

Forever Gr\$\$n, But Not Transparent: Why Does the Grand Jury Keep Investigating the Primary Public Defender Contract?

Summary

The public defender provides legal representation to those persons who are charged with a crime but cannot afford an attorney. In Santa Cruz County, the same law firm has held the primary public defender contract since 1975. That was the last year there was a competitive bidding process for this contract. Since then there have been negotiated extensions only. Moreover, despite prior Grand Juries' recommendations, never during this 35 year period has this contract been audited. Without a competitive bidding process and regular audits, there is no visibility into the actual costs of public defender services and no understanding of whether the County is receiving the best service at the best possible price.

The County has examined the possibility of converting the contracted public defender services into a County agency. The County's decision against conversion was based largely on the use of a comparability or replication model. The model, considered Confidential by the County Administrative Office (CAO), was developed in-house to compare the current contract costs to the costs of using County employees to provide public defender services. The comparability model has not been verified by an independent source.

All parties involved with the primary public defender, e.g., Superior Court personnel, County attorneys, and the CAO, agree that the quality of services rendered by the primary public defender to clients has been satisfactory. In fact, the Grand Jury received unsolicited positive comments on the performance of the incumbent contractor.

While there is general agreement that the contractor's services are satisfactory, the fact remains that for over three decades Santa Cruz County has not subjected the current primary public defender contract to competition or audit. This continued lack of transparency and oversight has led the Grand Jury to recommend the following:

- restructure the current contract from a fixed-price type to a cost element type immediately, or at the latest during the next contract negotiation period with the current contractor
- add a "right to audit" clause to the contract
- audit reports and invoices submitted by the incumbent contractor
- have an independent, outside agency verify the comparability model
- publish the process by which the decision to compete or not to compete is made, through a formal announcement by the County

Definitions

Comparability or replication model: A model developed by the County Administrative Office to compare the current contract against the cost of using County employees to provide public defender services. The County considers this model to be Confidential.

Conflict contract: When the primary public defender cannot represent defendants because of a conflict of interest, the County contracts with another private law firm to handle the cases.

Cost element contract: A contract that is structured to state the individual elements that comprise the bottom line cost. These elements include direct and indirect labor, materials and supplies, travel, and any other discrete costs which accumulate into the total final price. All cost elements are subject to audit. This is a standard contractual arrangement for service contracts.

Evergreen contract: A contract that is automatically renewed in its entirety after a predetermined period. The contract continues unless either party gives notice for termination. Evergreens often are used for long term agreements such as memberships or maintenance contracts.

Fiscal year (FY): A twelve month period for which an organization plans the use of its funds. For Santa Cruz County, the fiscal year is July 1 – June 30.

Fourth party services: A law firm appointed by the Court to represent defendants when a conflict of interest exists with all of the other contracted public defender firms.

The Lanterman-Petris-Short Act (LPS): This act is associated with a person's involuntary civil commitment to a mental health institution in the State of California.

Request for proposal (RFP): An invitation for providers of a product or service to bid on the right to supply that product or service to the individual or entity that issued the RFP.

Background

In 1963, the United States Supreme Court ruled that state courts are required under the Sixth Amendment of the Constitution of the United States to provide effective legal representation to those persons who do not possess the financial means to hire an attorney in criminal cases, juvenile delinquency proceedings, mental health commitments, and quasi-criminal (e.g., contempt of court) cases.

California counties use one of three methods to provide this legal representation:

1. a public defender's office as part of the local government, staffed by attorneys who are County employees,
2. private attorneys who serve as public defenders under contract with the local government, or
3. private attorneys who are appointed by the court on a rotating basis to serve as public defenders.

Santa Cruz County has chosen the second option, to contract with private law firms for its public defender services. This primary public defender contract has been with the same law firm from 1975 to the present. Although technically it is not an “evergreen” contract, the County has not issued a request for proposal since 1975. For the first ten years, the contract was renewed annually. Since 1985 the contract has been renewed on a multi-year basis with a series of negotiated extensions.

