

**SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

877



FROM: Executive Office

SUBMITTAL DATE:
June 7, 2011

SUBJECT: Response to the Grand Jury Report: Riverside County Indigent Defense Contract

RECOMMENDED MOTION: That the Board of Supervisors:

- 1) Approve with or without modifications, the attached response to the Grand Jury's recommendations regarding the Riverside County Indigent Defense Contract.
- 2) Direct the Clerk of the Board to immediately forward the Board's finalized response to the Grand Jury, to the Presiding Judge, and the County Clerk-Recorder (for mandatory filing with the State).

BACKGROUND: On April 26, 2011, the Board directed staff to prepare a draft of the Board's response to the Grand Jury's report regarding the Riverside County Indigent Defense Contract.

Section 933 (c) of the Penal Code requires that the Board of Supervisors comment on the Grand Jury's recommendations pertaining to the matters under the control of the Board, and that a response be provided to the Presiding Judge of the Superior Court within 90 days.

90dayresponsef1indigentdefense06.11

Departmental Concurrence

FINANCIAL DATA

Current F.Y. Total Cost: \$ N/A
 Current F.Y. Net County Cost: \$
 Annual Net County Cost: \$

In Current Year Budget:
 Budget Adjustment:
 For Fiscal Year:

SOURCE OF FUNDS:

Positions To Be Deleted Per A-30	<input type="checkbox"/>
Requires 4/5 Vote	<input type="checkbox"/>

C.E.O. RECOMMENDATION: APPROVE

County Executive Office Signature

BY:
Jay E. Orr

Policy
 Consent
 Policy
 Consent

Dept't Recomm.:
 Per Exec. Ofc.:

Prev. Agn. Ref.: 3.7 - 04/26/11 | District: | Agenda Number:

ATTACHMENTS FILED
WITH THE CLERK OF THE BOARD

3.9

2010-2011 GRAND JURY REPORT

Riverside County Indigent Defense Contract

FINDINGS:

1. In March 2010, rather than consider renewing the existing Indigent Defense contracts, the Board of Supervisors voted to issue a new Request for Proposal (RFP) for Indigent Defense later in the year with more explicit contractual requirements, a response to alleged improprieties regarding the selection of 2009-2010 Indigent Defense contractors.

Additionally, in an effort to ensure that any and all future RFP's and contract processes be more open, transparent and fair, the Board of Supervisors tentatively approved a draft set of amendments to Section 2.48 of the Purchasing Manual entitled B.R.U.T.E., "Bid Review Under Transparent Environment." B.R.U.T.E. consists of nine amendment items listed as "A" through "I". The Purchasing Department was instructed to review this draft and submit alterations to B.R.U.T.E.

The County's current Purchasing Policy manual recognizes two types of bid requests: Requests for Quotations (RFQ's) and RFP's. The latter allows bidders to be contacted by the Purchasing Department after the proposals are submitted and before the final decision is made to allow negotiation of a final bid price even after a bidder has been selected.

B.R.U.T.E. requires that "Regular audits shall be done to ensure the County Contractor is performing all the duties associated with their contract." Current Indigent Defense contracts do not address the type of audits to be conducted (such as financial, physical or operational) once a contract has been approved by the Board of Supervisors.

B.R.U.T.E. states that all proposals should be delivered to the Clerk of the Board and requires the "Public unsealing of bids and read into the record." Testimony revealed that this procedure was added to improve transparency and avoid any appearance of collusion. Investigation further revealed that due to the vast number of County contracts awarded, the public unsealing of bids at Board of Supervisors meetings is not feasible, cost effective or necessary to ensure B.R.U.T.E. is being followed. Further investigation revealed that the Clerk of the Board does not have the space, personnel or resources to record, receive and handle public unsealing of all County bids.

RESPONSE:

Respondent agrees with the finding.

2. In 2010, these Indigent Defense contracts totaled approximately \$10.6 million per year and defined the provisions and requirements for providing Indigent Defense services. The 2010 cost of these attorney services totaled \$9.6 million. The 2010 total annual amount of these trust accounts was approximately \$1.0 million.

An Indigent Defense contract is issued in two parts. The largest dollar part covers the attorney services provided in conflict cases. The other smaller part provides a trust

account for ancillary non-attorney services. There is an existing provision in an Indigent Defense contract that stipulates the County may "audit/inspect files/books and/or financial records at any time." However, investigation has revealed that the Executive Office has been negligent in requesting any audits of the larger contract portion, which provides attorney services.

Indigent Defense contract provisions require that the trust accounts be audited each year by an external accounting firm. Investigation indicates that the trust accounts have only been audited five times in the past nine years. The auditors made many recommendations some of which were not implemented and many of the recommendations were repeated in subsequent audits.

