

HB

262

<TARGET><BILL>HB 262</BILL><SUBJECT>HB
262</SUBJECT><COMM>HSTA28</COMM></TARGET>

Nancy Manly

From: Robert Ervine
Sent: Wednesday, February 19, 2014 12:46 PM
To: Nancy Manly
Subject: HB 262

Hi Nancy,

I just wanted to touch base and let you know that Deputy Commissioner Mike Barnhill is planning on testifying. Quinlan Steiner and Rick Allen are planning on being available for questions and can probably offer testimony if necessary. Thanks for all the hard work on this bill and the hard work on the CDVSA bill.

Thanks,
Robert

Robert Ervine
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Alaska State Legislature
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Representative Lindsey Holmes

House Bill 262 Sponsor Statement

An Act exempting the Public Defender Agency and the office of public advocacy from certain provisions of the State Procurement Code; and providing for an effective date.

In response to issues raised by the 2012 audit of the Office of Public Advocacy, HB 262 seeks to provide clarity to the applicability of the Alaska Procurement Code (AS 36.30) to the Office of Public Advocacy and the Public Defender Agency.

OPA/PD provides the important service of defending indigent Alaskans against prosecution by the Department of Law. HB 262 levels the playing field between OPA and PD by providing the same exceptions in the Alaska Procurement Code enjoyed by the Department of Law. Under current statute when securing the services of expert witnesses or contract counsel OPA/PD are required to put out a formal request for procurement; the DOL is exempt from this requirement. This could potentially create a state of disadvantage when OPA/PD is defending the neediest Alaskans against the DOL.

The bill ensures that in no event, would OPA or PD need to seek permission from the DOL regarding procurement of services related to the representation of an indigent defendant in a criminal case. The need to get approval from an opposing party is not in line with best professional practices and could potentially impede in the defense.

Please join me in supporting this simple but important piece of legislation that creates an equal playing field between the OPA/PD and DOL.



Representative Lindsey Holmes

House Bill 262 Sectional Analysis

An Act exempting the Public Defender Agency and the office of public advocacy from certain provisions of the State Procurement Code; and providing for an effective date.

Section 1 of the bill, adding new section to AS 36.30.015, would exempt the Public Defender Agency and the office of public advocacy from the requirement of seeking the attorney general's approval in legal matters if the attorney general is an adverse party.

Section 2 of the bill, amending AS 36.30.3059(a), would provide the Public Defender Agency and the office of public advocacy the same authority for small procurements as currently exists for the Department of Law.

Section 3 of the bill, amending AS 36.30.850(b)(2), would extend to the Public Defender Agency and the office of public advocacy the same exemption from the State Procurement Code for contracts for expert witnesses and conflict legal counsel currently provided to the Department of Law.

Section 4 of the bill, amending AS 36.30.850(b)(31), extends procurement exemption to conflict counsel for Public Defender Agency and the office of public advocacy.

Section 5 confers immediate effective date under AS 01.10.070(c).

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HB 262
Fiscal Note Number: _____
() Publish Date: _____

Identifier: HB262-DOA-OPA-02-14-14
Title: PROCUREMENT EXEMPTION: PDA, OPA
Sponsor: HOLMES
Requester: House State of Affairs

Department: Department of Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015 Appropriation Requested	Included in Governor's FY2015 Request	Out-Year Cost Estimates				
			FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES	FY 2015	FY 2015					
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? **Yes**
If yes, by what date are the regulations to be adopted, amended or repealed? **01/31/15**

Why this fiscal note differs from previous version:

Not applicable, initial version

Prepared By: <u>Richard Allen, Director</u>	Phone: <u>(907)269-3504</u>
Division: <u>Office of Public Advocacy</u>	Date: <u>02/14/2014 05:00 PM</u>
Approved By: <u>Curtis Thayer, Commissioner</u>	Date: <u>02/14/14</u>
Agency: <u>Department of Administration</u>	

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. HB 262

Analysis

HB262, sponsored by Representative Holmes, would amend AS 36.30, the state procurement code, to permit the Office of Public Advocacy (OPA) and the Public Defender Agency (PDA) to contract for legal services on a non-competitive basis when the contract is (a) for less than \$100,000 and, (b) for legal services in matters where the affected agency has either been appointed by a court to represent a person, or in matters where the affected agency has or may have a conflict of interest, or has need to retain a professional (expert) witness.

