

**REPORT TO THE PUBLIC DEFENSE SERVICES  
COMMISSION**

**Recommendations to Improve  
Oregon's Public Defense Contracting System**

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## **INTRODUCTION**

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The Public Defense Services Commission (PDSC) assumes responsibility for the contracting of public defense services effective July 1, 2003. During May and June 2003, Peter Ozanne, the executive director of the Office of Public Defense Services (OPDS); John Potter, a PDSC member; and Geoff Guilfoy, a management consultant from Aldrich Kilbride & Tatone LLC held a series of meetings throughout the state with public defense contractors to discuss how the present contracting system is working and what changes PDSC should make to the contracting process to improve service delivery and the quality of legal representation.

We held nine days of meetings with contractors from Multnomah, Clackamas, Marion, Deschutes, Crook, Jefferson, Lane, Douglas, Wasco, Sherman, Gilliam, Wheeler, Umatilla, Morrow, Jackson, Josephine, Coos, Lake and Klamath counties in locations across the state. Over 60 attorneys and staff representing nonprofit public defenders, consortia, law firms and hourly paid attorneys were personally interviewed in separate meetings. We found the contractors to be very open and candid in their opinions and extremely helpful in proposing solutions to improve contract negotiations, monitoring, service delivery and overall system quality.

This report to PDSC outlines concerns with the present contracting system and recommends several improvements we believe will assist PDSC in carrying out its statutory mission to administer “a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.” (ORS 151.216)<sup>1</sup>

## **CONTRACTORS’ CONCERNS**

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Numerous local and national studies have confirmed that Oregon’s public defense system ranks among the very best in the country. While the public defense contractors we interviewed expressed concerns and frustrations about the state’s contracting process, particularly due to events over the past few months, virtually all of them recognized the high quality of Oregon’s public defense system, as well as the skill, dedication and commitment of the men and women at the State Court Administrator’s Indigent Defense Services Division (IDSD) who have contributed to that quality with very limited administrative resources and support.

During our interviews, we asked contractors to speak candidly about their views of the strengths and weaknesses of the state’s administration of Oregon’s public defense contracting process. We conducted these interviews in the midst of a crisis in contractor operations and finances caused by the Legislature’s 2002 special session budget cuts to the Indigent Defense Account. Therefore, we urged contractors to set aside their feelings stemming from recent experiences trying to cope with this crisis in order to give us longer-term views based on the totality of their experiences with the contracting process. While we believe most contractors we interviewed made every effort to comply with this request, feelings about the state budget crisis and its consequences may have colored some of the observations we report here. Finally, we assured contractors that we would not identify their individual comments, but would instead develop a series of themes and recommendations for PDSC to consider as it works to improve the overall system for providing public defense services while preserving the current strengths of that system.

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<sup>1</sup> This report does not include the perspectives or input of the state’s contracting staff at the Contract and Business Services Division (CBS) of OPDS (formerly IDSD). We believe that this input is critical to the validity and effectiveness of any process that PDSC may employ to address the observations and recommendations in this report. Therefore, we recommend that OPDS establish a method of communicating this critical information to the Commission during its deliberations concerning this report.

This report presents those themes and recommendations in four categories:

1. Working relationships;
2. System issues;
3. Financial issues;
4. Quality issues.

## Working Relationships

The past 15-month state budget crisis has spawned an increasing level of stress and anxiety throughout Oregon's public defense contractor community. The crisis reached its peak when it became apparent that IDSD would have to make significant financial reductions to contracts in order to rebalance the state's public defense budget in the aftermath of the state's five special sessions during 2002.

From the contractors' perspective, the state's contracting process during the budget crisis was filled with uncertainty and poor communication with IDSD. From IDSD's perspective, any communication lapses were due to lack of information, the press of the special legislative sessions, and the sheer volume of work involved in renegotiating and revising contracts. What IDSD perceived as the right thing to do (e.g., not giving out incorrect information or information that might change), contractors frequently perceived as manipulation or an unwillingness to communicate openly.

