standard fee schedule.

Written internal procedures have been developed by Office of Counsel to ensure compliance with applicable provisions of the statutes and F.A.C. and establish a process for engaging outside counsel. Office of Counsel attorneys requesting outside legal services are required to prepare written justifications documenting the need for the services and obtain approvals from General Counsel, Deputy General Counsel and the Practice Group Managing Attorney.

To develop a listing of law firms capable of providing legal services when needed, the District's General Counsel issued a RFI for outside attorney services. Seventy-eight law firms responded, some of which have active contracts with the District. A listing of attorneys has been compiled and segregated by type of law practiced to provide General Counsel with a resource when selecting an outside law firm. To date, respondents to the RFI have not been evaluated for qualifications nor is there any intent to evaluate them. Office of Counsel plans to update the RFI every three to five years. In competitive procurements, the Procurement Policy requires a RFI listing to be updated annually.

The Office of Counsel internal procedures includes competitive selection of outside representation. After approving the need for outside counsel, General Counsel selects three law firms from the listing that are qualified to do the work and conducts phone and in-person interviews with the firms before determining the best attorney to represent the District. We reviewed two recently contracted outside attorneys for compliance with these procedures. There was no documented evidence indicating that interviews of the prospective law firms were conducted.

General Counsel is also not limited to selecting outside counsel from the listing and may choose any law firm deemed qualified. According to General Counsel, deviations from the list require written justification, but this has not been written into the internal procedures. In the past, before selecting a firm, an in-house attorney was required to call three outside law firms prior to recommending one to General Counsel. This practice is no longer used.

The Procurement Policy suggests that documentation be prepared for special procurements which do not require competition, explaining why this is the best value to the District. General Counsel is not obligated to prepare this documentation but it would add to the control environment if it were completed when outside counsel is engaged.

Under the present process, General Counsel solely makes the hiring decision. Although the existing procedures do not specifically set forth in-house attorney participation in the hiring process, they do provide a valuable service as fact finders for the selection of outside counsel. This interaction is especially important when outside counsel is engaged as co-counsel.

Results Of Water Management Districts and State Agencies Survey

In order to gain an understanding of the practices used to engage outside counsel by other water management districts and State agencies, we surveyed two water management districts and two State agencies. We also reviewed a report on *The Selection of Outside Counsel by Corporations*². We focused on three elements of the engagement process: justification, selection, and outside counsel evaluation.

Overall, all the surveyed entities follow the State Statutes and F.A.C. and also have minimal written guidance in the form of internal policies and procedures. Similar to the SFWMD, the procurement policies of the two water management districts surveyed exempted them from competitive standards when procuring outside legal services. All use sole source.

There was one water management district that opted to issue a RFP for a law firm to advise the Governing Board and handle real estate transactions. A panel of Board members selected the law firm. Issuing a RFP was a Board decision and they were not obligated to use the RFP process.

Our survey indicated that each of the respective General Counsels is responsible for hiring outside counsel. The Department of Environmental Protection (DEP) uses a combination of in-house attorneys and the State's Attorney General's Office to handle department legal matters. When a legal matter requires outside assistance, DEP is required to refer these matters to the Attorney General's Office for first refusal before hiring outside counsel. If the Attorney General cannot do the work, DEP's selected outside counsel requires the Attorney General's Office approval. A representative from the Attorney General's Office stated that statutes and other guidance are not meant to stifle competition. They prefer a competitive selection process for engaging outside counsel.

² Report, dated July 15, 1997 was prepared by the Greater New York Chapter of the American Corporate Counsel Association.

Based on conversations with General Counsel at the surveyed entities, documentation is ordinarily not prepared for justifying and selecting outside counsel. Nevertheless, they considered the complexity of the engagement, the skill level required and in-house attorney workload before deciding on outside counsel. General Counsel at the surveyed entities acknowledged that they are aware of the capabilities of outside attorneys practicing within their jurisdiction.

Water management districts are not required to refer legal matters to the Attorney General but must obtain a fee waiver to engage legal counsel in excess of rates specified in the F.A.C. A booklet of legal firms used by State agencies and the rates charged, indicates that it is not unusual for law firms to exceed the \$125 hourly threshold. Our analysis revealed that State agencies retained over 50% of the law firms that were under contract in the prior year.

None of the entities surveyed prepared evaluations when the contract was completed. The Office of Counsel routinely prepares an evaluation as part of the contract closing out process.