The OPA and PDA would not have to obtain the prior approval of the Attorney General in cases where the Attorney General is an adverse party.

The bill is meant to allow OPA and the PDA to efficiently contract for legal and professional witness services, under \$100,000 per contract, on a non-competitive basis, while avoiding ethical conflicts posed by the current system, which requires either competitive contracts or the approval of the Attorney General to proceed on a non-competitive basis. The Attorney General is almost always an adverse party to OPA clients. HB262 would ensure separation of the Attorney General's role as an adverse party from the role of approving OPA and PDA legal and professional services contracts.

If enacted into law as presently drafted HB262 would likely reduce the administrative overhead costs associated with procuring legal and professional witness services for OPA and the PDA. OPA is anticipating that the adoption of this legislation will change the regulations and if so, changes will need to be in place six (6) months from the effective date of the bill or by January 2015 whichever is earlier. The Office of Public Advocacy submits a zero fiscal note.

ALASKA STATE LEGISLATURE
LEGISLATIVE BUDGET AND AUDIT COMMITTEE
Division of Legislative Audit



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October 31, 2012

The Honorable Becky Hultberg
Commissioner
Department of Administration
P.O. Box 110200
Juneau, AK 99811-0200

Dear Commissioner Hultberg:

RE: Management Letter No. 1, Department of Administration, Office of Public Advocacy (OPA), Procurement

It is the policy of the Division of Legislative Audit to inform an auditee of any significant findings noted during the course of our audit. We would appreciate receiving a written response from you to help us evaluate the conclusions, findings, and recommendations presented in this letter. Since the audit has not yet been completed, information included in this letter is confidential.

Please clearly state your agreement or disagreement with the recommendations. If you concur with a recommendation, you should indicate the methods used or anticipated to be used for implementing the recommendation. If you do not concur with a recommendation, please explain the reason for your disagreement.

In order to facilitate the completion of our audit, please furnish this division with your written reply within ten working days. A preliminary report, which may or may not contain these findings, will be sent to you later for your comments.

BACKGROUND

State Procurement Code Fiscal Safeguards

The State Procurement Code, promulgated in AS 36.30 and 2 AAC 12, provides the rules and guidance for state agencies to conduct procurement in an open, fair, ethical, and

transparent manner. It is designed to promote and encourage open competition in satisfying the State's needs, providing fair and equitable treatment to involved parties, maximizing the purchasing value of public funds, and providing safeguards for maintaining the state procurement system's quality and integrity.

The State's procurement rules vary depending on the professional service¹ contract amount and can be separated into two categories: large procurements (purchases equal to or greater than \$50,000) and small procurements (purchases less than \$50,000).

Professional services obtained in accordance with large procurement rules may be secured using one of the following processes:

- Competitive sealed proposals (AS 36.30.200);
- Single source procurements (AS 36.30.300);
- Limited competition procurements (AS 36.30.305);
- Innovative procurements (AS 36.30.308); and
- Emergency procurements (AS 36.30.310).

For procurements less than \$50,000, the State Procurement Code requires state agencies to acquire professional services in accordance with small procurement rules using the following processes.