The many reported perceptions of contractors regarding their working relationships with the state, whether accurate or mistaken, and their suggestions for improvement can be summarized as follows:

- ▶ A substantial number of contractors, especially in rural areas and smaller counties and among adept negotiators, report positive and constructive relationships with IDSD's management and contract analysts over the years, including responsiveness, recognition of their needs and a willingness to address their most critical problems.
- ▶ A few IDSD staff over the years have been difficult to work with and some contractors have worried about reprisals if they complained about their treatment or resulting circumstances.
- ▶ OPDS's executive director needs to get out to all counties, establish relationships with contractors, court administrators, presiding judges, district attorneys, legislators and other criminal justice stakeholders, and be seen by them as a "problem solver."
- ▶ IDSD is frequently perceived as insensitive to the business needs of contractors, including their need for time and funding to wind down their operations in the event of budget cuts, caseload reductions or contract terminations.
- ▶ The State of Oregon is generally not seen as holding itself accountable for the recent drastic cuts in public defense budgets. As a result, contractors have had to assume the financial burdens and professional liabilities associated with the woefully inadequate resources provided by the state.
- ▶ Most contractors feel that their contracts are not really negotiated or renegotiated. Contracts are usually presented to them on a "take it or leave it" basis.

- ▶ Staggered contract cycles, apparently adopted to facilitate IDSD’s management of contracts in certain locales and to ensure some level of continuing service during contract negotiations, sometimes produce seemingly irrational inconsistencies within counties or among similarly situated contractors.
- ▶ The state’s public defense contracting process lacks transparency and consistency. IDSD does not appear to most contractors to be driven by explicit or consistent policies in negotiating contracts. Instead, contract terms are apparently subject to the personal discretion of IDSD management or more senior contract analysts.
- ▶ In many cases, contractors do not believe that their assigned analyst has the authority to make final contract decisions. This leads those contractors to question the utility of working with their analysts, as opposed to the “real decision makers” within IDSD’s management.
- ▶ IDSD often uses impersonal email and faxes to send bad news, rather than personally talking to contractors face-to-face or over the telephone. With the exception of annual conferences, contractors rarely meet with their contract analysts or other representatives of IDSD. Some have never personally met their analysts.
- ▶ A few contractors believe IDSD has tried to break up their organizations by directly contacting their attorneys to encourage them to form consortia and contract separately with the state.
- ▶ Many contractors currently have a low level of trust and confidence in the state’s administration of the public defense contracting system. These contractors note that IDSD has failed to take an open and collaborative approach to planning and contracting in their counties. They want OPDS to treat them like fellow professionals and bring their local defense communities together to develop coherent delivery systems in partnership with the state. IDSD is perceived by some contractors as deliberately staggering contract cycles within counties in order to “divide and conquer” contractors, rather than to plan and collaborate together in the development of comprehensive and coherent local public defense systems.

## System Issues

Contractors identified a number of inconsistencies, ambiguities and delays in the state’s current contracting system. While some of these problems were especially evident during this past biennium, many are apparently longstanding. Here are contractors’ most important observations and suggestions regarding the contracting system:

- ▶ There appears to be no consistent methods or apparent policies for distributing cases among providers in the same area, tracking and fairly compensating contractors for conflicts-of-interest cases, or rebalancing and reallocating caseloads in the event contractors fail to meet or exceed their contract quotas.
- ▶ PDSC needs to establish transparent contracting processes and clear and uniform policies for administering the public defense contracting system.
- ▶ Many counties have a mixed delivery system of nonprofit public defenders, consortia, law firms and hourly paid attorneys. The state has failed to clearly define or explicitly prioritize their respective roles in the local defense service delivery systems. The consequences include uncoordinated distributions of cases among providers, under and over assignment of caseloads, and serious cash flow problems for some providers.

