

OUTSOURCING COLLECTIONS CONTRACTS

**What you need to Know**



Presented by  
Glenn O. Lewis  
Municipal Court Judge  
City of Forest Hill

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*Prepared by:*

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*Glenn O. Lewis*

**Background:**

*Licensed by the Supreme Court of Texas since 1984. Holds an A.A. Degree from Tarrant County College, a B.A. Degree from Texas Wesleyan University and a Doctor of Jurisprudence Degree from The University of Texas School of Law. Capital Partner with Linebarger Goggan Blair & Sampson, LLP.*

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**Introduction**

Cities and Counties have attempted in numerous ways to collect delinquent fines and fees.....from.....

- Warrant officers;
- Warrant Round Ups;
- Abstracting Judgments; to
- Outsourcing collections through private companies

Although statistically, in-house collection may be more successful, outsourcing is a viable method.

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**Article 103.0031: Texas Code of Criminal Procedures**

➤ Commissioners Court of a County or the governing body of a municipality may enter into a contract with a private attorney or a public or private vendor for the provision of collection services for one or more of the following:

- Debts and accounts receivable such as unpaid fines, fees, court costs, forfeited bonds, and restitution ordered
- Amounts in cases in which the accused has failed to appear

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**Article 103.0031: Texas Code of Criminal Procedures**

➤ Commissioners Court or governing body of a municipality that enters into a contract with a private attorney or private vendor under this article may authorize the addition of a collection fee

- 30% on each item
- More than 60 days past due
- Referred to the attorney or vendor for collection

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**Article 103.0031: continued**

A county or municipality that enters into a contract may not use the additional 30 percent collection fee for any purpose other than compensating the private attorney or private vendor who earns the fee

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**Article 103.0031: Subsection (a)**

1. Does Article 103.0031 preempt other collection efforts?

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**Article 103.0031: Subsection (b)**

1. Is a city or county required to add a collection fee?
2. If the governing body imposed a collection fee, must it be 30% fee?
3. How may a county or city add this fee?
4. May a governmental body impose this fee on a judgment without judicial consent?
5. Is there a collection fee if the defendant is found not guilty or the case is otherwise dismissed?

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**Article 103.0031: Subsection (e)**

1. What incentive, if any, does the collection contractor have to collect more than the fee?
2. Who can make the determination to collect less than the judgment owed and when is this determination made?

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**Additional Questions**

1. Is competitive bidding required for collection contacts?
2. What is the purpose of the services to be provided and why outsource the collection of delinquent accounts?
3. What is the role of the Judge in contract negotiations?

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**Conclusion**

- Remember you are in the Driver's Seat
- Article 103.0031 must be construed to be consistent with its underlying purpose and the policies it promotes.
- The primary purpose is the collection of delinquent court-ordered judgments.
- An outside contractor may be useful as an additional tracking tool

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# OUTSOURCING COLLECTIONS CONTRACTS: WHAT YOU NEED TO KNOW



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**Government Collectors Association of Texas**

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Cities and counties have attempted in numerous ways to collect upon delinquent fines and judgments, from the use of warrant officers and warrant round ups, to abstracting judgments to outsourcing its collection efforts through private companies. Although, statistically, in-house collection may be more successful, outsourcing is a viable method, especially given this past legislative session and the passage of SB 782, which amended Article 103.0031 of the Texas Code of Criminal Procedures, to apply to municipalities and counties as follows:

**Art. 103.0031. Collection Contracts.<sup>1</sup>**

- (a) The commissioners court of a county or the governing body of a municipality may enter into a contract with a private attorney or a public or private vendor for the provision of collection services for one or more of the following items:
  - (1) debts and accounts receivable such as unpaid fines, fees, court costs, forfeited bonds, and restitution ordered paid by:
    - (A) a court serving the county or a court serving the municipality, as applicable; or
    - (B) a hearing officer serving the municipality under Chapter 682, Transportation Code; and
  - (2) amounts in cases in which the accused has failed to appear:
    - (A) as promised under Subchapter A, Chapter 543, Transportation Code, or other law;
    - (B) in compliance with a lawful written notice to appear issued under Article 14.06(b) or other law;
    - (C) in compliance with a lawful summons issued under Article 15.03(b) or other law;
    - (D) in compliance with a lawful order of a court serving the county or municipality; or
    - (E) as specified in a citation, summons, or other notice authorized by Section 682.002, Transportation Code, that charges the accused with a parking or stopping offense [~~debts and accounts receivable such as fines, fees, restitution, and other debts or costs, other than forfeited bonds, ordered to be paid by a court serving the county or a court serving the municipality, as appropriate~~].
- (b) A commissioners court or governing body of a municipality that enters into a contract with a private attorney or private vendor under this article may authorize the addition of a collection fee [~~fees~~] in the amount of 30 percent on each item

described in Subsection (a) [~~debt or account receivable~~] that is more than 60 days past due and has been referred to the attorney or vendor for collection. The collection fee does not apply to a case that has been dismissed by a court of competent jurisdiction or to any amount that has been satisfied through time-served credit or community service. The collection fee may be applied to any balance remaining after a partial credit for time served or community service if the balance is more than 60 days past due. Unless the contract provides otherwise, the court shall calculate the amount of any collection fee due to the governmental entity or to the private attorney or public or private vendor performing the collection services and shall receive all fees, including the collection fee. With respect to cases described by Subsection (a) (2), the amount to which the 30 percent collection fee applies is:

(1) the amount to be paid that is communicated to the accused as acceptable to the court under its standard policy for resolution of the case, if the accused voluntarily agrees to pay that amount; or

(2) the amount ordered paid by the court after plea or trial.

(c) The governing body of a municipality with a population of more than 1.9 million may authorize the addition of collection fees under Subsection (b) for a collection program performed by employees of the governing body.

(d) A defendant is not liable for the collection fees authorized under Subsection (b) if the court of original jurisdiction has determined the defendant is indigent, or has insufficient resources or income, or is otherwise unable to pay all or part of the underlying fine or costs.

(e) [~~(d)~~] If a county or municipality has entered into a contract under Subsection (a) and [~~private attorney or private vendor collects from~~] a person pays [~~owing costs ordered paid by the court~~] an amount that is less than the aggregate total to be collected under Subsections (a) and (b), the allocation to the comptroller, the county or municipality, and the private attorney or vendor shall be reduced proportionately [~~costs owed by the person, including collection costs permitted under the attorney's or vendor's contract with the commissioners court or governing body, the amount of costs collected otherwise required to be sent to the comptroller and the amount permitted to be retained by the county or municipality are reduced by an equal percentage in order to fully compensate the attorney or vendor, not to exceed the percentage specified as allowable collection costs in the attorney's or vendor's contract with the county or municipality~~].

(f) An item subject to collection services under Subsection (a) and to the additional collection fee authorized by Subsection (b) is considered more than 60 days past due under Subsection (b) if it remains unpaid on the 61st day after the following appropriate date:

(1) with respect to an item described by Subsection (a)(1), the date on which the debt, fine, fee, forfeited bond, or court cost must be paid in full as determined by the court or hearing officer; or

(2) with respect to an item described by Subsection (a)(2), the date by which the accused promised to appear or was notified, summoned, or ordered to appear.

(g) A county or municipality that enters into a contract under Subsection (a) may not use the additional 30 percent collection fee authorized by Subsection (b) for any purpose other than compensating the private attorney or private vendor who earns the fee.

(h) This section does not apply to the collection of commercial bail bonds.

(i) The commissioners court of a county or the governing body of a municipality may enter into a contract as described in this article to collect a debt incurred as a result of the commission of a criminal or civil offense committed before the effective date of this subsection. The collection fee does not apply to a debt collected pursuant to a contract entered into under this subsection.