- For procurements less than \$2,500, obtain one quote or informal proposal from a qualified firm or person.
- For procurements totaling \$2,500 to \$5,000, and legal services totaling \$2,500 to \$25,000, use reasonable and adequate procedures and create records that facilitate auditing the purchasing agency.
- For procurements between \$5,000 and \$25,000, contact at least three firms or individuals, either verbally or in writing, for a quote or informal proposal and provide the specifications, the award criteria, and the date and time verbal or written responses are due. Award the contract to the party providing the lowest quote or the most advantageous informal proposal.
- For procurements between \$25,000 and \$50,000, contact, in writing, at least three firms or individuals for a quote or informal proposal, and provide the specifications, the award criteria, and the date and time written responses are due. Award the contract to the party providing the lowest quote or the most advantageous informal proposal. Provide written notice of the award.

¹The State Procurement Code defines *professional services* as:

Professional, technical, or consultant services that are predominantly intellectual in character, result in the production of a report or a completion of a task, and include analysis, evaluation, prediction, planning, or recommendation.

Professional Services Exempt from the State Procurement Code

The State Procurement Code defines specific services that are exempt from the procurement code.² Appendix 1 of the Alaska Administrative Manual (AAM) provides guidance for those services not covered by the procurement code. The guidance states “*expending funds for these items [not covered by the procurement code] should have a rational, reasonable method of selecting the recipients of the expended funds.*”

OPA’s services to children in need of aid (CINA), delinquent minors, and vulnerable adults are exempt from the State Procurement Code. This includes attorneys, *guardians ad litem* (GALs), and court visitors that provide services to these populations. The exemption does not apply to OPA attorneys working on criminal cases, investigators, experts, and transcriptionists.

Types of OPA Professional Services and Procurement Methods

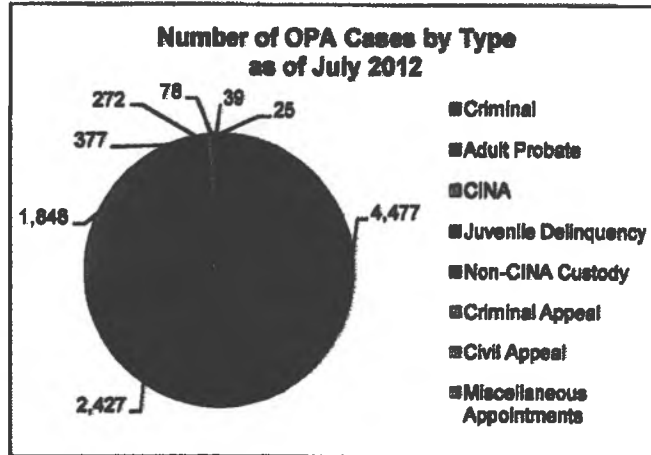
Several types of professional services are provided to OPA each year. The most common services include attorneys, GALs, court visitors, investigators, transcriptionists, and experts. These services accounted for approximately \$42.1 million in expenses for the period FY 06 through FY 12. Of that amount, attorneys comprise the biggest percentage, \$30.74 million (73 percent).

The major functions of OPA contractors are described in the following paragraphs.

Attorneys

OPA represents clients in juvenile delinquency, child, probate, elder fraud, and criminal cases. Except for criminal cases, OPA is the primary agency responsible for such cases. For criminal cases, the court first sends the case to the Public Defender Agency. If there is a conflict of interest for the public defender, the court notifies OPA, and OPA represents the indigent defendant.³ Exhibit 1 documents the number of OPA cases as of July 9, 2012, which provides a

Exhibit 1



²Alaska Statute 36.30.850(b).

³Indigent defendant refers to a person who cannot afford a lawyer.

representative snapshot of OPA's workload. Approximately 50 percent of OPA's workload is related to criminal cases.

Once notified by the court, OPA staff checks its case management system⁴ to identify attorneys without a conflict of interest. If all OPA-employed attorneys have conflicts, OPA staff contacts a private attorney. OPA's system contains a detailed list of private attorneys with or without a contract. OPA staff does not consider whether an attorney has a contract when assigning a case. However, OPA management uses different processes to solicit and secure the services of contract versus non-contract attorneys.