- ▶ IDSD's original RFP process involved unnecessary paperwork, which turned out to be irrelevant to contract negotiations and failed to generate competitive bids. Because IDSD generally contracts with the same providers over the years, the RFP process has been modified over time and perhaps could be streamlined even more.
- ▶ The contract negotiation process frequently proceeds too slowly. Contractors often work without a contract for months, and sometimes for as long as a year. While most contractors recognize that IDSD's limited resources may explain some of these delays, they believe that four-year contracts would mitigate this problem, and would also permit them to more easily manage their operations and finances.
- ▶ Contracts within a county or defined region should begin on the same cycle. The current contracting system with staggered contract cycles may facilitate the management of the contract caseloads by IDSD's contract analysts, but it prevents the development of integrated local public defense systems. It also creates management difficulties for contractors, especially when actual caseloads fall short of or exceed caseload projections and contract quotas.
- ▶ There is sometimes little apparent consistency among the terms and rates of contracts in the same area or among similarly situated contractors.
- ▶ Some contractors characterize IDSD's approach to establishing and administering contracts as an employer/employee relationship rather than an independent contractor relationship.
- ▶ IDSD fails to employ state-of-the-art case forecasting methods, like the methods used by the State Economist to forecast prison populations or by some of the larger public defense contractors. Without accurate case forecasts, contractors cannot manage their businesses or handle their caseloads cost-effectively.
- ▶ There are wide variations in the quality and availability of public defense services for juvenile law cases across the state. Some contractors expressed their view that IDSD has failed to adequately take into account the unique nature of these cases and, instead, has tended to impose a criminal law "template" on juvenile law contractors.
- ▶ Contractors in similar circumstances should be using the same form contracts with comparable terms and conditions, including case rates. Differences in case rates are to be expected, but they must be capable of explanation and justification by OPDS.
- ▶ High volume programs like Drug Courts and Early Disposition Programs are difficult for small contractors to administer cost-effectively. These programs require experienced attorneys to be available in court and on call to handle their demands. Nonprofit public defenders are usually better equipped to operate these programs. PDSC should adopt uniform statewide policies regarding the nature and quality of these programs and require all qualified contractors to participate.
- ▶ IDSD appears not to understand or appreciate what it takes to build office infrastructure and, therefore, fails to compensate for it when negotiating or terminating contracts.

- ▶ IDSD sometimes contracts with too many people and organizations. This has created huge problems in some counties due to recent budget reductions and resulting downsizing. PDSC should carefully consider the mix and diversity of contractors in any given location. Private law firms and consortia that are dependent on public defense contracts as their sole source of income, and large, dominant contractors can limit the state's contracting options and flexibility in the course of administering local public defense systems.
- ▶ OPDS needs to develop systematic and reliable processes for identifying conflicts-of-interest and avoiding unnecessary costs (such as double billing the state), which has typically been associated with resolving conflicts. Some local processes for handling conflicts still provide financial incentives for contractors to "churn" conflict cases in order to receive compensation without performing any legal work on cases that must be passed on to other contractors.
- ▶ PDSC apparently assumes that private contractors and consortia have greater flexibility than nonprofit public defenders to absorb the risk of reduced caseloads. This assumption is not correct if these contractors and consortia rely exclusively on work generated by indigent defense contracts. The expertise of individual lawyers and the assurance of continual professional training, internal quality control and "institutionalizing" a defense delivery system may be the most important factors in selecting the type of contractors for a particular locale. However, if private contractors in a county rely exclusively on state public defense contracts, then the Commission should determine whether duplication of contractors' operating and overhead costs could be reduced by consolidating or restructuring that county's public defense delivery system.
- ▶ The state's method of determining end-of-biennium payments severely impacts contractors' cash flow and creates major financial burdens for them. If at all possible, this practice should be abandoned.
- ▶ IDSD has not defined the goals of the state's contracting process. A balance between saving the state money and providing quality legal representation has not been expressly established and consistently enforced.
- ▶ IDSD has done a very good job of administering the state's extraordinary or non-routine expense system. OPDS should standardize processes and forms as it undertakes its additional responsibilities for administering non-routine expenses.

## Financial Issues

There is no question that the state's appropriations for public defense services have historically failed to adequately compensate contractors for the work they do. Significant discrepancies in pay still exist between some public defense attorneys and their counterparts in prosecutors' offices. Nevertheless, the contractors we interviewed recognized that IDSD has done a remarkable job of spreading the limited amount of state funding across the system and ensuring quality statewide public defense services in the process. But they also expressed the following financial concerns and suggestions:

- ▶ PDSC should, within practical and political limits, seek uniformity in contract rates among similar classes of cases, similarly situated contractors, and within the same counties or other defined regions. Differences in rates will exist, but they should have rational bases that can be explained to contractors. For example, differences in rates may be justified by differences in costs of living and practicing in certain locales and staffing levels, or as incentives to handle certain cases or to practice in certain areas of the state.

