



December 1, 2020

**Per Ramfjord, Chair, Public Defense Services Commission
Members, Public Defense Services Commission**

RE: Public Defense Contract General and Specific Terms

Dear Members of the PDSC,

We are embarking on a systemic transformation in how we deliver public defense services in Oregon. For decades, Oregon has utilized a “fixed fee per case” contracting model, which has incentivized attorneys to accept representation in as many cases as possible. This contracting model – combined with the lack of agency infrastructure to provide oversight, quality assurance, and contract compliance – has rightfully called into question the efficacy of public defense in Oregon.

The Sixth Amendment Center Report, *The Right to Counsel in Oregon*, published in January 2019, highlighted these concerns. Two months later, the PDSC voted unanimously and directed the Office of Public Defense Services to develop and adopt a new contracting model. OPDS sought reform legislation in 2019 and 2020 legislative sessions. Despite broad legislative support for OPDS’s reform agenda, those efforts and the resources necessary to achieve that agenda were stymied by external political disputes and the financial crisis precipitated by COVID-19. The legislature did, however, also agree that significant reform was necessary, and it directed OPDS to address concerns raised by the Sixth Amendment Center report in a budget note.

OPDS has worked hard to develop a new contracting model; but it’s also been challenging. The agency’s current budget is predicated upon a fixed-fee case rate model that the PDSC and the Legislature have rejected. Yet, there has been no reform legislation. And only a portion of the 2019 Special Purpose Appropriation (SPA) was released.

Oregon Office of Public Defense Services

Contracts and Business Services

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In September 2020, the PDSC directed OPDS to begin a new contracting model with the following parameters:

- FTE contracts based upon a fixed amount to cover a caseload;
- Caseload cannot exceed 115% of the 1973 National Advisory Commission (NAC) on Criminal Justice Standards and Goals, from the US Department of Justice;
- Differential to reflect cost differences in urban and rural counties;
- Revenue neutral.

To accomplish this task and address other agency concerns raised by the 6AC Report, OPDS has modified the existing general and specific contract terms. Those changes, and a short summary of the reasoning for those changes, is highlighted below:

1.4.2 – 1.4.5 Modification to the Use of Subcontractors

- Defines terms to clarify that contracting groups may not include subcontractors.
- Prohibits contractor from utilizing subcontractors without OPDS express approval.

Reason: Subcontractors are a gap in the state's ability to provide oversight. It creates incentives for contractors to delegate work to non-contract members at a lessor rate and thereby create a profit. There may be particularized moments where subcontracting is appropriate. But it's the agency's goal to eliminate all subcontracting.

1.4.6 Definition of "Client"

- Adjusts definition of "client" to include OPDS authority for pre-appointment representation.

Reason: OPDS, acting consistently with its statutory directive to ensure public defense services consistent with the Oregon Constitution, the United States Constitution, and national standards of justice, occasionally assigns counsel to a client before there is a judicial appointment. This change makes the definition of "client" consistent with agency practice and authority.

1.4.8 Definition of "Full Time"

- Defined FTE for public defense contracting in terms of the percent of one's work time one devotes to public defense work, as opposed to a specific number of hours.

Reason: Without additional agency infrastructure, OPDS lacks the ability to define FTE in terms of hours per year. OPDS will define full time in line with the PDSC's directives

on caseload. A 1.0 FTE should provide representation for the target number of cases (not to exceed 115% of NAC) or the number of cases that the attorney can ethically handle; whichever is less. And the non-contract work for any prorated FTE will be limited by section 4.2 discussed below.

1.4.9 FTE/Workload Model

- Defines new contracting model as staff and infrastructure needed to provide legal representation in a particularized jurisdiction/region.

Reason: New term; needed definition.

1.4.10 Caseload

- Defines caseload as the number of open cases assigned to an attorney during a given year.

Reason: New term; needed definition.

1.4.11 Workload

- Defines workload as the number of open cases an attorney has at any given time.

Reason: New term; needed definition.

3.1 Subcontracts and Assignment of Contract

- Establishes condition precedent that any prior subcontract agreements must be terminated before the contract take effect.
- Reiterates that OPDS approval is required in writing before subcontracting can occur.
- Clarifies that OPDS approval will be given on a case-by-case basis.

Reason: Provision eliminates all existing subcontracting arrangements, allowing the agency to start anew. And it furthers the agency's goal of eliminating subcontracting.

3.6 Contractor Workload – Capacity Increase or Decrease

- The ability to modify contracts based on an increase or decrease in caseload is removed from the “Mutual Obligation” section of the contract and moved to the “Rights of the PDSC” section.
- Existing section 5.5 – which described the approach to a decreasing caseload as a “Mutual Obligation” – has been deleted.