RESPONSE:

Respondent disagrees wholly with the finding.

Executive Office staff assigned to indigent defense reviewed contractors required reports during each contract period. Some reports were validated against court records. As there was no indication of discrepancy no outside management audits were ordered. While it could be advisable to have an outside review of management practices, it is not recommended that the services delivered to indigent defendants be monitored by professional staff with no legal expertise. Moving the contracts to the Law Office of the Public Defender ensures that attorneys will be reviewing work done by attorneys.

Trust account audits were completed as follows:

10/1/02—9/30/03 by Fern Latham
10/1/03—6/30/05 by Fern Latham
7/1/05—6/30/07 by James W. Wiley
7/1/07—12/1/09 by Harvey Rose and Associates
1/1/10—9/30/10 by Harvey Rose and Associates

Staff provided copies of each audit to the Grand Jury. The most recent audit findings note that: "*Under the terms of their contracts, the County of Riverside requires its three indigent service providers to have protocols and controls in place to ensure that County funds spent on specialized and professional services are accounted for properly. While improvements have been made by all three contractors in their protocols and controls since the most recent audit in 2009, opportunities exist for further improvement. . . It should be noted that, although deficiencies were identified, no evidence of fraud or inappropriate use of County funds intended for specialized and professional services were found.*" This finding notes that improvements were made since the prior audit and also that further improvements are needed. Each of the contractors audited submitted proposals to continue providing legal services during the current contract period. Trust account audits were not requested by the proposal review committee.

3. The Riverside County Executive Office has no approved written policies and procedures for processing monthly Indigent Defense payments for legal services or handling monthly payments to their trust accounts. Investigation revealed that prior to April 2010, the Indigent Defense contractors' documentation submitted to the Riverside

County Executive Office was in the form of brief memoranda rather than detailed invoices or activity reports. This demonstrates that validation of contracted services did not occur before payments were processed. Investigation also revealed that as a result of the Riverside County Executive Office becoming aware of this lack of documentation for work performed, the Riverside County Executive Office demanded Indigent Defense contractors submit activity reports before any payments would be issued.

RESPONSE:

Respondent agrees with the finding.

4. Investigation into Indigent Defense reporting revealed that Indigent Defense contractors stated they were unable to provide hours per case to the Riverside County Executive Office. Conversely, as Riverside County is one of nineteen counties in California which houses State prisons, when hearings for prisoners incarcerated in a State facility occur and defense is provided by the local County, Penal Code sections 4750-4755 and 6005 allow for reimbursement to the County that provides these defense services on behalf of the State of California. Evidence also revealed that the FAM-27 form has been submitted by the County to the State for reimbursement and required the County to include the number of hours of Indigent Defense provided.

RESPONSE:

Respondent disagrees partially with the finding.

Attorneys and investigators who provided defense services to State prison inmates accused of a crime while incarcerated always submitted hours to the Executive Office since documentation of hours is required for reimbursement. In April 2010 when the Executive Office changed the documentation required for contractors to submit invoices for payment it was determined that requesting hours per case per attorney would be included with the next Request for Proposal package. EOARC-019 included as Exhibit C the monthly reporting form for each attorney. See attachment A.

5. Examination into the selection processes for the Indigent Defense Contracts revealed that the methodology used in the 2009 RFP relied on seven technical evaluation categories: five of which were rated with varying subjective levels, and two categories were evaluated as "Pass or Fail." Five evaluators were selected to provide technical evaluations, only one of which had any defense experience.

The significant fault of this 2009 evaluation system was found in the subjective category entitled "Cost to the County", which had a weight of 40%. Further examination revealed that these evaluators used a range in their ratings from one to five, five being the highest. Two qualified bidders were only \$100 apart on the final bid of \$6.9 million, a difference of only 0.00144%, although their weighted evaluations were significantly farther apart. This demonstrated the weakness of the subjective evaluation process. The subjective ratings based on "Cost to County" were very far apart although the final cost bids were relatively equal. Since the weight of this category was 40% of the decision making process, it showed the broad range of assigned ratings had influenced the final decision incorrectly.

In March 2010, a steering committee was created to develop a new 2010 RFP based on the B.R.U.T.E. process. Members representing each of the Supervisors, the Riverside County Executive Office, the Public Defender, County Counsel and Purchasing were invited to participate in the construction of a new RFP for Indigent Defense. All members contributed, although one County Supervisor did not send a representative. The final RFP reflected many changes from prior RFP's: there were more Pass/Fail categories and the evaluators' credentials were vastly improved. This latter major change came when three heads of Offices of Public Defenders from other counties were invited to evaluate the submitted proposals. Their years of public defense experience totaled over 80 years. They came from the Sacramento, San Mateo and Sonoma counties for three days to evaluate each technical category in depth and did not examine cost until their technical evaluations were completed.