- ▶ The state’s case valuation process for determining contract rates does not always reflect the actual cost of handling cases. The state’s contract rates sometimes do not reflect the complexity of cases. Discrepancies in rates exist for the same kinds of cases within a county or among similarly situated contractors.
- ▶ IDSD uses the same contracting and pricing methods for juvenile and criminal cases. But the demands of legal representation in juvenile cases are vastly different from criminal cases and, as a result, case rates should be determined differently.
- ▶ IDSD may need to develop a more flexible system for small firms that permits payment as cases are completed, rather than monthly lump sum payments.
- ▶ Contract negotiations focus almost exclusively on the value of cases in projected caseloads. It appears to some contractors that the state neither knows nor cares about what it actually costs to run contractors’ businesses.
- ▶ Investigators may be making more in some cases under an hourly rate payment method than appointed attorneys are making under contract in the same cases.
- ▶ IDSD does not pay contractors for the costs of automation. This is a necessary cost of doing business. It is unreasonable to expect that these costs can be covered under the state’s current contract rates.

## Quality Issues

Most of the contractors we interviewed agreed that, while Oregon’s public defense system ranks high nationally, there are problems with the quality of legal representation in Oregon’s public defense system. Some suggested there are long-term contractors in the state who are not qualified to provide public defense services. Many felt there were too few opportunities for new attorneys to receive basic skill training in criminal defense practice. On the other hand, the contractors gave high marks to the Oregon Criminal Defense Lawyers Association for the quality and availability of its training programs, particularly for experienced practitioners.

Contractors are clearly interested in improving the quality of public defense legal representation in Oregon, and are eager for PDSC to lead the charge. Here are contractors’ most important observations and suggestions regarding the quality of public defense services in Oregon:

- ▶ A peer review process would be an important element in assuring quality legal representation. Whatever quality assurance processes are adopted by PDSC, they should be developed at the “grass roots” level by experienced trial lawyers in order to be accepted as credible and valid by the public defense community. Such grass roots processes represent opportunities for contractors to work in partnership with PDSC and OPDS to accomplish their critical joint mission of ensuring the delivery of quality, cost-efficient legal services.
- ▶ IDSD collects many case-related statistics unrelated to contractor performance and quality. These statistics often measure workloads, but they do not measure quality. PDSC needs to establish quality assurance processes and performance measures as integral components of a system that monitors contractors’ operations.

- ▶ Achieving statewide uniformity in quality is unlikely. PDSC should at least seek uniformity in the quality of legal services within each county of the state. Differential contract rates may be one effective means to attract contractors to rural areas of the state.
- ▶ Attracting competent lawyers (like competent physicians) to rural areas of the state may be PDSC's greatest challenge.
- ▶ The state can improve the quality of public defense services in the state by allocating cases to contractors in a way that ensures a mix of complex and simple cases, along with a significant substantive variety of cases. Specialized caseloads often lead to burnout and incompetence.
- ▶ OPDS needs to develop an in-house performance audit capability.
- ▶ OPDS should systematically survey district attorneys and judges for the purposes of evaluating the quality of legal services provided by contractors and the individual performance of their attorneys. OPDS should also survey clients to determine contracting attorneys' communications skills and responsiveness to their clients' needs.
- ▶ OPDS needs to develop basic skills training programs for new attorneys. Ample training resources exist throughout the public defense community and within OCDLA, which OPDS should draw upon to develop these programs. A basic level of attorney training, particularly practice skills training, should be mandated by PDSC's contracts.
- ▶ Programs like the Clackamas County Consortium's apprenticeship and mentoring programs and the in-house training programs of the Multnomah and Lane County public defenders offices, should be used as models in developing regional and statewide training programs.
- ▶ Attorneys who are not certified to handle particular kinds of cases should not be permitted to handle them. PDSC should adopt a certification process in collaboration with the courts that incorporates objective standards and qualifications, as well as a valid means to verify self-reported experience and expertise of attorneys seeking certification.