(j) A communication to the accused person regarding the amount of payment that is acceptable to the court under the court's standard policy for resolution of a case must include a notice of the person's right to enter a plea or go to trial on any offense charged.

Unfortunately, despite the good intentions, this new legislation provides more questions than answers and there is a complete dearth of case law associated with these collection contracts or similar contracts to provide the necessary guidance. I have attempted to address the statute as written, consistent with the Code Construction Act,<sup>2</sup> offer some answers to questions based upon the legislative history and discussions with personnel from the Office of the Comptroller, the Office of the Legislative General Counsel and the Attorney General. We can only hope that some of these questions are addressed in the next legislative session or through an opinion issued by the Attorney General.

## **Subsection (a):**

Subsection (a) provides the authority to enter into, and defines the purpose of, these collection contracts. Specifically, subsection (a) provides for the use of private and public vendors, and attorney vendors, for the collection of court-ordered fines, fees, restitution and other debts or costs. Most significantly, due to the past legislative session, the statute now allows for the collection of forfeited bonds and amounts in cases where the accused has failed to appear.



***Does a city or county have the right to contract outside this article?***

Yes. General law cities have the right to contract with other persons the same as individuals.<sup>3</sup> Home rule cities have the full power of local self-government,<sup>4</sup> which includes the right to contract.

County business is conducted by and through the Commissioners Court which can “exercise such powers and jurisdiction over all county business” as presented by Texas Constitution and statute.<sup>5</sup> In other words, a county’s authority to enter into a contract is limited to the authority conferred upon it by the Constitution or state statute.<sup>6</sup> However, a county may contract for services it may perform itself.<sup>7</sup> Further, a county Commissioners Court may appoint an agent to make a contract for any purpose authorized by law.<sup>8</sup> This general right to contract may be circumscribed or limited by the Texas Constitution, a charter provision or other statute, such as the one at issue.

***Does Art. 103.0031 preempt other collection efforts?***

A qualified no. A county or municipality may only enact an ordinance that is consistent, and does not conflict, with federal and state law. Essentially, counties and municipalities are prohibited from enacting orders or adopting ordinances that are covered by a federal or state statute, or where the legislature intended state law to exclusively occupy the field. However, the mere fact that the legislature has passed a law on a particular subject matter does not mean the subject matter is completely preempted. If any reasonable construction can leave intact both a state statute and local order or ordinance, pre-emption does not occur.<sup>9</sup>

However, what constitutes an absolute preemption versus a case of conflict without preemption is generally left to the courts. As a general rule of thumb, if a state statute or federal regulation sets forth specific rules, procedures or penalties, the governing body, if it enacts an order or adopts an ordinance, should mirror that rule or procedure or penalty. If the statute does not completely address all issues, the doctrine of preemption will likely allow non-conflicting provisions that may have some overlap.

Prior to this enactment of this statute, collection contracts were based upon the percentage collected, and related to more than delinquent judgments. Counties and cities have utilized private contractors for the collection of delinquent utility debts and EMS billing accounts as well. These collection contracts generally meant that the governmental entity received less of the funds collected because part of its allocation of the monies collected went to pay the collection agency.

It is arguable that a collection contract for a judgment debt that does not contain the additional collection fee authorized by the statute is not pre-empted and need not follow the restrictions set forth therein. Further, collection contracts involving delinquent debts other than delinquent judgments are also not included within the scope of the statute by its stated terms and by omission. Therefore, as a practical matter, there is no reason why a governmental entity could not continue with this type of collection effort given the stated considerations.

***May this fee be added to all collection efforts, or only capias warrants?***

Prior to this last legislative session, Subsection (a) referred to the collection of “debts and accounts receivable such as fines, fees, restitution and other debts or costs, other than forfeited bonds, ordered to be paid by a court.” The amendments to the statute clearly allow for the assessment of the collection fee on forfeited bonds and to amounts in cases where the accused has failed to appear. However, the conundrum still remains: If a defendant has not appeared, and not entered a plea, is it an account receivable? The judgment cannot be imposed, or fines ordered to be paid, until a plea is entered – there is no default judgment in criminal proceedings. Although some courts may view warrants issued on a failure to appear as an account receivable for the underlying fine and fees, the court and governing body must address the logistics involved with having the defendant enter a plea prior to the collection of any judgment, cost or fee. Moreover, given the location of the legislation in the Texas Code of Criminal Procedure, the application of the collection fee would be solely on criminal judgments, and not to other administrative or civil collection efforts.

**Subsection (b):**

Subsection (b) authorizes “the addition of a collection fees in the amount of 30 percent on each item described in Subsection (a) that is more than 60 days past due and has been referred to the attorney or vendor for collection.” In other words, if an account is 60 days delinquent, collection fees in the amount of 30% may be added to the account, similar to a time payment fee.

This subsection raises numerous questions and provides very little in the way of answers.

***Is a city or county required to add a collection fee?***

No. It is purely discretionary as to whether the governing body imposes or collects the additional fee. The statutory language does not mandate a collection fee; rather, it is offered as an offset to collection costs when utilizing outside vendors to collect delinquent judgments.

***If the governing body imposes a collection fee, must it be a 30% fee?***

As a threshold matter, the expression of an absolute percentage is not common in legislative enactments.<sup>10</sup> Based upon public policy rationale, it is doubtful that the legislature intended to make this an all or nothing provision; rather, it is more likely that the 30% fee is intended to be a cap and not an absolute required percentage. In other words, it would be against public policy to require a municipality or county to add 30% or not allow an additional percentage at all. Notwithstanding the public policy rationale, the legislature may be trying to avoid a constitutional challenge relative to a violation of equal protection or due process rights as discussed in greater detail below.

The legislature, in SB 782, deleted the provisions in former Subsection (d), now Subsection (e), relative to the language that allowed a vendor to recover an amount “not to exceed the

percentage specified as allowable collection costs.” It is more arguable at this juncture that the collection fee must be in the amount of 30%.

***Is there a potential for a constitutional challenge if some governmental bodies impose the statutory percentages and others do not?***

Yes. The statute does not ensure consistency in costs. Due to the discretionary nature of the statute, there is likelihood that some governing bodies will add a 30% fee and others may opt not to impose a collection fee at all. Texas courts and the Attorney General have held or opined that non-uniform penalty provisions are unconstitutional both on due process and equal protection grounds.<sup>11</sup> Therefore the non-uniform imposition of this collection fee upon defendants presents a very real possibility of a similar constitutional challenge based upon equal protection and due process concerns.

***How may a county or city add this fee?***

The statute does not address the imposition of the fee; it merely authorizes the addition of a collection fee. However, in order for a county or municipality to impose the fee, it will have to take the appropriate action, such as an order or ordinance, to establish the additional fee.

***May a governmental body impose this fee on a judgment without judicial consent?***

No. Given that the amount due and owing is on a court-ordered judgment, it is likely to require a standing order that permits the additional collection fee to be added after 60 days. To allow otherwise potentially violates the separation of powers doctrine.<sup>12</sup> The logistical difficulty concerns the point at which the judge become involved in the process. As a practical matter, the judge is not involved in the contractual negotiations or the legislative determination that the fee should be imposed. However, if the Commissioners Court or City Council imposes the collection fee, and the contract specifies the collection fee as ordained, is the judge then required to impose that fee? Due to the separation of powers, the judge has the discretion whether to impose the ordained fee on delinquent judgments, which may create a political nightmare for all concerned. Consulting with the judge prior to initiating the process is recommended to avoid unnecessary difficulties between the legislative and judiciary branch of your local government.