Per the current contract, the primary public defender must provide quarterly reports to the County Auditor-Controller and County Administrative Office. These quarterly reports include information regarding types of cases and how many there are in each of the following categories:

- felony jury trials
- adult misdemeanor cases
- adult felony cases
- adult probation violations
- juvenile criminal cases
- LPS cases
- paternity cases
- conflict of interest cases declared that arise solely from the contractor’s private criminal practice or other assigned cases
- other cases

The contractor also must provide other reports to the Board of Supervisors as may be requested from time to time by the CAO. The contractor annually reports to the CAO the frequency and cost of other services in representing parties including witness fees and fees for scientific investigations and other services. The County reimburses the contractor for these charges. Under the contract provisions the primary public defender firm must maintain a minimum staffing of the full time equivalent of 19 attorneys, 6 investigators, and 2 paralegals. The current annual workload of the primary public defender is about 10,500 cases (2,600 felonies; 6,300 misdemeanors; 900 juvenile cases; and 700 miscellaneous cases). The primary public defender may handle private criminal cases except those cases where there would be a conflict with a previous assignment arising out of the contract.

The above information concerning reimbursed fees and caseload cannot be verified as no audit provision is included in the current contract.

The latest contract was renegotiated effective July 1, 2009 and extends through June 30, 2014. Contract costs include a direct charge for services; this charge for FY 2009/10 is \$5,254,738. This amount is scheduled to increase annually, and the final year of the current contract (FY 2013/14) it will be \$6,390,009. While the yearly increases appear modest (see *Schedule of Payments* below), there are two points to consider:

1. The contracted amount for FY 2013/14 represents about a 21 percent increase over the charges for FY 2009/10.
2. While the amounts paid by the County to the primary public defender contractor increase from year to year, at the same time, due to the economic crisis, the County

District Attorney's Office may suffer budget cuts. In fact, for FY 2009/10 this budget cut was over 4 percent. It is true that the primary public defender has agreed to the same fee for 2009/10 as for 2008/09, in exchange for a contract extension.

Schedule of Payments for Primary Public Defender Contract

Fiscal Year	Annual Amount	Percent Change
2005/06	\$4,524,237	
2006/07	\$4,803,487	+6.17
2007/08	\$4,940,580	+2.85
2008/09	\$5,254,738	+6.36
2009/10	\$5,254,738	0.0
2010/11	\$5,454,738	+3.81
2011/12	\$5,729,738	+5.04
2012/13	\$6,031,106	+5.26
2013/14	\$6,390,009	+5.95

In addition to the contract cost for services, there are a variety of other expenses associated with the primary public defender contract:

- rent, janitorial services, and utilities for the primary public defender's offices in Watsonville
- reimbursement to the contractor for the costs associated with court transcripts; medical, psychological, and psychiatric experts; interpreters; witness fees; and other such services as may be required
- the actual cost of the contractor's professional errors and omissions insurance
- some fees associated with the contractor's employee insurance

Besides all these stated fees for the primary contractor, additional charges are incurred for conflict contractors, fourth party services, other professional services, and miscellaneous expenses, bringing the total budget for public defender services in FY 2009/10 to \$8,416,825.

The 1991/92 and 1994/95 Santa Cruz County Grand Juries investigated the primary public defender's contract arrangements. Among the Grand Juries' recommendations were the following:

- all County contracts should contain provisions for audit
- an outside firm should be hired to study the feasibility of establishing an in-house Public Defender's Office
- the CAO should request the review and concurrence with the [comparability] model's assumptions and numbers from both the Auditor-Controller's Office and the District Attorney's Office before presentation to the Board of Supervisors

None of these recommendations were implemented.

The 2009/10 Grand Jury was prompted, by the continued lack of transparency and oversight, to research the procedures used in retaining the contract with the primary public defender. The current arrangement might be the best for the citizens of Santa Cruz County, but because there

has been no competition for or audit of this contract for many years, it only can be assumed that this is the best and most cost-efficient means for providing public defender services.

Scope

The Grand Jury's goal was to learn how the primary public defender contract was awarded and continues to be extended without competition or audit.