## **OUR RECOMMENDATIONS**

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The following recommendations are aimed at (a) improving working relationships between OPDS and contractors, (b) rationalizing and streamlining the contracting system, (c) allocating in a cost-efficient manner what will no doubt always be scarce financial resources and (d) increasing the quality of public defense legal representation. If PDSC adopts some or all of these recommendations, OPDS should prepare a detailed work plan for review, approval and implementation by PDSC, with the goal of implementing as many recommendations as possible during the 2003-05 biennium.

### **Working Relationships**

It is crucial for PDSC and OPDS to strengthen working relationships and increase levels of trust among their contractors. The key to the success of these working relationships is to strike a balance between the necessary "arms length" relationship between OPDS and its contractors for the purposes of ensuring quality legal services, cost-efficient performance and public accountability, on the one hand; and a collegial relationship, on the other hand, that views contractors as (a) fellow professionals who share PDSC's and OPDS's commitment to quality public defense, (b) representatives of the State of Oregon in carrying out the mission of PDSC, (c) long-term providers with ongoing relationships with PDSC and OPDS and (d) essential participants in the cost-efficient administration of Oregon's public defense system. This, of course, assumes that contractors will also recognize the need to treat OPDS staff as fellow professionals committed to quality public defense services.

PDSC and OPDS should take the following steps to promote the quality of their working relationships with contractors:

- ▶ Make the contract negotiation process more open, consistent and transparent.
- ▶ Increase communication with contractors by requiring OPDS's contract analysts and management to spend more time in the field conducting business, rather than relying on email, faxes and telephone conversations from Salem. This change in doing business will promote a greater understanding by OPDS of the issues and challenges contractors face, as well as how they operate their businesses. It will also promote a greater understand by contractors of the issues and challenges that OPDS must face in Salem and across the state.
- ▶ Rotate the location of PDSC's monthly meetings among major regions of the state. This will offer more contractors an opportunity to interact with the Commission and will provide the Commission with a greater understanding of the issues and concerns within specific regions of the state.
- ▶ Clearly define expectations for the contracting process and contractor performance. Policies governing the contracting system and its administrative processes need to be formulated and enacted by the Commission. OPDS's contracting staff and the contractors will then be able to rely on the Commission's policies in determining the limits of the state's proper exercise of its administrative discretion and as practical guidance in the conduct of their contract negotiations and working relationships. This kind of explicit policymaking process by the Commission is a critical element in clarifying and improving working relationships between OPDS contracting staff and contractors.
- ▶ Direct OPDS's executive director to concentrate high-level contract negotiating and decision-making authority with a limited number of senior contracting staff in order to ensure consistency and compliance with PDSC's policies and directives. A team approach to contract negotiations, with one of these senior staff and the contract analyst regularly assigned to a contractor, is another effective method to accomplish these goals.
- ▶ Develop a policy regarding contacts between OPDS and individual attorneys in contractors' offices who express an interest in forming new public defense offices and contracting separately with the state. This scenario confronts OPDS, as it has IDSD, with a dilemma calling for policy guidance from PDSC: (a) respond to such contacts and be seen by current contractors as operating "behind their backs" and "breaking up" their law firms, or (b) cut off opportunities for attorneys to develop professionally and for OPDS to increase the capacity of the state's public defense system? In resolving this dilemma, the Commission may not satisfy all of the interests involved; but it will at least reflect a reasoned and consistent approach to the problem.
- ▶ Reinforce the sense that (1) contractors and OPDS share the same goal (the delivery of high quality and cost-efficient legal services to public defense clients); (2) we are all fellow professionals engaged in a common mission; and (3) OPDS has a stake in the future of the key contractors with whom it has chosen to do business.
- ▶ Develop a "customer satisfaction" survey for contractors to complete each biennium, which provides them with an opportunity to express their concerns about OPDS's administration of the public defense contracting process and to recommend improvements in the process.

## System Issues

The following recommendations focus on ways to strengthen OPDS's approach to the contracting process and the outcomes it produces. These recommendations concentrate on making the process more open and collaborative, with the goal of ensuring a strong and competent contractor community.