***Is there a collection fee if the defendant is found not guilty or the case is otherwise dismissed?***

No. SB 782 clarified a problem that existed under the former provisions. SB 782 specifically provides that the fee may not be applied to a dismissed case or to any amount satisfied through time-served credit or community service. The fee, however, may be applied to any remaining balance after partial credit for time served or community service if that balance is more than 60 days past due.

*How is the fee calculated when partial credit is given?*

Unless provided by the contract, the court must calculate the amount of any collection fee due the governmental entity and the vendor (whether private attorney or public or private vendor). Interestingly, the calculation to be made by the court does not include monies to go to the state and includes a calculation for a public vendor, specifically prohibited from receiving the fee.

*How is the fee calculated on a failure to appear?*

The 30% collection fee applies to the amount communicated to the accused as acceptable to the court under its standard policy for resolution of the case and the accused voluntarily agrees to pay that fee. It may also be that amount ordered by the court to be paid after plea or trial. Again, the notice required under Subsection (j) is critical for this determination and assessment.

**Subsection (c):**

SB 782, created a new Subsection (c) which allows for “the governing body of a municipality with a population of more than 1.9 million to authorize the addition of collection fees under Subsection (b) for a collection program performed by employees of the governing body.”

*May a public vendor receive the additional collection fee?*

As a general matter Subsection (a) allows for contracts to be entered into with public vendors; however, subsection (b), by omission, precludes the assessment of the fee on collection contracts with public vendors. To further bolster this view, a new Subsection (g) was added that provides that “[a] county or municipality that enters into a contract under Subsection (a) may not use the additional 30 percent collection fee authorized by Subsection (b) for any purpose that compensating the private attorney or private vendor who earns the fee.” By the addition of this new Subsection (g) a conflict was created with the new Subsection (c). Arguably, Houston, the only city currently with a population over 1.9 million, will be unable to use the 30 percent collection fee to fund its in house program since the monies would go to fund a program other than that of a private attorney or vendor. Notwithstanding the foregoing, a fair reading, to give effect to the new Subsection (c), would remove the authorization for the collection fee for Houston under the purview of Subsection (a) and keep it solely within the parameters of Subsection (c).

**Subsection (d):**

Subsection (d) provides that a defendant is not required to pay, or otherwise liable for, the additional 30% fee, if the defendant has been declared indigent or been found to have insufficient income or an inability to pay.

*When does this declaration or determination occur?*

Generally, a defendant who has been declared indigent or without resources to pay, does not have an outstanding judgment. Therefore, this subsection would apply to the situation wherein a defendant has pled guilty or no contest, been put on a payment plan and defaulted or otherwise advises the collection agent of the inability to pay after the imposition of the judgment. Generally, a court would require a show cause hearing to determine whether there is good cause for the default, or an indigency hearing to determine whether the defendant has an ability to pay. In order to make this determination, the defendant must appear in court. The problem arises in that there is no authority for the collection agent to bring the defendant to court, or set a court date. The collection agent can merely refer the judgment debtor or defendant to the court for ultimate disposition of the file. The collection contract should address the referral of defendants to the court, and the collection contractor's authority and responsibility in detail to avoid any difficulties with the disposition of the cases or potential usurping of judicial authority.

### **Subsection (e):**

Subsection (e) provides for the situation where less than the court-ordered amount is collected, including the collection fees. SB 782 addressed the issue of risk sharing, making the burden of collecting less than the aggregate total due, by reducing the ultimate allocation proportionally between the vendor, the Comptroller and the city or county.

*What incentive, if any, does the collection contractor have to collect more than the fee?*

SB 782 corrected the problem that existed under the prior legislation which allowed for the collection vendor to recoup all fees if less than the total judgment, including fees, was recovered, thus providing no incentive for the vendor to collect more than the allowable collection costs outlined in the contract, other than the potential termination of the contract. The proportionate reduction of the ultimate allocation now provides the requisite incentive to collect the aggregate total of the delinquent debt.

*Who can make the determination to collect less than the judgment owed and when is this determination made?*

A collection vendor has no authority to reduce the judgment or collect less than the amount owed. The fee may only be assessed on delinquent court-ordered judgments that can only be modified by court order. The vendor would be required to communicate to the court, or refer the judgment debtor to the court, for ultimate disposition of the judgment and potential reduction of the debt owed.

### **Subsection (f):**

This new subsection more clearly defines when an item is considered more than 60 days past due. More specifically, if the item remains unpaid on the 61<sup>st</sup> day after either the date on which the debt, fine, fee, forfeited bond or court cost must be paid in full as determined by the court or

the date by which the accused promised to appear or was notified, summoned or ordered to appear.

*If an individual is placed on a payment plan, when is the debt due for purposes of assessment of the collection fee?*

The subsection defines a past due debt as being on the date that the debt, fine, fee, forfeited bond or court cost ***must be paid in full***. On a payment plan, the date on which the amount must be paid in full would be the date of the last anticipated payment. Therefore, arguably, until that date passes, although a warrant could be issued, the debt could not be referred to a collection vendor. An option to correct this problem would be an acceleration notice in the payment plan or judgment that failure to make the payments as ordered would accelerate the due date so that the full amount would be due on a date certain, such as the date of non-payment.

### **Subsection (g):**

This new subsection prohibits the use of the 30% collection fee for any purpose other than compensating the private attorney or private vendor who earns the fee. Again, this poses a potential conflict with the provisions in subsection (c) that allows a city with a population of over 1.9 million to authorize the imposition of the collection fee for a in-house collection program.

### **Subsection (h):**

This prohibits the application of the collection fee to the collection of commercial bail bonds. Therefore, the forfeited bonds which would constitute a delinquent debt would be a cash bond, attorney bond, among others.

### **Subsection (i):**

This subsection outlines the effective date for the application of the collection fee; however, a conflict exists between Subsection (i) and Section 4 of SB 782.

*May the collection fee be applied to delinquent debts that occurred prior to September 1, 2003.*

Subsection (i) allows for a county or municipality to enter into a contract to collect a debt incurred as a result of the commission of a civil or criminal offense committed before the effective date of this subsection, or September 1, 2003. However, the Subsection specifically provides that the collection fee could not be applied to such a debt.

The legislature, under Section 4 of the SB 782, made the changes to the law applicable to a debt, account receivable, or an amount incurred as a result of a criminal or civil offense committed before, on or after the effective date of the Act, except that the collection fee does not apply to an

amount incurred under Subsection (a)(2), the FTA provisions, if the civil or criminal offense was committed before September 1, 2003.

Several interpretations arise:

1. The law allows a city or county to contract for the collection of a debt that occurred before the effective date of the Act, but no statutory collection fee may be added. *Subsection (i)*. This would not prevent the city or county from contracting for a fee outside of Art. 103.0031 for debts that arose prior to September 1, 2003.
2. The law allows a city or county to contract for the collection of a debt that occurred before the effective date of the Act, but no collection fee may be added to a debt under the FTA provisions. *Section 4(a)*. The language of the Section leaves open the possibility that a collection fee may be added for a debt that occurred before the effective date of the Act, under Subsection (a)(1).
3. A collection fee may be added to debts that occurred on or after the effective date of the Act. *Section 4(a)*.

### **Subsection (j):**

Subsection (j) provides for the requisite notice to the accused regarding the amount of payment that is acceptable to the court under the court's standard policy for resolution of the case. The communication must provide notice of the person's right to enter a plea or go to trial on any offense.

*What are the ramifications, if any, for failure to provide such notice?*

The statute itself does not provide a penalty for lack of notice; however, under normal due process considerations, the argument would be that the collection fee could not be collected if the requisite notice is not provided. In addition, although the Act does not require a written communication, it would appear prudent to do so for evidence of compliance with this mandatory notice provision.