Based on the final calculations of the weighted categories, a single firm received the highest number of points. This firm had technical scores ranging from 8 to 10. The current Indigent Defense contractors scored lower in these same categories. The results were incorporated into a Form 11 (formal recommendation) and presented to the Board of Supervisors for consideration of approval on December 7, 2010. The recommendation, which followed B.R.U.T.E. guidelines, entailed awarding the entire contract to the highest point recipient of the evaluations. A motion to approve this recommendation was not seconded by the Board of Supervisors and did not go to vote.

The 2010 RFP clearly stated that face-to-face interviews were not a requirement of the evaluation process. Pursuant to sworn testimony the optimal "face-to-face" interview step outlined in the 2010 RFP was deemed unnecessary during the selection process to further ensure transparency. One Board of Supervisors member, who had previously voted in favor of the 2010 RFP procedures, questioned the results of the 2010 RFP process citing the applicants had no face-to-face interviews with the evaluators.

One Board of Supervisors member also made a motion to retain existing Indigent Defense firms, although neither had the highest evaluation scores in the bidding process, thus disregarding the work of the steering committee and Purchasing Department in the selection of Indigent Defense contractors. This motion did not pass. Since one Board of Supervisors member had excused himself from the ongoing Board meeting, the remaining Board of Supervisors agreed to table the vote on the proposal for one week when all five members of the Board would be present. The Board of Supervisors ultimately requested the Purchasing Department negotiate with the three firms to find a satisfactory method to split the contract, again disregarding the transparency process as outlined in B.R.U.T.E.

The result of these actions was that the Board of Supervisors completely circumvented the work of the Steering Committee and other individuals who diligently developed and implemented the approval process for the RFP for the Indigent Defense contract and fully disregarded the intent of B.R.U.T.E. to bring transparency to the process. Non-adherence to the Board of Supervisors' own voted directives in this situation led competitors to negotiate amongst themselves rather than in the open environment as outlined in B.R.U.T.E.

RESPONSE:

Respondent disagrees wholly with the finding.

The 2009 evaluation panel consisted of professionals who all had experience working with law, the courts, indigents and contracts. Although only one was an attorney, all were chosen for their ability to make impartial judgments based upon the responses to the RFP. No questions were raised by any individual or organization when the contract for juvenile defense was awarded to a bidder with more than 15 years experience providing this service in western and southwestern Riverside County juvenile courts.

In March 2010 the Riverside County Executive Office convened a steering committee to prepare an RFP for adult Indigent Defense services. Those invited to participate included the Public Defender, an attorney from County Counsel who had been involved in past indigent defense RFP preparation, contract preparation and who assisted the Executive Office analysts with indigent defense questions; a Purchasing buyer and a representative from Supervisor Jeff Stone's office. During the preparation of the RFP the draft contract language was considerably strengthened including making audits of both the trust accounts and the management of the contract required events and outlining consequences for a failure to report as required. The B.R.U.T.E. policy was reviewed but not given primary consideration since a final draft and recommendations from Purchasing had not been approved by the Board of Supervisors.

Prior to the draft RFP going to the Board of Supervisors for review and approval, each Supervisor's Chief of Staff was contacted and invited to review the RFP and meet with the committee. Three chiefs of staff attended the meeting as did one representative for a vacationing chief of staff. The fifth chief of staff was sent all materials electronically. At the review meeting the group recommended adding a column for reporting hours to the monthly form submitted by each subcontracting attorney.

Following this meeting the Executive Office requested that the Public Defender submit the names of individuals experienced in public defense and who did not work in Riverside County to Purchasing as possible reviewers. The number to be selected as reviewers was left to Purchasing. The three reviewers spent one and one half days reviewing documents submitted.

The recommendation of the evaluation committee was presented on December 7, 2010 as pointed out by the Grand Jury. The report fails to note however that the RFP states in bold type: **The County reserves the right to split or make the award/s that is/are most advantageous to the County.** (EOARC-019 12.0 Evaluation Process, page 16)

The Board of Supervisors determined that while one bidder had the highest scores based upon a written product that individual also had no experience delivering indigent defense services. Further, the two other bidders had extensive experience as contractors, one for more than twenty years, the other for nearly a decade. The Board felt that actual experience was essential and also noted that given the nature of the service being bid individual interviews were advisable.

Purchasing, County Counsel, representatives from the Law Office of the Public Defender and the bidders were asked to meet following the December 14, 2010 Board meeting. The Board gave the group until February 1, 2011 to come to agreement on splitting Western and Southwestern Court regions. The Board made a recommendation for the Eastern region of the County after determining that the contractor would provide indigent defense for the amount offered by the lower bidder.