- ▶ PDSC's and OPDS's responsibilities to the state's taxpayers require them to take a business-like approach with contractors and a commitment to finding the most cost-efficient approaches to providing quality public defense services. However, it is also in the interest of taxpayers, as well as the state's indigent clients, for PDSC to promote the viability and competence of contractors by recognizing their need for stability and predictability in their operations. During the 2003-05 biennium, OPDS needs to strike this balance and reflect it in the contracting process.
- ▶ Contractors, judges and prosecutors have a wealth of knowledge and expertise relevant to the improvement of Oregon's public defense system. During 2003-05, OPDS's management should conduct on-site visits in regions of the state selected by PDSC to solicit input from these and other public safety stakeholders on the appropriate structure and operation of local public defense systems. The primary purpose of these site visits should be to develop ideas for local "service delivery plans" to submit to PDSC for its consideration.
- ▶ In order to promote both the quality and cost-efficiency of Oregon's public defense services, the current contracting process relies to a large extent on free-market forces involving many and varied contractors across the state. The competition and diversity among contractors that such a market-based approach promotes are important elements in assuring the quality of the state's public defense system. However, market forces without planning and structure can produce misallocations of resources, irrational contracting practices and operational inefficiencies. A principal challenge for PDSC is to strike the right balance between a market-based approach to public defense contracting and a comprehensive planning process, in order to ensure quality, consistency and cost-efficiency in Oregon's public defense system.
- ▶ PDSC should consider developing and adopting a set of "service delivery principles" regarding the structure, components and features of a quality, cost-efficient public defense system. Focusing first on such general principles would enable the Commission to address some controversial issues effectively, without becoming entangled in questions affecting the interests of individual contractors or jurisdictions. These principles should be developed in conjunction with the Commission's response to the Legislature's 2003 directive "to develop performance measures for appellate and trial court public defense services, and to present the draft performance measures to the Joint Legislative Audit Committee for review and approval by no later than July 2004." Such principles could include:
  - Establishing nonprofit public defenders or consortia as primary contractors in particular jurisdictions, depending on local conditions and resources. These contractors should be capable of providing:
    - Continuity and permanence for the purpose of "institutionalizing" local public defense delivery systems; and
    - Leadership, policy direction and training for local defense communities.

- Designating consortia as the preferred back-up structure in jurisdictions with another primary public defense contractor. These consortia would:
    - Handle conflicts and overflow efficiently;
    - Provide access to experienced attorneys who are no longer interested in working in larger law firms or public defender offices;
    - Offer flexibility to handle varying public defense caseloads, particularly in rural areas, due to diverse law practices involving specialties other than public defense; and
    - Provide administrative efficiencies and accountability by reducing the number of contracts and office administrators in the jurisdiction.
  - Designating private law firms and sole practitioners as an additional public defense resource to meet excess demands for public defense services or to deliver specialized defense services that other contractors in a jurisdiction cannot provide.
- ▶ Assuming PDSC adopts a set of service delivery principles, the Commission should then direct OPDS to propose selected regions of the state in which the Commission would consider adopting “service delivery plans.” The Commission would select these regions, based upon the needs and resources of a region and the Commission’s priorities for accomplishing its statutory mission. A statewide plan or “template” should not be applied indiscriminately across the state. Instead, local customs, practices and resources must be taken into account within the framework of PDSC’s service delivery principles. OPDS should discuss these principles and potential local service delivery plans with public safety stakeholders in every region selected by the Commission (probably through Local Public Safety Coordinating Councils and Criminal Justice Advisory Committees, which each county in the state is required by statute to operate). PDSC would then be able to develop relevant and effective service delivery plans that address the varying public defense needs and resources in selected regions of the state. Once the Commission adopts a service delivery plan, contracts in the region would be negotiated in accordance with that plan. This kind of comprehensive approach to planning would also require the Commission to establish a “contracting plan” for 2003-05 and subsequent biennia that establishes (1) its priorities in terms of which regions of the state to address first in the comprehensive planning process (based, for example, on concerns over the quality of available legal services or the size of a region’s caseload) and (2) another, more streamlined process to negotiate and administer contracts within other, lower priority regions of the state.
  - ▶ The foregoing planning process would call for a change in the state’s current contracting cycle so that all contracts in a region would be negotiated on the same cycle in accordance with the PDSC’s service delivery plans. As a result, contracts could be coordinated in conformity with rational and coherent plans and public defense resources could be deployed cost-efficiently to handle projected caseloads.
  - ▶ The terms and conditions of PDSC’s contracts are matters of public record, which should be readily accessible to all of its contractors for review. In general, case rates should be the same for similar contractors handling similar cases. Differences in rates must be rational and justifiable; based, for example, on local conditions, costs of living, types and levels of staffing, case complexity or the Commission’s policy priorities (such as attracting contractors to under-served areas of the state).