### **Additional Questions and Practical Considerations**

*Is competitive bidding required for collection contracts?*

The mandate for competitive bidding requires, as a threshold matter, the expenditure of public funds, in excess of the statutory amount, as of this past legislative session, \$25,000.00. Although not specifically listed as an exemption, it stands to reason, that without the expenditure of public funds, competitive bidding is not required. Since the collection of these fees is not necessarily an expenditure of public funds as budgeted by the governing body, or reasonably anticipated to be

received by the political subdivision as revenue, there is a defensible posture negating the legal requirement for competitive bidding. Home rule cities, though, should review the charter to determine whether by local law, competitive bidding is required.

There is a school of thought that public funds are being expended due to the genesis of the collection fee and therefore the services should be solicited through a competitive process consistent with the solicitation for professional services. This form of competition is in keeping with the general understanding that attorney services are professional services excepted under the professional services exception to competitive bidding procedures, although a distinction may be made between general collection services and general legal services. *See generally* Texas Local Government Code, §252.022(a)(4).<sup>13</sup> Moreover, it would be illogical to require statutory competitive bidding for private vendors but not for attorney vendors performing the same function.

Notwithstanding the above, solicitation of collection services is recommended to avoid the appearance of impropriety and to safeguard the public trust. Moreover, competitive solicitation of these services provides the opportunity to compare private vendors and attorney vendors, review their respective track record, determine demonstrated competence and qualifications and negotiate for the services most advantageous to the County or City.

As additional food for thought, I leave you with this question: If a 30% collection fee is statutorily required, what would the purpose be of a competitive bidding requirement?

***What is the purpose of the services to be provided and why outsource the collection of delinquent accounts?***

Each governing body must determine the ultimate goal of outsourcing the collection of delinquent accounts. Is it a tracking tool to locate a defendant, rather than utilizing court staff and governmental funds, the collection of a debt or both? The outsourcing contract should reflect the purpose and provide a procedure for attaining the stated goal.

As to why a governing body should outsource, that is a good question. Despite the defraying of the cost of the outsourced contract to a private vendor through the authorization of a collection fee, outsourcing presents several legal and logistical difficulties as previously outlined in this paper; specifically, attorney vendors and private vendors cannot:

- pull warrants;
- require a defendant to appear in court;
- set a court date;
- discount or reduce judgments;
- institute a payment plan; or
- authorize an alternate disposition of a case

Given these deficiencies or hurdles, the court must still retain control and monitor the file, expend administrative energy tracking the progress and the collections, maintain accurate and



detailed records and periodically audit the contractor to ensure compliance with contractual obligations and adherence to applicable policies and procedures. Essentially, unless the defendant agrees to pay in full, the contractor may only track down the defendant and establish the initial contact – all transactions thereafter would necessitate court intervention to dispose of the judgment. Some courts prefer to hire an additional marshal and not deal with the practical difficulties associated with outsourcing.

The supporters of the legislation contend that governmental agencies would not lose revenue with the ability to impose additional collection costs. Currently, supporters contend, most collection contracts provide for collection costs of 5 to 30% of the amount of delinquent fines collected.<sup>14</sup> Governmental bodies lose revenue if they collect less than the monies due and owing, thus effectively requiring taxpayers to subsidize collection efforts or due to the cost of collection, forego collection efforts.<sup>15</sup>

The opponents of the legislation believe that the legislation will ultimately result in less revenue for state and local governments by allowing a contractor to collect the full fee prior to the governmental entity, and not affording the same benefit to public vendors.<sup>16</sup> According to their statistics, in-house government collection agencies successfully collect 75 to 94 percent of the assigned collections whereas private, third party contractors have only a 5 to 30% success rate.<sup>17</sup> Inasmuch as the legislation excludes public vendors from benefiting from the additional collection fee, opponents feel they should be included to level the playing field and enhance the likelihood of recovery.

#### ***What is the role of the judge in contract negotiations?***

The judge does not have a role in the contract negotiations but should be consulted with regard to the proposed contract and the ultimate disposition of the judgments. The judge will need to sign a standing order allowing the collection fee to be imposed on a delinquent judgment consistent with the authorized collection fee. Without the judge's participation or execution of a standing order, there may arise a separation of powers issue by the legislature (City Council or Commissioners Court) performing a judicial function in the imposition of an additional fee on a court-ordered judgment.<sup>18</sup>

Further, there can be no collection of less than the debt, or a reduction in the amount owed, without the judge's approval because the collection effort is based upon a court-ordered judgment. Only the judge can modify his or her judgment or determine a defendant's ability to pay.

#### ***Is the Contractor subject to the Texas Public Information Act?***

Yes. Section 552.002(a) of the Texas Government Code provides that “public information” means information that is collected assembled, or maintained ... in connection with the transaction of official business... for a governmental body and the governmental body owns the information or has a right of access to it.” Therefore, even though the information may not be in the physical custody of the governmental body, it is in the constructive custody of the

governmental entity, and therefore subject to the Public Information Act.<sup>19</sup> The contract should provide for the ownership, retention and release of public records.

***Is the Federal Fair Debt Collection Act or the Texas Debt Collection Practices Act applicable to court collections?***

The statute outlining the court collections falls outside the purview of the federal and state debt collection acts because criminal court judgments do not fall within the definition of consumer transaction. More specifically, the Fair Debt Collection Practices Act prohibits a debt collector from using abusive, deceptive, or unfair practices for the purpose of collecting a debt from a consumer.<sup>20</sup> A "debt" under the federal act is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."<sup>21</sup>

The Texas Debt Collection Practices Act, like the federal law prohibits debt collectors from using coercive, threatening, abusive, and other repugnant practices for the purpose of collecting a consumer debt. A "consumer debt" is defined as "an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction."<sup>22</sup> Again, the critical, and missing, element is the consumer aspect of the debt to be collected.

The Attorney General has enumerated specific points for consumers to remember:

It is illegal for a debt collector to:

- threaten violence;
- use profane or obscene language;
- falsely accuse you of fraud or other crimes;
- threaten the consumer with arrest;
- repossess or seize property without appropriate court proceedings;
- harass debtors by calling anonymously or making repeated or continuous calls; or
- make collect calls without disclosing the name of the caller before the charges are accepted.

Debt collection agencies may not:

- use a false name for identification;
- misrepresent the amount of the debt;
- send documents that appear to be from a court;
- fail to identify the person or company that holds the debt; or
- misrepresent the nature of the services rendered by the collection agency or the collector.<sup>23</sup>

Although legally outside the parameters of the state and federal acts, governmental agencies may want to require that the contractor adhere to the guidelines for the purpose of maintaining the

good will of its citizenry and avoid the negative consequences of unfair or harassing debt collection practices.

***Contract Terms and Negotiations: Remember You are in the Driver's Seat***

I have attached a Model Contractor Collection Services Agreement for your consideration. Each entity should carefully review the contract proposed, especially if it is in a form provided by the contractor, with its legal counsel to ensure that the proposed services and terms are in the best interest of the political subdivision. There are numerous contractors vying for your business, as well as viable in-house options, which place a governing body in the driver's seat relative to negotiations. For purposes of discussion, I have outlined a few critical provisions for your consideration.

**1. Contingency Clauses:**

- The actions qualifying the contractor for payment of the collection fee should be specified in detail, preferably only upon final disposition of the judgment.
- The governing body may want to consider a risk-sharing clause versus utilizing the subsection (d) provision. The issue will arise with regard to the allocation of the funds if less than 30 % is utilized as the collection fee. Further, if less than the 30% amount is ordained and collected, the allocation may be by typical distribution, to state and local fees and costs, to the fine and then to the contractor.

