



To: Per Ramfjord, Chair, Public Defense Services Commission
Paul Solomon, Vice-Chair, Public Defense Services Commission
Members, Public Defense Services Commission

From: Eric Deitrick, General Counsel

Cc: Jessica Kampfe, Executive Director

Re: Draft '23-'25 Public Defense Contract

Date: February 15, 2023

This memo is intended to summarize changes between the existing 2022 public defense contract document and the one currently before you.

The existing public defense contract has been described as unwieldy and unhelpful, both by attorney providers and PDSC staff. It's over two decades old and exists on a word processing document that originated from the Oregon Judicial Department, before the agency was created. It's been amended over and over again.

Structurally, the previous contract was organized by rights and obligations of the PDSC, rights and obligations of Contractor, and mutual rights. The challenge with that approach is that a right to one party often creates an obligation of the other party. Accordingly, provisions regarding concepts like "breach," "notice," and "reporting requirements" are located in multiple locations throughout the document. This is confusing to any reader of the document, and in some instances, creates contradictory directives.

The intent with the new document is to have a better organized contract that provides clarity and is easier to read. As a starting point, we looked to the model public defense contract put forth by the National Legal Aid and Defenders Association (NLADA). The structure of this new contract was predicated upon that. From there, we used existing contract language as often as possible and moved it into this new document. There are terms removed from the prior contract, and on occasion, new language introduced. Most of the new language is based upon language from the NLADA model contract.

There are three structural changes to the contract model. We propose moving to two tiers of

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reimbursement rates, rather than four. We propose only contracting with attorneys who are giving at least half of their time to public defense work – so .5 FTE and up. And we are proposing a 15% variance on the maximum attorney caseload to account for jurisdictional practice differences. This mirrors the variance in PCRCP contracts

We want feedback on these changes and the new document as a whole. As described above, our goal is not to make significant changes with this contract, but better organize it. If you see language additions or deletions that concern you, please let us know.

The PDSC is required to have separate contracts for criminal, juvenile, and PCRCP representation. The structure of this new contract has general language applicable to all contractors. From there, there are three exhibits that are contract specific to criminal, juvenile, and PCRCP. Those are Exhibit A (Compensation), Exhibit B (Caseload & Workload Standards), and Exhibit C (Additional Performance Standards).

One final note – this contract does not refer to OPDS. It only refers to the PDSC. This is not intended to change our governance roles of contract management and oversight. Rather, use of this term is in line with our governance improvements and direction from the legislature.

I will now walk through the new contract document and summarize the source of the language, along with any notable changes.

Preamble: The preamble is predicated upon language from the NLADA model contract, tailored to Oregon.

I. Duration of Contract: This is predicated upon NLADA model contract.

II. Rules: The contract interpretation rules are identical to what is in the existing contract.

III. Definitions: These are the structural components of our service delivery model – clients, cases, attorneys, maximum attorney caseload, caseload, workload, and services. The misappropriation of funds term comes from the NLADA model contract, and the concept is a triggering point for notice obligations and potential breach.

IV. Independent Contractor: The language is predicated upon language in the NLADA model contract, with some language from the existing contract overlaid.

V. Assignment and Subcontracting: The language is our existing contract language, written more simply.

VI. Agency's Employees, Members, Office, and Equipment: This is language from the NLADA model contract, with the existing requirement that attorney providers maintain an office at which confidential confirmation with client can occur overlaid. These concepts are already implicitly or explicitly embedded in various parts of the existing contract.

VII. Performance Requirements: This is language from the NLADA model contract, tailored to

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Oregon. The existing contracts contain numerous performance requirements, which are identified in section 7.1. The approach here was to define the big picture standards to which attorneys are tethered, with specific performance requirements for each contract type identified in Exhibit C to the contract.

VIII. Attorney Training: This is new language taken from the NLADA model contract. CLE requirements from the existing contract were added here. The training obligations, while never previously funded, were previously implied by sections 7.10 and the general language surrounding compliance with best practices.