- ▶ Contract periods for PDSC's key contractors should be extended to four years, assuming processes are established that ensure the quality of their legal services and the cost-efficiency of their operations.
- ▶ To the extent this change in doing business has not yet been fully implemented, contracts should be more standardized and perhaps tailored to the needs and structure of particular types of contractors (e.g., three form contracts: one for nonprofit public defenders; one for consortia; and one for law firms or sole practitioners). PDSC should establish a representative work group of contractors and OPDS contracting staff to review and propose revisions to the state's current form public defense contracts.
- ▶ Contractors who wind up falling below or exceeding their contract quotas present problems that interfere with the cost-efficient administration of the state's contracting system. Keeping track of a contractor's progress in meeting its quotas, and periodically modifying the contract, if necessary, may be the most important responsibility of OPDS's contract analysts. OPDS should consider concentrating this responsibility among a few of its most experienced analysts. OPDS must continue to closely monitor this process.
- ▶ Specialized contractor caseloads should be kept to a minimum, since most contractors depend on a wide range or "mix" of cases to operate cost-efficiently. When specialized caseloads are developed, most notably for programs like EDP or Drug Courts, PDSC should develop policies and standards governing the roles and responsibilities of defense attorneys engaged in these programs. Many, if not most, specialized programs should be operated by nonprofit public defender offices or larger consortia.
- ▶ OPDS should utilize state-of-the-art caseload forecasting methods and technologies, similar to the ones used by the State Economist to forecast prison populations or by larger public defense contractors to manage their operations. While past experience combined with anecdotal assessments of policy changes and crime trends are useful, the state's current public defense forecasting methods may present a risk of inaccurate caseload projections, unrealistic contract quotas and severe financial management problems.
- ▶ OPDS should streamline contracting processes and expedite contract negotiations, with the goal that no contractor should be operating without a signed contract. This goal should be one of OPDS's key performance benchmarks.

## Financial Issues

Like many, if not most, of the recommendations in this report, the degree to which PDSC can implement the following recommendations will depend on the sufficiency of its 2003-05 budget. Along with measurable performance standards and management controls to ensure quality and cost-efficient performance, OPDS must establish a manageable number of contracts, with fair and realistic rates. The Commission should consider taking the following steps to improve the financial management of Oregon's public defense contracts:

- ▶ Develop a uniform contract rate structure which, to the maximum extent possible, compensates contractors for actual work performed and establishes clear and rational bases for differences in contract rates.

- ▶ Direct OPDS to factor into PDSC’s contract rate structure for full-time contractors the reasonable costs of purchasing and replacing technology and office equipment, which are essential components in cost-efficient public defense operations.
- ▶ Authorize and, if possible, fund key contractors to establish adequate cash reserves.
- ▶ Direct OPDS to consider the establishment of an internal audit unit in order to ensure greater uniformity and reliability in monitoring contractor performance and relieve OPDS’s contract analysts of the burden of verifying the accuracy of contractors’ case-counting methods and reports. This unit would systematically conduct on-site contractor audits and train contractor staff.
- ▶ Reexamine prevailing methods and processes for identifying, resolving and compensating contractors for conflicts-of-interest cases. PDSC should also consider appointing a working group of contractors, OPDS staff and other criminal justice stakeholders to propose new or revised methods and processes for handling conflicts.
- ▶ Inform the boards of directors of nonprofit public defenders and consortia of their responsibilities and liabilities for the business operations and practices of their offices and offer training opportunities to board members.
- ▶ Require key consortia to have boards of directors with a majority of independent members.
- ▶ Designate boards of directors as the parties authorized to contract with PDSC.
- ▶ Provide for PDSC’s formal input into the office and financial management of contractors through such means as approval of boards of directors, appointment of one or more board members, and participation in the selection of directors of nonprofit public defenders and consortia.
- ▶ Eliminate the present end-of-biennium process for paying contractors as unnecessarily disruptive to their financial operations.
- ▶ Require contractors to comply with prevailing financial management and accounting standards and practices, and to acquire basic financial management expertise through training and outside professional services. Mandate these standards and safeguards in PDSC’s contracts.