Reason: Under current contracts, each contractor has a case credit quota. At the end of the biennium there is an adjustment made against that quota, and contractors

may owe or be owed money. Currently, caseload adjustments can be made by mutual agreement of the parties, which is often in everyone's interest.

For example, if there is an increase in caseload, the contractor may want to add an attorney to the group to help address caseload needs. Or, if caseload is down, the contractor may want to reduce their monthly allocation so that they do not owe OPDS funds at the end of the biennium. There is nothing in contract that precludes a contractor from absorbing an increased caseload with existing resources and not adding attorneys and/or staff.

This provision ensures that contractor FTE is in line with a jurisdiction's legal needs and grants the agency more ongoing authority and control over public defense funds.

4.2 Court Appointments Outside of Contract

- Attorney can choose hourly work or contract work, but not both.
- Authorizes OPDS to adjust the contractor's FTE to account for additional caseload.
- Requires contractors to act in good faith and ensure their non-contract work is in line with their contract obligations.
- Precludes any public defense contractor working as a 1.0 FTE from taking on additional paid legal work.

Reason: Historically, OPDS has had no means of knowing what an individual attorney's workload and caseload was. The agency did not know who is doing which cases on a contract. Some attorneys are on multiple contracts. Some do contract work and hourly work for OPDS, which is overseen by different agency personnel. And the agency has no information regarding the amount of non-public defense work attorneys engage in.

The terms continue to allow public defense contractors to handle court appointments outside the scope of the contract. However, contractors will no longer be compensated hourly for non-contract cases. To the extent OPDS needs contractors to cover cases in a jurisdiction outside of their contract, the agency shall count those cases toward the contractors target quota.

This is the first step in providing additional scrutiny over provider workloads and fund distribution. If someone is doing full-time public defense work, they are full time. That commitment to public defense (and the dollar value associated with it) should preclude other paid legal work. This is how all of our non-profit public defender offices operate; it's only equitable to treat all entities the same.

To the extent a public defense provider is not a 1.0 FTE, the terms require the contractor to act in good faith in ensuring their non-contract work is in line with their contract obligations.

7.1.2.1 Pre-Appointment Representation

- Adds language to match the agency's current practice when considering pre-appointment representation.

Reason: OPDS does authorize pre-appointment counsel when appropriate, and the new language reflects the agency's analysis when the issue arises.

7.2.2 Case Assignment and Workload

- Added language to align this provision with section 4.2

Reason: Establish consistency with other contract provisions.

7.4.1 Number of Persons Providing Services

- Authorizes OPDS to remove contract funds from a provider if the FTE attorney or staff is not filled within 90 days of a vacancy.
- Prohibits non-compete agreements.

Reason: Currently, when an attorney or staff member leaves a contracting group, that group continues to receive funds, even if the attorney is not replaced. With the new FTE model, OPDS needs to ensure that public defense funds are going to the services that it has agreed to fund. In most cases, 90 days is a reasonable period of time to fill a vacancy. It should be noted that this provision is permissive. Additionally, non-compete agreements are precluded for the reasons discussed on the record at prior PDSC meetings.

Specific Terms

- Specific language on the number of attorney, staff, and investigator FTE built into the contract.
- Contract value per FTE attorney included for transparency.
- Requirement that contract administrator attests that all attorney members have reviewed the contract.
- Prohibits contractor from distributing contract funds on a "fee per case" basis.
- Incorporates OSB Rule of Professional Conduct 1.7 regarding conflict of interest. The maximum number of cases a public defense provider can handle per year is the lessor of (a) the target annual quota (115% of NAC) or (b) the amount permitted under RPC 1.7.

Reason: The new model requires OPDS to define clearly what we are funding, in terms of attorney, staff, and investigator FTE. Additionally, OPDS receives frequent complaints/questions from line attorneys about the distribution of funds by their contract administrator. Transparency requires that line public defense attorneys be informed of the actual dollar value associated with these contracts.

The prohibition of compensation on a fixed fee for case basis is in line with directives from the PDSC and the 6AC report. Over the course of the last year, many consortia have continued to distribute funds in this manner. This provision will finally end that practice.

Finally, the provision clarifies that the number of cases an attorney can handle per year is limited by RPC 1.7.

Overall

- Clarified roles of OPDS and PDSC
- Font changed from Arial to Goudy Old Style

Conclusion

The proposed contract terms further the agency's goal of transparency, equity, and accountability in public defense contracts. They provide more structure to the state distribution of public defense dollars to ensure a more stable trial system. Most importantly, the contract terms aid the agency in ensuring that public defense clients receive constitutionally mandated legal services. Please contact me if you have any questions.

Sincerely,

Eric J. Deitrick
General Counsel, OPDS