The investigation included interviews with personnel of County agencies, public defender contractors, and individuals in the Superior Courts. The Grand Jury also reviewed a variety of documents including the comparability model, contracts, the primary public defender's quarterly reports, and detailed lists of County expenditures for all public defenders' costs.

Findings

- F1.** The current contract for public defender services is a fixed-price multi-year instrument. There is no visibility (transparency) into the breakdown of costs associated with this effort. The CAO negotiates extensions to this contract periodically without reference to the separate cost elements which make up the bottom line price.

Response: Santa Cruz County Administrator Office and Board of Supervisors – PARTIALLY AGREE

The current contract for public defender services is a fixed price multi-year instrument. The current contract is scheduled to expire as of June 30, 2015. The County Administrative Office has in the past negotiated extensions to this contract prior to and in accordance with expiration dates, and has negotiated reductions in the mid-term when the County's fiscal constraints have required such renegotiation. The County has negotiated extensions to the contract in exchange for concessions from the amounts previously negotiated.

Fixed price contracts are used throughout the County including in Public Works where large contracts do not include line item details on costs.

- F2.** The primary Public Defender's contract has never been audited by the County Auditor-Controller's Office or any independent, outside auditor. This finding is similar to a finding of the 1991-1992 Grand Jury, which recommended that provisions for audit be included in all County contracts. The County's response was, "*The County's policy regarding the inclusion of an audit provision within a contract is determined by the specific requirements of the contract. Certain contracts, particularly for professional services, including legal services, generally do not contain a provision for audit.*"

Response: Santa Cruz County Auditor-Controller – AGREE

To our knowledge such an audit has not been performed.

- F3.** The County, as directed by The Board of Supervisors, has not initiated a request for proposal for the primary public defender contract due in part to the following reasons:
- belief that public competition for this contract would be costly and complex

- assumption that there is no other local law firm of sufficient size that could manage the current work load
- fact that the Board of Supervisors and judges are satisfied with the current law firm and therefore there is no reason to change contractors

Response: Santa Cruz County Administrator Office and Board of Supervisors – PARTIALLY AGREE

The County has identified the following reasons for not recently initiating a request for proposals for the primary public defender contract:

- *the complexity and costs associated with transitioning the magnitude of the current public defender case load (between approximately 9,500 to 10,500 adult and juvenile appointments per year),*
- *the absence of another local firm with sufficient staffing resources and management experience to provide comparable services,*
- *the indications by the Board of Supervisors and the Superior Court that the current contractor meets the need of their clients and the needs of the Court.*
- *the determination that costs for the current primary public defender contract are competitive with the costs the County would pay for a Public Defender Office operated as a County department, staffed with public employees and,*
- *the importance that the current Public Defender plays in the local Criminal Justice System as an advocate for the defense of indigent clients and as an advocate for an efficiently run criminal justice system.*

- F4. The County's decision not to convert from a contracted public defender to a County department is based largely on the use of a comparability or replication model and the costs associated with conversion. This model was developed in-house by the CAO and is considered to be Confidential.

Response: Santa Cruz County Administrator Office and Board of Supervisors – DISAGREE

The County's decision is based on all of the issues identified in the response to Finding 3 above.

- F5. In 1998, the County created a Public Defender Transition Task Force to consider future provisions for public defender services if the primary contractor were no longer available. The Task Force's efforts included estimating the costs of contracting with other law firms and the costs of providing public defender services through an in-house department staffed by attorneys who would be County employees. Since this 1998 exercise and a 2006 update of the comparability model, there have been no recent evaluations of possible alternatives for providing public defender services.

Response: Santa Cruz County Administrator Office and Board of Supervisors – PARTIALLY AGREE

The County created a Public Defender Transition Task Force in light of the fact that as of July 1998 there would be three years remaining on the agreement with the Biggam law firm. The purpose of the Task Force, as articulated in a preliminary agenda for the meeting on June 19, 1998, was to continue the County's long tradition of cooperation between the

Board of Supervisors and the Court in the delivery of public defender services, and to develop a plan for Public Defender Services, to address what happens when the Biggam Law firm is no longer available to provide public defender services, including a determination of what the form of the next provider would be, i.e., a County Department or another contractor, and when the transition would begin and end.

