



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: Edits to Proposed '23-'25 Contracts Following Provider Feedback

Date: March 21, 2023

This memo is intended to summarize changes to the proposed '23-'25 public defense contracts following provider feedback.

On February 23, 2023, the agency presented proposed draft contracts to the PDSC in a public meeting. Following that meeting, public defense providers were encouraged to provide feedback. The agency created a portal on its website for providers to submit written feedback. In addition, the agency scheduled four virtual feedback sessions on March 6, 7, and 8.

Overall, the feedback was helpful, useful, and constructive. Providers commented on the improvements made to the contract's structure and edits, noting that it was easier to understand, and that unnecessary verbiage was deleted.

Attached are the draft contracts, with proposed changes highlighted. Below is a summary of those edits, along with responses to certain feedback the agency received.

Proposed Edits

Section VIII: Contractor's obligation is modified to they shall "require" training, rather than necessarily "provide" the training themselves.

Section XI: The requirement that Contractor utilize the accrual method of accounting is deleted. Additionally, the requirement that Contractor retain ballot measure 11 client files for 20 years is changed to 10 years. Only murder cases now require a retention of 20 years.

Section XII: The requirement that Contractor provide a quarterly report to the agency regarding how it distributes funds is deleted. As amended, Contractor is required to submit a quarterly report of its staff or membership roster, along with the case types the attorneys are qualified to receive appointments. Additionally, subsection D is amended to require the agency provide 10 days' notice for an audit or inspection, rather than "reasonable notice," and it contains a mandate that entities required by law to conduct financial audits disclose those audits to the agency.

Section XV: Subsection B is amended to allow sole proprietor contractors to terminate the contract with 30 days' notice without cause. The financial penalties for a termination lacking good cause are deleted. Subsection C is amended to clarify the wind-down procedure should a contract terminate, and the language is identical to the current contract.

Exhibit B: Language regarding the Rules of Professional Conduct (RPC) is added to this section. The agency received feedback that RPC 1.7 was omitted from this contract. It was not the agency's intent to omit RPC 1.7 from this contract, as a reference to contractor's obligation to comply with the RPCs was included on page 1. It is the agency's intent that contractors comply with all of the RPC, and the decision was made to reference the entirety of the rules, rather than one provision. Regardless, the agency lacks legal authority to require attorneys to violate the RPC, and we added the RPC to this section to assuage contractors.

Additionally, language was added to ensure that an attorney's monthly appointments are within the 15% variance of 25 weighted cases per month.

Finally, the time periods for partial weighting in Subsection E was modified, and language authorizing cases to receive additional credit if the case lasts longer than one year is amended to eliminate that provision for murder and Jessica Law cases.

Exhibit C: Obligation to contact in-custody clients is changed from 24 hours to 48 hours following the arraignment or first appearance. Additionally, new language is added regarding the purpose of the initial client interview.

Other Feedback and Response

Compensation/Reimbursement Rates: The financial value of the contracts was one of the most inquired about issues. As discussed in prior meetings, Exhibit A will contain all of the financial information for the contracts, and it is currently a blank slate as we await budget information from the legislature. The only difference contemplated is to move from four reimbursement rates to two, for the reasons discussed in prior meetings. Additionally, providers commented on the increased hourly rates for unrepresented individuals and expressed frustration about the perceived disparity between service delivery models.

Caseload/Workload/Case Weighting: Another topic that came up with frequency was that of caseloads, workloads, and case weighting. Providers described the caseload limits as excessively high. Some feedback was received on the weight that should be afforded to specific case types, and whether cases with multiple incident dates should receive different weight. Others discussed the challenge of an annualized caseload standard and expressed a preference for an open workload model.

Ultimately, we informed providers that the agency is not in a position to make those kind of programmatic changes at this time. Having said that, the agency does intend to better gather information on and measure workload during the contracting cycle. Additionally, Exhibit B contains a clause through which a provider can request additional case weighting for a particular case based upon unique factors.

Contracts for Consortia: The agency heard feedback that the contracts appeared to be drafted for public defender offices and law firms, and not for consortia. The specific issues raised were the application of the subcontracting, file retention, and reporting provisions.

The contracts are written to apply to entities, not any particular entity type. By contracting with the PDSC, the administrator of the entity assumes responsibility to ensure that contract obligations are met. For example, the entity itself does not have to retain all of the files for cases assigned to entity attorneys. But the entity does have to ensure that all of its members are complying with the file retention requirements. The same applies to reporting.

Regarding subcontracting, what matters to the agency is (a) knowing which attorneys are providing services pursuant to the contract and (b) approving those attorneys qualifications before they can receive appointments. If the consortia entity elects to bind itself together by a contractual relationship, they can do so. The agency does not consider that prohibited conduct. Prohibited subcontracting is assigning the representational services required by this contract to attorneys who are not identified as members of the consortia.

Out-of-County Representation: Providers inquired about whether they would be required to accept appointments to out-of-county cases. We informed providers that the rule this cycle would remain the same – not mandatory, but encouraged and incentivized. We did change the language somewhat, but not the rule. Additionally, we received feedback from providers on why they would not accept appointments to out-of-county cases, which included: workload challenges, scheduling challenges, and a perceived lack of respect by out-of-county courts and judges. Providers believed taking cases in multiple jurisdictions would require not only lower caseload or workload standards, but also a culture shift in how courts treat attorneys who practice in other jurisdictions.

Section IX: Providers inquired about whether this section was designed to limit how they can spend their money. That's not the intent. This section defines what the PDSC is paying for – representational services, training and education, and overhead costs. Once the entity earns the money, it is free to distribute the funds as it chooses.

Variance: Following the last PDSC meeting, we received some inquiries regarding the variance. The variance applies flexibility to an otherwise rigid contract limitation that is (a) not data informed, (b) does not consider jurisdictional specific practice differences, (c) does not consider an attorney's experience and resources, and (d) does not consider case complexity.

The variance also ensures accountability, which it should aid system partners manage their dockets and filings, and aid attorneys in pacing their appointments throughout the year. There is no requirement that a person take an additional 15% caseload in a given year. Rather, the agency wants

attorneys to pace their appointments so as to not exceed the caseload limits in Exhibit B. Accordingly, as discussed above, language was added to Exhibit B to keep providers on pace and prevent providers from exceeding their monthly appointments by 15% without written preapproval by the agency. This will allow monthly workload monitoring to avoid losing attorney capacity before the end of the year and better ensure client-centered representation.