**2. Quality Control-Performance Measures**

- How do you ensure that the political subdivision is paying for a service already provided – by providing specific reporting, tracking and auditing provisions. A procedure should be instituted whereby the case is referred, with the collection fee calculated, and the Contractor is required to report institution of collection efforts and provide regular progress reports. A provision should be included wherein uncollected files are returned to the governmental body, without fee, after a specified period of time.
- The contract should provide a method to refer the file to the contractor and which files to refer. It should be a non-exclusive contract, allowing the governmental body to retain files it determines best to collect in-house and/or provide for the retention of active warrants. Cases referred must be at least 60 days delinquent in order to qualify for the additional collection fee.

**3. Customer Friendly Services**

A political subdivision can generally ensure customer service through the monitoring of its employees, policies and procedures and general complaint process. This control is lessened in the case of independent contractors. However, governing bodies can

include provisions requiring that the contractor be readily accessible to defendants by providing a 1-800 number or a help desk. Further, contracts should contain provisions which allow for the substitution of contractor employees to which the political subdivision has reasonable objection.

## CONCLUSION

Article 103.0031 must be construed to be consistent with its underlying purpose and the policies it promotes. The primary purpose is the collection of delinquent court-ordered judgments. The outstanding evil sought to be addressed by this legislation is the expenditure of government funds and manpower to collect delinquent accounts. Unfortunately the legislation does not give a political subdivision any substantial assistance due to the parameters of the authority granted. A political subdivision, other than a municipality exceeding 1.9 million in population, may not utilize the fees to offset its in-house collection costs, even those required in monitoring and administering the collection contract. It does, however, offer an opportunity to allow someone, other than a full time employee, to beat the path to find deadbeat defendants, and potentially clear the books, using other than public funds.

Notwithstanding the above, given the practical difficulties outlined herein, it would appear more prudent for a political subdivision and court to look towards adding a marshal or warrant officer to handle the cases to effectuate a greater recovery rate. The expeditious recovery of debts may offset the additional staff costs associated with the collection efforts. Cases may only receive the additional collection fee after 60 days from the date of delinquency – the longer the period of time for referral the colder the trail. An outside contractor may be useful as an additional tracking tool, but unfortunately not much more than that given the need for court intervention and monitoring. Contracts, orders and ordinances must address the issues outlined above. As a closing note, municipalities and counties would benefit greatly if some of these issues were submitted to the Attorney General for clarification, or the legislature resolved the matter through less ambiguous legislation in its next session. Until then, we are left to our own devices and rights to contract under terms most favorable to the political subdivision.

**MODEL  
CONTRACTOR COLLECTION SERVICES AGREEMENT**

This agreement (“Agreement”) is made by the Political Subdivision, a \_\_\_\_\_ corporation (“Political Subdivision”) and \_\_\_\_\_ (“Contractor”). Under this Agreement, Contractor shall provide professional services relative to the collection of delinquent fines, fees, restitution and other court-ordered debts or costs (“Services”). The Political Subdivision and Contractor agree:

1. **EMPLOYMENT OF CONTRACTOR.** The Political Subdivision agrees to retain Contractor, and Contractor agrees to perform professional services in connection with the Services as set forth herein.
2. **LIASION WITH COURT.** Contractor shall communicate with the Political Subdivision by and through the Court, through the individual designated in writing. The Court shall be responsible for the forwarding of delinquent accounts, with all necessary and appropriate documentation, for purposes of the Services to be provided herein. The Court shall be solely responsible for the disposition of all cases, including reduction of judgments, pulling of warrants, setting of court dates, and the final disposition of a case.
3. **SCOPE OF SERVICES.** Deviations from the scope of work may be authorized from time to time by the Political Subdivision in writing.
  - a. The scope of work shall include all activities and functions generally required of contractors collecting delinquent fines, fees, restitution and other court-ordered debts and costs for a political subdivision from a judgment debtor.
  - b. Contractor agrees to mail notices, telephone or otherwise contact the judgment debtor with accounts due the Political Subdivision in order to notify the judgment debtor of the outstanding obligation and collect those debts owed by the judgment debtor. The purpose of this contact is to offer the judgment debtor an opportunity to dispose of the obligation voluntarily before the Political Subdivision takes other appropriate legal action. The Political Subdivision will provide, in addition to the names and last known addresses of the judgment debtor, all information regarding the date(s) of the alleged debt(s), the amount of such debt(s) and the date judgment was entered or the citation issued. Contractor will make all reasonable efforts to locate a judgment debtor whose last known address is incorrect and provide all additional corrective information to the Political Subdivision in the monthly progress reports.
  - c. Although telephone contact is permissible, the Contractor shall provide written notification to the judgment debtor advising that resolution of the matter includes the person’s right to enter a plea or go to trial on any offense charged.

- d. Contractor shall have no liability for any amounts uncollected and in no event shall be required to bring suit for the collection of any such uncollected amount. Contractor shall receive no fee for amounts uncollected.
- e. Contractor shall be required to submit monthly progress reports no later than the last day of the month relative to the status of delinquent accounts on a form satisfactory to the Political Subdivision. Contractor shall be required to maintain complete, detailed and accurate records of its collection efforts, and submit monthly invoices for reconciliation. These reports may include but are not limited to the following:
  - (1) “aged accounts receivable”
  - (2) “monthly transaction summary report”
  - (3) “monthly transaction detail report”
- f. Contractor shall refer all judgment debtors who do not submit immediate payment for the full amount of the debt, including collection fees, to the Court for disposition. The Contractor may accept payments in full of all costs and fees, as determined by the Political Subdivision, by money order or cashier’s check, made payable to the for the Political Subdivision, and the same shall be submitted to the Political Subdivision within 5 business days of receipt of said payment. In cases where Contractor has received full payment, Contractor agrees to notify the Political Subdivision on a daily basis of any monies received from a judgment debtor toward the payment of the debt so that the Political Subdivision may pull any warrants associated with that debt or take other appropriate action.
 

Any other form of payment must be made to the Court in person unless alternative arrangements are made by the defendant/judgment debtor with the Court.
- g. Contractor acknowledges and understands that the Political Subdivision issues warrants upon delinquent debts within five (5) days of the delinquency. Contractor further acknowledges and understands that such warrants shall remain active notwithstanding the referral to the Contractor of the delinquent file after sixty (60) days. Contractor acknowledges and agrees that the Allowable Collection Fees stated herein shall not be assessed on judgment debts collected due to the execution of a warrant, notwithstanding the Contractor’s collection efforts on that file.

4. **ADDITIONAL DUTIES.** In addition to the duties provided in this Contract, the parties shall abide by the following terms and conditions:

- a. **Remittance of Monies.** Contractor shall cause to have payments made directly to the Political Subdivision with instructions for payment of fees indicating that payments be made to:
  - Political Subdivision
  - [address]

attn: \_\_\_\_\_

Contractor shall take all reasonable precautions to ensure that proper documentation is generated for proper identification of accounts due and owing. Political Subdivision shall not be responsible for timely remittance of payments received in a manner or location other than as indicated above. For all accounts referred by the Political Subdivision to Contractor for collection for which the Political Subdivision is paid (in whole or in part), regardless of whether payment is accepted directly by the Political Subdivision or by Contractor on the Political Subdivision's behalf, the Political Subdivision will pay Contractor the Allowable Collection Fee described in Section 6. Political Subdivision will immediately notify Contractor of accounts referred to Contractor for collection that have been paid by the judgment debtor directly to the Political Subdivision, executed by warrant or otherwise modified by the Court, whenever said collection-altering event occurs. By the fifteenth (15th) of each month, the Political Subdivision will provide detailed reporting to the Contractor to identify all accounts known to be collected during the prior month, reconciled with the Contractor's monthly progress report and remit the Allowable Collection Fee due and owing Contractor no later than 30 days from date of Contractor's monthly report and invoice for service.