During the period from June 1998 through December 1998 the Task Force considered a number of issues, including: how public defender services are provided in other counties, the County's legal authority for multi-year agreements, inter-county cost comparisons for Public Defender services and the distribution of cost and caseloads between the main firm and the conflicts firms, the history of collection of payments for public defender services assessed by the Courts, the cost per case for the District Attorney's Office, and the estimated cost of the main public defender function if it were operated as a county department. Among other costs, the estimate included costs for a Public Defender, attorneys, administrative staff, investigators and support staff.

While not recalculated each year, in the event that the County renegotiates the economic value of the contract mid-term, the various elements of the comparability model are tested.

- F6.** All parties involved with the primary public defender, e.g., the Superior Courts, the County Board of Supervisors, County attorneys, and the CAO, are satisfied with the services provided by the contractor. Several persons interviewed by the Grand Jury volunteered favorable comments about the quality of the primary public defender's services.

No Response Required

Conclusions

- C1.** During the last 35 years, the same law firm has been contracted to be the primary public defender. Because there has been no competition for, or audit of, this contract during this time period, the citizens of Santa Cruz County only can assume that this is the best means of providing public defender services. The County needs to make public not just their reasoning but also their factual findings as to why the County continues to contract public defender services with the same firm.
- C2.** There is more latitude with service contracts than just the bottom line. The County's argument that the contract is too large for another local firm cannot be known without an RFP; another firm may be able to satisfy the terms of the contract. The County's arguments that there are costs involved in the RFP process and that everyone appears to be satisfied with the current contractor seem to be true. However, with the RFP process the County might be able to award the contract to the current contractor at a lower cost to the County.
- C3.** Without an analysis (audit) of the cost elements which determine the bottom line price of the public defender services contract, it is impossible to determine if the price is fair and reasonable for the effort being performed, especially since this contract is extended periodically without competition. The County's response to a prior Grand Jury

recommendation that a provision for audit be included in all County contracts was vague and does not address the need for audit provisions.

- C4. The primary public defender contract and any extensions need to be audited to determine the validity of the periodic reports from the contractor and the accuracy of the information provided in their proposals to change or extend the contract.
- C5. The assumptions of the 1998 Public Defender Transition Task Force now are almost twelve years old and may be out of date. Additionally, the comparability model may be an accurate tool to use to evaluate the use of a contracted primary public defender versus an in-house office staffed by County employees, but another party or organization outside of the CAO should update this model and validate its assumptions and accuracy.

Recommendations

- R1. The Board of Supervisors should direct the County Administrative Office to restructure the current contract from a fixed-price type to a cost element type immediately or, at a minimum, during the next negotiation with the incumbent contractor.

Response: Santa Cruz County Administrator Office and Board of Supervisors – WILL NOT BE IMPLEMENTED

The County Administrative Office cannot restructure the current contract immediately because the term of the contract has not expired. The County will include discussion of different methods of cost structuring in future negotiations.

- R2. The County Administrative Office should add a ‘right to audit’ clause to the primary public defender’s contract.

Response: Santa Cruz County Administrator Office and Board of Supervisors – HAS NOT BEEN IMPLEMENTED BUT MAY BE IMPLEMENTED IN THE FUTURE

The County Administrative Office cannot unilaterally amend the existing contract. The office will discuss this recommendation with the contractor if renegotiations occur.

- R3. The County Auditor-Controller’s Office should conduct annual audits of the public defender contracts as part of the ongoing County Audit Program.

Response: Santa Cruz County Auditor-Controller – WILL NOT BE IMPLEMENTED WITHIN NEXT 6 MONTHS

The County performs various audits each year included some contract compliance audits. Due to staffing limitations and the wide range of audits to be performed, it is unusual that the same contract compliance audit would be performed annually unless the County is required to do so by either contract terms or legal requirements.