A report prepared by the New York Chapter of the American Corporate Counsel Association recommended that in-house counsel analyze a case from a cost/benefit standpoint. Counsel should evaluate the magnitude of the matter and the strengths and weaknesses of an entity's position to determine the best outside attorney to hire. Not every matter requires the best legal talent. Our conversations with the District's General Counsel and in-house attorneys indicated that this is done in strategy meetings but not documented. District strategy and analysis is closely guarded, particularly in the inverse condemnation actions where multiple cases that are similar may be pending. It should be noted that government entities in Florida are subject to the provisions of the Sunshine Law while corporations are not.

Recommendations

1. Institutionalize Office of Counsel internal procedures.

Management Response:

Concur. The new Office of Counsel management team already instituted internal procedures earlier in the year. Nonetheless, the Office of Counsel's existing internal procedures for the selection and engagement of outside counsel will be amended based upon the recommendations of this audit and will be adopted by the General Counsel as the official Office of Counsel procedure. All managers and attorneys in the Office of Counsel will receive a complete copy of the revised procedures by transmittal from the General Counsel and will be provided appropriate training.

Responsible Office: Office of Counsel

Estimated Completion Date: February 28, 2001

2. Document interviews of the three law firms that General Counsel considers qualified and list the reasons why the selected attorney is best suited to represent the District. Revise internal procedures to include written justification when an outside attorney not on the RFI list is hired.

Management Response:

Concur. The Office of Counsel has already revised its contract checklist in order to ensure documentation of the above-referenced information. Additionally, the Office of Counsel internal procedures will also be amended to specifically provide for this documentation.

Responsible Office: Office of Counsel

Estimated Completion Date: Checklist completed
Amend internal procedures –
February 28, 2001

3. Determine whether more frequent updates of the RFI for outside attorneys would be beneficial.

Management Response:

Concur. It should also be noted that the Office of Counsel's RFI is not static and continues to be updated on a day-by-day basis. Firms are actively encouraged to continue to submit the necessary information to be included in the Office of Counsel's RFI list in order to maximize participation. However, a careful analysis will be conducted in order to determine the appropriate frequency of a formal, advertised update to the RFI which will balance factors such as advocating the competitive process, the cost and dedication of resources of conducting a RFI update, as well as frequency in which outside counsel will likely be engaged in the future.

Responsible Office: Office of Counsel

Estimated Completion Date: March 31, 2001

Establish Guidelines for Amending Outside Attorney Contracts

General Counsel's commitment to maximize in-house attorney skills and place less reliance on outside counsel is supported by reductions in the number of outside attorneys under contract and total outside legal expenditures.

An analysis of outside legal contract activities revealed that in the Inverse Condemnation, the Everglades related matters and the construction areas of law, Office of Counsel has used three attorneys, exclusively. A review of the resumes of the outside attorneys representing the District in these matters verified that they are very capable and respected in their area of law. The following table illustrates the legal issues for which outside counsel was engaged, the contract origination date and subsequent additions either through amendments or new contracts.

Legal Matter	Outside Counsel Contract Origination Date	Number of Contracts	Number of Amendments	Total Expend.
Inverse Condemnation	July 19, 1996	7	11	\$551,300
Everglades and related issues	July 29, 1991	1	11	\$1,861,000
Construction	September 13, 1993	2	9	\$59,015

According to in-house counsel, amendments to existing contracts or the issuance of new contracts were necessary for representation in new or on-going litigation, or in-house expertise was not available. In addition, only one in-house attorney has the experience to handle inverse condemnation and Everglades cases. An attorney from the State Attorney General's Office is sometimes available to assist in cases related to these areas. However, consistent with General Counsel's plan, the long-term solution is to assign an additional in-house attorney, which General Counsel has done. However, it takes time to bring the in-house attorney up to speed. Until such time, Office of Counsel will have to manage with part-time assistance from the State Attorney General's Office and outside counsel.

Considering the volume of amendments and new contracts issued to three outside attorneys, the Office of Counsel should establish criteria for determining when it is appropriate to amend an existing contract, issue a

new contract or resolicit from the RFI outside attorney listing. Internal procedures do not address this issue.

We also noted that under one outside attorney contract, services were provided at least four months prior to having a signed contract. Two recent outside attorney contracts were also retroactive contracts. On occasion, circumstances dictate that legal actions demand immediate attention requiring Office of Counsel to act quickly. However, this practice bypasses the controls governing the hiring of outside attorneys. After discussion with General Counsel's management team it was agreed that for all outside counsel contracting, the internal procedures will be adhered to in the future. The criteria requiring identification and selection of three outside attorneys and interviews will be followed and a contract will be signed before work begins, albeit in a condensed time frame. This will require the Procurement Department to expedite outside counsel contracting when these circumstances are present.