- b. **Telephone Service.** Contractor agrees to have in operation within five (5) days after the execution of this Contract a toll free telephone number, which shall be without cost or expense to the caller, which will be staffed during regular business hours by an employee of Contractor who will answer any questions regarding the judgment debt or other services provided by Contractor under this Contract. The phone number shall be published on all statements sent by Contractor in its collection efforts under this Contract. Contractor shall make all reasonable efforts to ensure that calls received after regular business hours be returned the next business day.

5. **SCHEDULE OF WORK.** Contractor agrees to begin work upon receipt of a delinquent file, to proceed diligently in all collection efforts, and to report progress to the Political Subdivision on a monthly basis, in conjunction with the submission of its invoice for services. Delinquent accounts not referred to the Court for disposition within ninety (90) days of the referral, shall be returned to the Political Subdivision as uncollected accounts for which no Allowable Collection Fees will be paid, unless the Political Subdivision has granted the Contractor, in writing, an additional period of time to conclude its collection efforts, not to exceed ninety (90) days. Upon return of the file, Contractor shall cease contacting the judgment debtor.

6. **COMPENSATION AND PROCEDURES.**

- a. Contractor's compensation shall be \_\_\_\_% of the net collections per month for each processed and paid judgment debt, as stated in Ordinance [Order] No. \_\_\_\_, and Standing Order executed by the Judge of the Court on \_\_\_\_\_, 200\_\_

("Allowable Collection Fee"). Net collections are defined as the total monies received on judgment debts referred to collection and received by the Political Subdivision, including the collection fee, less monies due to the state for costs in accordance with law and Comptroller auditing requirements. Contractor shall receive no additional funds or compensation for Service-related expenses, such as reproduction costs, mileage, delivery service, long distance telephone calls, etc. Contractor shall receive the Allowable Collection Fee based upon the amount collected upon final disposition of the judgment and, upon submission of an itemized statement reflecting the amounts collected, which shall be reconciled with the court's records.

*alternate language under subsection (d)*

- a. Contractor's compensation shall be 30% of the judgment debt ("Allowable Collection Fee"), which amount shall be added to the original judgment debt consistent with Ordinance [Order] No. \_\_\_\_\_ and Standing Order No. \_\_\_\_\_. For all cases referred by Political Subdivision to Contractor, for which the Political Subdivision is paid, Contractor shall receive the Allowable Collection Fee in proportion to the amount recovered, consistent with Article 103.0031(e) of the Texas Code of Criminal Procedure.
  - b. Contractor agrees to use due diligence and its best efforts to collect the maximum amounts due the Political Subdivision. Political Subdivision will endeavor to refer delinquent judgments to Contractor upon the expiration of sixty (60) days; however, Political Subdivision reserves the right to retain delinquent accounts for internal collection efforts at its discretion.
7. **INFORMATION PROVIDED BY THE POLITICAL SUBDIVISION.** The Political Subdivision agrees to furnish or make available to Contractor the information necessary to perform the Services set forth herein. Although every effort has been or will be made to furnish accurate information, the Political Subdivision does not guarantee the accuracy of the documents or information it furnishes to Contractor. Contractor shall update the Political Subdivision's records to the extent it determines the information is incorrect.
8. **INSURANCE.** Contractor shall maintain throughout the period of this Agreement and for a period of three years thereafter, a standard form of errors and omissions insurance with an insurance company satisfactory to the Political Subdivision. Contractor shall also maintain insurance coverage for commercial general liability, automobile liability, and workers' compensation in forms and amounts satisfactory to the Political Subdivision. Contractor shall submit to Political Subdivision proof of such insurance in amounts satisfactory to the Political Subdivision. The maintenance in full current force and effect of such form and amount of insurance, in such amount as Political Subdivision shall have accepted, shall be a condition precedent to the Contractor's exercise or enforcement of any rights under this Agreement. Insurance policies required for Contractor shall include a provision requiring written notice to the Political Subdivision at least thirty days prior to any cancellation, non-renewal or material modification of the policies. The Political



Subdivision shall be named as a named insured on all insurance policies, except workers' compensation and professional liability, required herein.

9. **INDEMNIFICATION.** CONTRACTOR SHALL INDEMNIFY, HOLD HARMLESS, PROTECT, AND DEFEND THE POLITICAL SUBDIVISION, ITS OFFICERS, EMPLOYEES, AGENTS, AND REPRESENTATIVES AGAINST ANY AND ALL CLAIMS, LOSSES, LIABILITIES, DAMAGES, COSTS, AND EXPENSES, INCLUDING REASONABLE ATTORNEY'S FEES AND EXPENSES, THAT OCCUR OR ARE ALLEGED TO HAVE OCCURRED IN WHOLE OR IN PART AS A RESULT OF ALL ACTIONS PERFORMED BY CONTRACTOR OR ITS AGENTS, EMPLOYEES OR REPRESENTATIVES ON ITS BEHALF IN CONNECTION WITH THIS AGREEMENT, WHETHER SUCH CLAIMS, LOSSES, LIABILITIES, DAMAGES, COSTS, AND EXPENSES ARE CAUSED IN PART BY AN INDIVIDUAL OR ENTITY INDEMNIFIED UNDER THIS AGREEMENT. CONTRACTOR'S INDEMNIFICATION OBLIGATION SHALL NOT INCLUDE INDEMNIFICATION FOR AN INDEMNITEE'S OWN NEGLIGENCE NOR SHALL IT INCLUDE THE DUTY TO DEFEND FOR CONCURRENT NEGLIGENCE CLAIMS AGAINST BOTH CONTRACTOR AND THE POLITICAL SUBDIVISION.
  
10. **AUDITS AND RECORDS.** At any time during normal business hours and as often as the Political Subdivision may deem necessary, the Contractor shall make available to the Political Subdivision for examination, all of its records, whether written or electronically generated and stored, which include but is not limited to all collections, accounts, activity, disposition, etc., with respect to all matters covered by the Contract and will permit the Political Subdivision to audit, examine and make copies, excerpts, or transcripts from such records. The Political Subdivision may also audit all contracts, invoices, payrolls records of personnel, conditions of employment and other data relating to the Contract. These records shall be available for inspection upon request by Political Subdivision from the inception of the Contract and for two years following termination or expiration of the Contract. The Contract, and information generated thereunder, is subject to the Texas Public Information Act to the extent required by law.
  
11. **EQUAL EMPLOYMENT OPPORTUNITY.** Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such actions shall include, but not be limited to the following: employment, promotions, demotions, transfers, recruitment or recruitment advertising, layoffs, terminations, selection for training (including apprenticeships), and participation in recreational activities.

Contractor agrees to post in conspicuous places, accessible to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause. Contractor will, in all solicitations or advertisements for employees placed by or on

behalf of Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

Contractor shall keep records and submit reports concerning the racial and ethnic origin(s) of applicants for employment and employees as the law may require.

12. **TERM AND TERMINATION OF AGREEMENT.**

- a. The initial term of this Contract shall be a period of twenty-four (24) months commencing upon the effective date hereof; provided, however, that the Political Subdivision shall have the right and option to extend the term hereof for three (3) successive additional twelve (12) month periods by giving written notice to Contractor to so extend the term hereof, such notice to be given not more than ninety (90) nor fewer than thirty (30) days prior to the expiration of the said initial term, or any renewal term.
- b. Either party may terminate, without cause, this Contract upon written notice to the other party at least thirty (30) days prior to the date of termination. Furthermore, the Political Subdivision retains the right to terminate this Contract at the expiration of each Political Subdivision budget period (September 30) during the term of this Contract, even without prior notice as described in the preceding sentence.
- c. Contractor shall be compensated for Services performed resulting in the collection of delinquent debts, consistent with this Contract up to the termination date, upon final disposition of the judgment, for which Contractor provided Services.