## Quality Issues

In addition to being a worthy enterprise in and of itself, advancing the goal of quality public defense legal services in Oregon satisfies PDSC’s statutory mandate to “ensure the provision of public defense services in the most cost-efficient manner . . . .” (ORS 151.216) Any experienced lawyer, including any prosecutor, would confirm that cases can be litigated and resolved most efficiently if opposing counsel is competent and experienced. Furthermore, poorly handled cases create serious inefficiencies requiring additional appeals and retrials to remedy errors and omissions caused by an inadequate defense.

PDSC can substantially improve the quality of Oregon's public defense delivery system and the legal services it provides by leveraging the expertise and resources of current contractors. The Commission can also advance this goal by establishing internal processes within OPDS to hold contractors, their attorneys and their boards of directors accountable for the quality of the services they provide. The following recommendations represent the first steps in that direction:

- ▶ The contracts of selected public defense contractors should include a requirement and funding to establish and administer training programs on a regional basis, which are designed to develop skills in public defense practice, financial operations and law office management.
- ▶ In collaboration with contractors across the state, PDSC should incorporate performance measures in its contracts that promote objective determinations of the quality and cost-efficiency of the legal and administrative services performed by contractors.
- ▶ PDSC should consider directing OPDS to develop plans for a public defense "training academy" similar to the Department of Justice's District Attorney Academy, along with a request for the necessary funding for its operation during the 2005-07 biennium.
- ▶ OPDS should consider hiring at least one experienced trial lawyer in a new Quality Assurance or Audit Unit to (a) perform systematic quality assurance audits in collaboration with selected contractors, (b) coordinate the development and administration of regional skills training programs, (c) develop plans for a new training academy, (d) establish a "360 Degree" performance evaluation system for contractors, which includes systematic surveys of judges, prosecutors, clients and defense attorneys regarding the quality of contractors' legal services and performance of their attorneys (e) recruit and coordinate qualified contractors to develop valid and reliable quality assurance processes (f) coordinate efforts to address conflicts-of-interest cases in a more cost-efficient manner and (g) staff a work group of contractors and OPDS contracting staff to propose revisions to the state's current public defense form contracts. OPDS's quality assurance process should include volunteer contractors to perform peer reviews and performance and management audits, as well as OPDS's appellate attorneys to provide additional feedback on the quality of public defense services. OPDS's Quality Assurance or Audit Unit could also serve as a "help desk" to field calls for advice and assistance.
- ▶ OPDS should consider contracting with one or more highly skilled and experienced Oregon lawyers to develop quality assurance standards for OPDS contracts and a quality assurance process and audit system for OPDS, in collaboration with qualified contractors across the state.
- ▶ OPDS is currently establishing a merit-based employee performance evaluation system, including annual work plans developed by every OPDS employee—from secretaries to the executive director—and annual reviews of those plans and performance evaluations by each employee's supervisor. In developing this system, OPDS is drawing upon the experience and expertise of public defense contractors across the state with such systems already in place. Once OPDS has developed its own employee performance system, PDSC should require every public defense contractor in the state to adopt and administer such a system as a condition of contracting with the Commission.

## **CONCLUSION**

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This report presents PDSC with an ambitious agenda for improving Oregon's public defense contracting system. Many of its recommendations will require significant involvement by PDSC, OPDS and the state's entire public defense community. However, as PDSC begins its first year as a fully integrated public defense agency, the recommendations in this report provide the Commission with an opportunity to demonstrate to the Oregon legislature, the public and the public defense community its clear commitment to improving the state's system of providing quality and cost-efficient legal services to people who cannot afford those services.