Recommendations

- 4. Revise and clarify internal procedures to use expedited Procurement Department processes and discontinue retroactive contracting.**

Management Response:

Concur. The Office of Counsel plans to meet with Procurement in order to finalize a streamlined contract form and process which could be used by Office of Counsel management and thus eliminate the need for retroactive contracts. This is particularly important since it is often necessary for the District to respond, as a defendant, to a lawsuit and the associated time frames required by law.

Responsible Office: Office of Counsel

Estimated Completion Date: March 31, 2001

5. Work with the Procurement Department to expedite outside counsel contracts as needed.

Management Response:

Concur. The Office of Counsel plans to meet with Procurement in order to finalize a streamlined contract form and process which could be used by Office of Counsel management in order to more efficiently receive a signed contract by the outside attorney and thus eliminate the need for retroactive contracts. This is particularly important since it is often necessary for the District to respond, as a defendant, to a lawsuit and the associated time frames required by law.

Responsible Office: Office of Counsel and Procurement

Estimated Completion Date: March 31, 2001

6. Establish guidelines for amending or issuing a new contract.

Management Response:

Concur. The Office of Counsel's existing internal procedures will be amended based upon the recommendations of this audit and will include specific and separate guidelines for amending and issuing new contracts.

Responsible Department: Office of Counsel

Estimated Completion Date: February 28, 2001

Improve Compliance with Contract

We reviewed six outside counsel contracts for compliance with the State Statute, F.A.C., and Office of Counsel internal procedures. These contracts represent approximately 73% of the outside legal service expenditures in FY 00. Our review was also aimed at obtaining evidence of project manager and contract specialist monitoring.

Our first focus was on the outside attorney boilerplate legal contract. We found that the contract developed by the Office of Counsel plainly communicates expectations and controls expenses. Contract language stipulates the lowest rate available, attorney staffing, no overtime premium, travel time at 50% of the contracted hourly rate, descriptive time journals and no multiple staffing at meetings, hearings and depositions. The agreement also limited and disallowed certain expenses. Routine expenses such as secretarial time, postage and other overhead costs are included in the outside attorney hourly rate, and therefore will not be separately compensated. Non-routine office overhead requires prior District approval and must be supported.

Our review of the contract file and invoiced expenditures revealed that in-house attorneys and contract specialists performed detailed analysis of the invoices. It was common for the project manager and contract specialist to disallow unsupported costs particularly for the first few invoices. We noted that the outside attorney staffing was limited to those designated in the contract. The description included in the time journals supporting invoiced amounts appeared sufficiently detailed to understand the service rendered. We saw no evidence of multiple staffing at depositions, hearings or meetings. Expenses incurred relating to the case were sometimes disallowed either contractually or due to lack of support documentation. However, we did find instances where, according to the contract, attorney travel time should have been reimbursed at 50% of the hourly rate but was paid at the full hourly rate. One time summary separately identified the hours spent traveling while another included it in the time summary description of services but did not break out the time traveled. We identified \$1,400 in travel overpayments. Based on file documentation, there appeared to be confusion as to invoice review responsibilities between the Office of Counsel and the Procurement Department. The District also made duplicate payments, which resulted in credits being issued by the law firm.

In all contracts reviewed, the outside attorney hourly rates exceeded the \$125 rate, which requires a waiver. The Office of Counsel has complied

with Section 2.37 F.A.C. and obtained the necessary waiver. A State Attorney General publication, in which hourly rates charged by law firms contracting with State agencies are compiled and published, indicated that the hourly rate of \$125 for legal services is often exceeded by other State agencies.

Recommendations

- 7. Define responsibilities between the Procurement Department and Office of Counsel for invoice review to ensure that travel time is paid in accordance with the contract and invoiced costs are not paid twice.**

Management Response:

Concur. Office of Counsel will establish a written protocol with the Procurement Department to ensure that responsibilities of the respective attorney project managers is clearly identified as to task (e.g., is the work authorized, was the work actually conducted, are the charges for the work reasonable) and the Procurement Department's contract administrator (e.g., are the charges and costs consistent with the terms of the contract).

Responsible Office: Office of Counsel and
Procurement

Estimated Completion Date: February 28, 2001

- 8. Request reimbursement or credit for \$1,400 in overpaid travel.**

Management Response:

Concur. Office of Counsel will request the Procurement Department contract administrator to request a \$1,400 credit for the overpaid travel time.

Responsible Office: Office of Counsel

Estimated Completion Date: January 31, 2001