The current primary Public Defender's contract does not presently have a clause that allows the Auditor-Controller to perform a contract compliance audit of it. Any request to perform an audit would need to be negotiated by the County Administrative office with the Public Defender firm. Under the current terms of the contract, it would be at the Public Defender's discretion to allow the audit and to control the scope of the audit. However, the

contract does stipulate that the Public Defender "shall provide other reports to the Board of Supervisors as may be requested from time to time by the County Administrative Office." The Auditor-Controller will work with the County Administrative Office to request various reports supporting a variety of detailed information which will hopefully allow the County to analyze staffing and case loads.

At the time the Public Defender's contract is next modified, we support the contract being brought in compliance with the current County Procedures. The Current County Policy and Procedures Manual, Section 300.A, which covers contracts and agreements, requires that contracts contain an audit provision allowing for audit and retention of records for a period of not less than 5 years or until audited whichever occurs first. The originating department is responsible for ensuring that these provisions are included in the agreement. We would at that time place the contract compliance audit on our annual audit plan.

- R4.** The County Administrative Office, or other appropriate agencies, should announce publicly if and when the public defender contracts are being competed or extended by negotiation in a manner similar to other contract awards or announcements. In view of the extended period since this contract was put out for bid (1975), such an announcement would indicate that a formal public process is being used by the County to obtain these services.

Response: Santa Cruz County Administrator Office and Board of Supervisors – HAS BEEN IMPLEMENTED

Each year, the Board of Supervisors adopts the Public Defender Budget in a Public Hearing. The County Administrative Officer's Recommended Budget and subsequent documents including the Supplemental Budget and Last Day Budget are made widely available to the public. For the past several years, existing contracts for the conflicts and main firms have only been re-opened by mutual consent solely to make reductions in the compensation schedules based on the County's fiscal constraints. For each year that reductions have been agreed to by the contractors, the negotiations have included a one-year extension. These contracts are considered by the Board of Supervisors either in scheduled Public Hearings during budget considerations, or on publicly noticed Board of Supervisors' Agendas.

- R5.** The County Administrative Office should have the comparability model reviewed and updated by another agency or organization, such as the County Auditor-Controller's Office or an independent auditor, to verify that the model provides a valid basis for the decision to continue to use a contracted public defender.

Response: Santa Cruz County Administrator Office and Board of Supervisors – HAS NOT BEEN IMPLEMENTED BUT MAY BE IMPLEMENTED IN THE FUTURE

Working with County Counsel to assure confidentiality, the County Administrative Office will review the comparability model with the Auditor-Controller for the purpose of verifying that the model provides a valid basis for the comparison of costs between a contracted public defender and providing these services as a County department.

Responses Required

Respondent	Findings	Recommendations	Respond Within/ Respond By
Santa Cruz County Auditor-Controller	F2	R3	90 Days October 1,2010
Santa Cruz County Administrative Office	F1, F3 – F5	R1, R2, R4, R5	90 Days October 1,2010
Santa Cruz County Board of Supervisors	F3	R1	60 Days September 1, 2010

Sources

Documents/Publications

1991/92 Grand Jury Report: Public Defender's Office
 1994/95 Grand Jury Report: A Study of the Cost of Public Defender Services for Indigents
 1998 Public Defender Transition Task Force Agendas and Memos
 2006 Comparability Model
 2008/09 Expenditure Actual Transactions Report for Professional and Special Services
 Budget Unit Financing Uses Detail – Public Defender FY 2008/09
 Conflict attorney contracts
 Primary public defender contract (current)
 Primary public defender contractor's quarterly reports to the CAO
 Santa Cruz County Budgets for FYs 2005/06 through 2009/10

Interviews

Administrators and Personnel:

County Administrative Office
 County Auditor-Controller's Office
 County District Attorney's Office
 Primary Public Defender Contractor
 Superior Court of California County of Santa Cruz

Site Visits

Superior Court of California County of Santa Cruz

Web Sites

<http://www.buttecounty.net/Department%20Contacts.aspx>
<http://www.co.marin.ca.us/>
<http://www.co.merced.ca.us/>
<http://www.co.santa-cruz.ca.us/>
<http://www.co.shasta.ca.us/html/CAO/budgets.htm>
<http://www.cpda.org/>
<http://www.placer.ca.gov/Departments/Auditor/Budget.aspx>
<http://www.slocounty.ca.gov/site4.aspx>