IX. Compensation and Method of Payment: This section clarifies several big picture items regarding compensation. It clarifies that attorney FTE compensation is pegged to the case types to which its attorneys accept appointments (for this contracting cycle, the agency's current plan is to reimburse providers at two rate tiers). It uses language from the NLADA model contract to define the scope of what PDSC funding may be used for. It uses the NLADA model contract language to discuss when funds can be withheld from contractor. Finally, there is language establishing the obligations for the parties in the event of a budget shortfall or adjustment. This language exists in the existing contract.

X. Contract Modification and Adjustments: This section is in the existing contract and governs when the PDSC can modify a contract without mutual agreement.

XI. Establishment and Maintenance of Records: Sub A is language from the NLADA model contract that contains obligations in our existing contract but stated more clearly. Sub B and C are from the existing contract.

XII. Contracting Reporting and Inspection: This section cleans up multiple sections of the existing contract. Sub A is predicated upon the NLADA model contract and would create a new reporting requirement for Contractors to disclose the identity of those performing work on the contract, the case types they are qualified to accept, and the funds they receive from the contract. Sub B incorporates our existing caseload and workload report requirements. Sub C authorizes additional reporting obligations not yet contemplated if the commission approves the reporting obligation and the agency creates the reporting form. This is a catch all to give the agency flexibility. Sub D takes obligations under the existing contract and uses the NLADA model contract language to incorporate those concepts. Sub D incorporates concepts from sections 3.6, 4.3, 4.4, 7.5, and 7.10 of the existing contract. Sub E are the potential penalties for late reports and is in the existing contract.

XIII. Evaluation of Contractor: The first paragraph is based on the NLADA model contract and defines the areas in which the agency could evaluate a Contractor. The second paragraph incorporates the meeting provisions from the existing contract. This is the space in which CAP will eventually play a role.

XIV. Corrective Action: This is language from the NLADA model contract and describes the process for the PDSC to engage a Contractor it believes may be in breach. This concept is in the existing contract in section 5.4, with different language with different time requirements.

XV. Contract Termination and Suspension: This is language from the NLADA model contract. The existing contract had termination provisions in sections 2.2, 3.3, 4.1, and 5.4

XVI. Notices: These concepts are already included in the existing contract. The misappropriation of funds provision is new and based upon language from the NLADA model contract, although the concept is arguably implied by language in existing section 7.8. Other ambiguous notice requirements have been deleted, as have provisions 7.8.2.1 and 7.8.2.2 of the existing contract. The timeline for reporting is shifted to time at which the Contractor becomes aware of the triggering event.

XVII. Insurance Requirements: These provisions are in the existing contract. Casualty insurance has been expressly deleted. However, there is a catch-all provision in the new contract requiring Contractors to comply with all applicable laws. So, if there are other insurance requirements required for a particular type of entity, they will still need to comply with those. The NLADA model contract had an express requirement for automobile insurance, which we have not incorporated. There are also specific notice provisions regarding insurance changes that we have deleted.

XVIII. Hold Harmless & Indemnification: This is the existing contract language that was vetted by Oregon DOJ and agreed to by public defense contractors previously.

XIX. Responsibility of Contract Administrator: These requirements are identical to what is in the existing contract.

XX. Compliance with Applicable Laws: This concept is already in the existing contract. This language comes from Oregon Department of Justice to highlight some of the existing state and federal statutes and rules that it believes should be highlighted in contracts.

XXI. Nondiscrimination: This language is from the NLADA Model Contract. The concept is not expressly stated in the existing contract, although implied by the existing “compliance with applicable law” provision.

XXII. Conflict of Interest: This is language from the NLADA Model Contract that does not currently exist in our contracts.

Exhibit A: This defines obligations and rules regarding Contractor compensation and will be updated as the budget picture becomes clearer.

Exhibit B: This defines the caseload and workload obligations for Contractors. It is consistent with the existing contract, although we built in a 15% variance in the caseload obligations to account for diverging practices in jurisdictions. This mirrors the existing PCRCP variance. For out of county cases, we kept the same structure but used different language. It’s still not a mandate; rather, we are trying to incentivize through additional case weighting.

Exhibit C: While section VII defined the high-level performance standards for attorneys, this exhibit provides specific expectations by contract type. It is consistent with the current contract.