13. **ACCOUNTS AND PROPERTY OF POLITICAL SUBDIVISION.** All accounts receivable, including documentation of any kind furnished by the Political Subdivision, shall and at all times remain the property of the Political Subdivision. In the event of termination of this Contract for any reason or expiration thereof, account receivables and all other documentation that is generated, supplied or prepared by or for the Political Subdivision, shall be returned within five (5) days to the Political Subdivision. Contractor shall receive and handle all collections as constructive trustee for the use and benefit of Political Subdivision. Contractor may not, under any circumstances, withhold such funds.

14. **CONTRACTOR'S REPRESENTATIONS.** Contractor hereby represents, promises and warrants to Political Subdivision that Contractor is financially solvent and possesses sufficient experience, authority, personnel and working capital to complete the Services required hereunder.

15. **PROMPT PERFORMANCE BY CONTRACTOR.** All services provided by Contractor hereunder shall be performed in accordance with the degree of care and skill ordinarily exercised under similar circumstances by competent members of the profession in the State of Texas applicable to such services of the type of Services contemplated by

this Contract, and Contractor shall be responsible for all Services provided hereunder. Contractor shall perform all duties and Services and make all decisions called for hereunder promptly and without unreasonable delay and will give these Services such priority in his office as is necessary to cause Contractor's services hereunder to be timely and properly performed.

16. **POLITICAL SUBDIVISION OBJECTION TO PERSONNEL.** If at any time after entering into this Contract, Political Subdivision has any reasonable objection to any of Contractor's personnel, assigned to the perform the Services, Contractor shall promptly propose substitutes to whom the Political Subdivision has no reasonable objection.
17. **ENTIRE AGREEMENT.** This instrument contains the entire Agreement between the Political Subdivision and Contractor concerning the Services.
18. **MAILING ADDRESSES.** All notices and communications concerning this Contract to be mailed, U.S. mail, via facsimile or delivered to the Political Subdivision shall be sent to the address of the Political Subdivision as follows, unless and until Contractor is otherwise notified:

*[Political Subdivision Contact and Address]*

All notices and communications under this Contract to be mailed U.S. mail, via facsimile or delivered to Contractor shall be sent to the address of Contractor as follows, unless and until the Political Subdivision is otherwise notified:

*[Contractor Contact and Address]*

Any notices and communications required to be given in writing by one party or the other shall be considered as having been given to the addressee on the date the notice or communication is placed in the United States Mail, faxed, or hand-delivered by other means.

19. **LAWS AND ORDINANCES.** The Contractor shall at all times observe and comply with all Federal, State and local laws, ordinances, regulations and policies of the Political Subdivision, which in any manner affect the Contractor or the Services, including those related to debt collection. Contractor shall indemnify and hold harmless the Political Subdivision against any claim, arising from the violation of any such laws, ordinances, and regulations whether by the Contractor or its agents, subcontractors, officers, directors, owners or employees in accordance with Section 9.
20. **ASSIGNMENT.** The Contractor agrees to retain control and to give full attention to the fulfillment of this Contract and shall give such priority to this Contract as to timely effectuate its purpose. This Contract may not be assigned, in whole or in part, without the prior written consent of the Political Subdivision, and that no part or feature of the work will be subcontracted to anyone objectionable to the Political Subdivision. The Contractor further agrees that the assignment of any portion or feature of the work or

materials required in the performance of this Contract shall not relieve the Contractor from its full obligations to the Political Subdivision as provided by this Contract.

21. **INDEPENDENT CONTRACTOR.** The Contractor, its agents, representatives and employees, is and shall be an Independent Contractor and shall not, with respect to its acts or omissions, be deemed an agent or employee of the Political Subdivision.
22. **AFFIDAVIT OF PROHIBITED INTEREST.** Contractor acknowledges and represents it is aware of the laws, [Municipal Charter, and Municipal Code of Conduct] regarding prohibited interests and that the existence of a prohibited interest at any time will render the Contract void by the Political Subdivision, without notice.
23. **BINDING ON PARTIES.** The undersigned signatories represent and warrant that he or she is the duly authorized representative of the Contractor and the Political Subdivision and is authorized to execute this Contract that has been approved and accepted by the Contractor and the Political Subdivision. This Contract shall not be considered fully executed or binding on the Political Subdivision until the same shall have been executed by Contractor, the Political Subdivision Manager or his designee, and the Political Subdivision Secretary, and approved and accepted by the Governing Body of the Political Subdivision in open meeting as required by law. This Contract shall be binding upon the parties hereto, and their successors and assigns. Nothing herein shall be construed as creating a personal liability on the part of any Political Subdivision officer, employee or agent.
24. **AMENDMENTS TO AGREEMENT.** The Political Subdivision and Contractor may amend this Agreement only in writing.
25. **LEGAL CONSTRUCTION.** In case any one or more of the provisions contained in the Contract shall be for any reason held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof and this Contract shall be construed as if such invalid, illegal or unenforceable provision had never been included.
26. **GOVERNING LAW AND VENUE.** The validity of this Contract and of any of its terms or provisions, as well as the rights and duties hereunder, shall be governed by and construed in accordance with Texas law. Venue shall lie in \_\_\_\_\_ County, Texas.
27. **COUNTERPARTS.** The Agreement may be signed in counterparts, each of which shall be deemed to be an original.
28. **EFFECTIVE DATE.** This Agreement shall be effective once it is signed by the Political Subdivision and Contractor.
29. **WAIVER.** Notwithstanding any provision to the contrary, the Political Subdivision does not waive any rights or obligations it may have, either at common law or by statute, through this Agreement or any other agreement with Contractor.

**AGREED TO BY:**

**CONTRACTOR**

By: \_\_\_\_\_  
Name: [name] \_\_\_\_\_  
Title: Principal \_\_\_\_\_  
Date: \_\_\_\_\_

**POLITICAL SUBDIVISION**

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Political Subdivision Manager/  
Mayor/Judge  
Date: \_\_\_\_\_

**ATTEST:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Political Subdivision Secretary

**ACKNOWLEDGEMENTS**

**STATE OF TEXAS** }

**COUNTY OF \_\_\_\_\_** }

On this \_\_\_\_ day of \_\_\_\_\_, 200\_, before me, a Notary Public, duly commissioned, qualified and acting, within and for the said County and State, appeared in person the within named \_\_\_\_\_ to me personally well known who stated that he was the \_\_\_\_\_ of \_\_\_\_\_, a corporation, and he was duly authorized in his capacity to execute the foregoing instrument for and in the name and behalf of said corporation, and further stated and acknowledged that he had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

**IN TESTIMONY WHEREOF, I** have hereunto set my hand and official seal this the \_\_\_\_\_ day of \_\_\_\_\_, 200\_.

\_\_\_\_\_  
Notary Public in and for the State of Texas

**STATE OF TEXAS** }

**COUNTY OF \_\_\_\_\_** }

**BEFORE ME**, the undersigned authority, on this day personally appeared, \_\_\_\_\_, [City Manager/Mayor] of the **POLITICAL SUBDIVISION**, a \_\_\_\_\_ corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as the act and deed of the **POLITICAL SUBDIVISION**, for the purposes and consideration therein expressed and the capacity therein stated.