The Board of Supervisors is ultimately responsible to the residents of Riverside County and hold their positions based on public elections. They are responsible for making decisions to award contracts that are in the best interest of the County of Riverside and have done so with Indigent Defense.

RECOMMENDATIONS:

1. The Board of Supervisors should review and place a finalized version of B.R.U.T.E. on its agenda for final vote as soon as possible. This finalized version should be expanded and refined as follows:
 - a. B.R.U.T.E. should state that responsibility of receipt of all proposals remain with the Purchasing Department and ensure a second witness is available when the proposals are delivered and certified.
 - b. The Purchasing Department should continue handling the administration of the proposal process including providing a certified copy to the Clerk of the Board and posting RFP's online including qualified evaluators. B.R.U.T.E. should identify which contract bids are to be opened at public Board of Supervisors meetings and which may be unsealed in another approved manner and would include public oversight and therefore provide transparency. All RFP's over \$1 million would be placed on the Board of Supervisors agenda for Board of Supervisors approval.
 - c. B.R.U.T.E. should require all Riverside County contracts over \$1 million contain an audit provision and include the following:
 - i. Define specifically what type of audit is to be conducted such as financial, physical or operational to ascertain appropriate deliverables are being made.
 - ii. Further define "regular" audits by such terms as annually or biennially.
 - iii. Define who performs the audit and who pays for the audit.

RESPONSE:

The recommendation requires further analysis.

The Board of Supervisors will have staff analyze the recommendations and will consider the analysis after approval of the final FY 2011/12 budget.

2. The Riverside County Executive Office has a fiscal responsibility to the County taxpayers to request audits, either internally or externally, of one of its largest contracts and verify that the terms of contracts are being adhered to.

The scope of specified audits of entities should include:

- Reliability and integrity of financial and operating information.
- Compliance with policies, procedures and regulations.
- Economical and efficient use of resources.
- Accomplishment of established objectives and goals of contracted service.

In addition to mandatory audits for the larger of the two contract components, the other components should periodically be audited for validation of overall compliance as well. The Auditor-Controller may perform the audits or an external auditor may be appointed to handle the physical and financial audits.

RESPONSE:

The recommendation will not be implemented because it is not warranted or is not reasonable.

On December 7, 2010 as item 3.25, motion 4 the Board of Supervisors approved the shift of Legal Indigent Defense to the Law Office of the Public Defender for administrative oversight and budget responsibility. A copy of this report has been provided to that office.

3. The Riverside County Executive Office should immediately prepare and distribute detailed written policies and procedures for processing payments on all Indigent Defense contracts including the trust account payments. Activity reports must continue to be submitted by Indigent Defense contractors. The Indigent Defense contracts should be amended to provide provisions to withhold monthly payments until required documents have been submitted.

RESPONSE:

The recommendation will not be implemented because it is not warranted or is not reasonable.

On December 7, 2010 as item 3.25, motion 4 the Board of Supervisors approved the shift of Legal Indigent Defense to the Law Office of the Public Defender for administrative oversight and budget responsibility. A copy of this report has been provided to that office. Additionally, Executive Office staff provided many hours of training as well as forms, and files to the Law Office of the Public Defender who has prepared detailed written policies and procedures for payments on all Indigent Defense contracts including trust accounts.

4. Future Indigent Defense contracts should require legal contractors report the number of hours of defense services, track on a regular basis (i.e. monthly, quarterly) and at the conclusion of each case. This is important in establishing benchmarks for tracking appropriateness of legal services, cost relative to contracted services, and a viable audit trail for validating the cost of legal services provided.

RESPONSE:

The recommendation has been implemented.

This recommendation was implemented prior to the Grand Jury report. The reporting form used by all attorneys is Attachment A to this document. Furthermore, contractors must submit individual attorney reports as part of the supporting documentation for monthly invoices. Failure to do so results in no payment until such information is submitted. This is a provision of the contract that is in place and was originally attached to RFP EOARC-019.

5. To restore credibility and integrity to the Board of Supervisors, they should work together with the Purchasing Department to construct a workable RFP process to ensure transparency in future Indigent Defense contracts. Lack of oversight invites potential abuse in the use of County funds.

RESPONSE:

This recommendation has been implemented.

The Board of Supervisors directed the Executive Office to develop the last RFP in cooperation with Purchasing. The process was transparent and resulted in agreements that ensure more oversight of Indigent Defense than ever before. Additionally the Board of Supervisors, in transferring administration of Indigent Defense to the Law Office of the Public Defender ensures that those providing the service will be evaluated by those who also deliver the same types of services.

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