**GIVEN** under my hand and seal of office this the \_\_\_\_\_ day of \_\_\_\_\_, 200\_.

\_\_\_\_\_  
Notary Public in and for the State of Texas

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<sup>1</sup> In 1993, Article 103.0031 was added to the Texas Code of Criminal Procedure. Originally, this section pertained solely to counties and was very limited in scope. In this past legislative session it was amended to apply to municipalities and became broader in scope.

<sup>2</sup> Texas Government Code, Chapter 311.

<sup>3</sup> See generally Texas Local Government Code, §§51.014 (Type A), 51.035 (Type B), and 51.051 (Type C).

<sup>4</sup> Texas Local Government Code, §51.072.

<sup>5</sup> Tex. Att’y Gen. LO-98-972 at 2 (quoting Texas Constitution Art. V § 18).

<sup>6</sup> *Canales v. McLaughlin* 214 S.W.2d 451, 453 (Tex. 1948).

<sup>7</sup> Tex. Att’y Gen. Op. JM-65 (1983).

<sup>8</sup> Texas Local Government Code § 262.001(a)(3).

<sup>9</sup> *Fair v. City of Galveston*, 915 F. Supp. 873 (S.D. Tex.), *aff’d*, 100 F.3d 953 (5<sup>th</sup> Cir 1996).

<sup>10</sup> Other similar provisions, such as those included in the Tax Code, refer to a “not to exceed” percentage versus the stated language herein of “in the amount of 30%.”

<sup>11</sup> See generally Request No. 0424-JC (January 3, 2002)(request for an opinion of the constitutionality of article 102.0173, Texas Code of Criminal Procedure, which requires a defendant convicted of a misdemeanor to pay as a cost of court, a technology fee)(citing *Ex parte Carson*, 159 S.W.2d 126 (Tex. Crim. App. 1942); *Ex Parte Ferguson*, 132 S.W.2d 408 (Tex.Crim. App. 1939); *Ex Parte Sizemore*, 8 S.W.2d 134 (Tex. Crim. App. 1928); *Memet v. State*, 642 S.W.2d 518 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1982, *pet. ref’d*); Tex. Att’y Gen. Op. No. JC-098 (1999); DM-123 (1992); JM-880 (1988)), and noting the pending case of *Caldwell et al. v. Rylander*, Cause No. 99-13088, pending before the 261<sup>st</sup> District Court of Travis County relative to the constitutionality of Texas Government Code, §51.702(b), found to be unconstitutional by the Attorney General in DM-123 (1992).

<sup>12</sup> Section one of article II of the Texas Constitution provides for the separation of governmental powers; specifically:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

<sup>13</sup> There is no judicial or statutory definition of the term “professional services; however, the cases reviewed generally suggest that a professional service requires labor and skill that is “predominately mental or intellectual, rather than physical or, manual.” *Maryland Casualty Co. v. Crazy Water Co.*, 160 S.W.2d 102 (Tex.Civ.App.--Eastland 1942, no writ). It no longer pertains solely to the services of lawyers, physicians, or theologians, but also includes members of disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence. See Texas Attorney General Opinion MW-344 (1981) and Texas Attorney General Opinion JM-1038 (1989).

<sup>14</sup> See House Research Organization’s Bill Analysis on SB 1778, page 3.

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<sup>15</sup> *Id.*

<sup>16</sup> *See* House Research Organization's Bill Analysis on SB 1778, page 4.

<sup>17</sup> *Id.*

<sup>18</sup> It's my understanding that this is the determination that Austin has made relative to the imposition of the collection fee.

<sup>19</sup> Open Records Decision No. 462 (1987).

<sup>20</sup> *See* 15 U.S.C.A. § 1692, *et seq.*

<sup>21</sup> 15 U.S.C.A. § 1692a.

<sup>22</sup> Fin. Code § 392.001.

<sup>23</sup> Abbott, Greg, *The Attorney General Can Stop Abusive Debt Collection*, November 4, 2003



## **Art. 103.0031. Collection Contracts.**

(a) The commissioners court of a county or the governing body of a municipality may enter into a contract with a private attorney or a public or private vendor for the provision of collection services for one or more of the following items:

(1) debts and accounts receivable such as unpaid fines, fees, court costs, forfeited bonds, and restitution ordered paid by:

(A) a court serving the county or a court serving the municipality, as applicable; or

(B) a hearing officer serving the municipality under Chapter 682, Transportation Code; and

(2) amounts in cases in which the accused has failed to appear:

(A) as promised under Subchapter A, Chapter 543, Transportation Code, or other law;

(B) in compliance with a lawful written notice to appear issued under Article 14.06(b) or other law;

(C) in compliance with a lawful summons issued under Article 15.03(b) or other law;

(D) in compliance with a lawful order of a court serving the county or municipality; or

(E) as specified in a citation, summons, or other notice authorized by Section 682.002, Transportation Code, that charges the accused with a parking or stopping offense.

(b) A commissioners court or governing body of a municipality that enters into a contract with a private attorney or private vendor under this article may authorize the addition of a collection fee in the amount of 30 percent on each item described in Subsection (a) that is more than 60 days past due and has been referred to the attorney or vendor for collection. The collection fee does not apply to a case that has been dismissed by a court of competent jurisdiction or to any amount that has been satisfied through time-served credit or community service. The collection fee may be applied to any balance remaining after a partial credit for time served or community service if the balance is more than 60 days past due. Unless the contract provides otherwise, the court shall calculate the amount of any collection fee due to the governmental entity or to the private attorney or public or private vendor performing the collection services and shall receive all fees, including the collection fee. With respect to cases described by Subsection (a)(2), the amount to which the 30 percent collection fee applies is:

(1) the amount to be paid that is communicated to the accused as acceptable to the court under its standard policy for resolution of the case, if the accused voluntarily agrees to pay that amount; or

(2) the amount ordered paid by the court after plea or trial.

(c) The governing body of a municipality with a population of more than 1.9 million may authorize the addition of collection fees under Subsection (b) for a collection program performed by employees of the governing body.

(d) A defendant is not liable for the collection fees authorized under Subsection (b) if the court of original jurisdiction has determined the defendant is indigent, or has insufficient resources or income, or is otherwise unable to pay all or part of the underlying fine or costs.

(e) If a county or municipality has entered into a contract under Subsection (a) and a person pays an amount that is less than the aggregate total to be collected under Subsections (a) and (b), the allocation to the comptroller, the county or municipality, and the private attorney or vendor shall be reduced proportionately

(f) An item subject to collection services under Subsection (a) and to the additional collection fee authorized by Subsection (b) is considered more than 60 days past due under Subsection (b) if it remains unpaid on the 61st day after the following appropriate date:

(1) with respect to an item described by Subsection (a)(1), the date on which the debt, fine, fee, forfeited bond, or court cost must be paid in full as determined by the court or hearing officer; or

(2) with respect to an item described by Subsection (a) (2), the date by which the accused promised to appear or was notified, summoned, or ordered to appear.

(g) A county or municipality that enters into a contract under Subsection (a) may not use the additional 30 percent collection fee authorized by Subsection (b) for any purpose other than compensating the private attorney or private vendor who earns the fee.

(h) This section does not apply to the collection of commercial bail bonds.

(i) The commissioners court of a county or the governing body of a municipality may enter into a contract as described in this article to collect a debt incurred as a result of the commission of a criminal or civil offense committed before the effective date of this subsection. The collection fee does not apply to a debt collected pursuant to a contract entered into under this subsection.

(j) A communication to the accused person regarding the amount of payment that is acceptable to the court under the court's standard policy for resolution of a case must include a notice of the person's right to enter a plea or go to trial on any offense charged.