Contract attorneys undergo a formal procurement process in accordance with the State Procurement Code and centralized procedures designed and implemented by the Department of Administration's (DOA) Division of Administrative Services (DAS).

OPA management obtains non-contract attorney services without involving DAS by first placing non-contract attorneys on an availability list. The opportunity to be placed on OPA's attorney list is not publicly noticed, and no contracts are issued for attorneys on the list. According to OPA management, an attorney is placed on the list after sending OPA a letter which includes: a description of relevant experience, three references, a copy of a license to practice law in Alaska, and insurance support. OPA management reviews the information, calls the references, and, if the attorney is qualified, negotiates a rate.

Guardians Ad Litem

GALs are appointed by a court to protect the interests of a minor or incompetent adult in a particular matter. Alaska Statute 13.26.025(d) states, OPA:

Shall provide guardian ad litem services to persons who would suffer financial hardship or become dependent upon a government agency or a private person or agency if the services were not to be provided at state expense.

GALs are appointed in the following types of cases: CINA, domestic violence, juvenile delinquency, private custody, adoption, emancipation, and child victims in adult criminal cases.

Though GALs are exempt from the State Procurement Code, from FY 06 through FY 10, OPA paid most of its GALs using flat rate pre-arranged contracts that were formally procured by DAS. In FY 10, the original contracts expired, and new contracts were awarded to the same contractors without going through a formal procurement process. Additionally,

⁴OPA's case management system, the Practice Manager System, is a database with multiple users and uses. It is used by OPA's Finance Unit to process bills, OPA paralegals to determine if attorneys have a conflict of interest, and OPA contractors to enter billing information. It also contains case information, contracts, contacts, and financial transactions.

OPA solicited some GALs on a case-by-case basis and paid the GALs without issuing a contract.

Court Visitors

Court visitors perform independent investigations and acquire the evidence judges use to evaluate the necessity and terms of guardianships. Court visitor oversight is used at three critical junctures:

- *To advise a court about the necessity of a guardianship.* Court visitors independently investigate and advise the court whether a guardianship is necessary or a less restrictive alternative will suffice.
- *To assess a ward's needs, finances, and options.* If a guardianship is necessary, a court visitor independently investigates the ward's needs, finances, and options for individuals or entities available to serve as guardian. The court visitor then advises the court as to the best guardian to assign, given these factors.
- *To assess a ward and GALs' relationship.* Court visitors periodically conduct independent reviews of guardian performances. Court visitors advise the court regarding any need for a change in the terms of guardianships.

As with attorneys and GALs, court visitors are either formally procured or obtained directly by OPA management.

Investigators, Experts, and Transcriptionists

Legal cases often require the assistance of investigators and various experts, including transcriptionists. Experts and the majority of investigators are solicited on a case-by-case basis without a contract. OPA management uses an internal preauthorization process to obtain these services.

OPA's preauthorization process begins with an attorney submitting a preauthorization form to OPA requesting investigator, expert, or transcriptionist services. The form includes the description and justification for services, the number of hours, the hourly rate, and the total estimated expenses per case. OPA management reviews the preauthorization form and, if necessary, adjusts the hours. OPA adds the preauthorized investigators and experts to OPA's case management system to enable billing for services rendered on the case.

Investigators, experts, and transcriptionists bill OPA monthly for the hours incurred. The actual hours are compared to the preauthorized hours. If the preauthorized hours are exceeded, OPA attorneys are required to submit an amended preauthorization form.

REPORT CONCLUSIONS

We were asked to conduct an audit of OPA's procurement activities covering the period of FY 06 through FY 12. The audit objectives were to:

1. Evaluate OPA's compliance with state law when procuring professional services;
2. Evaluate whether OPA's professional service contracts were prudently administered; and
3. Identify whether OPA's professional service contractors were appropriately classified as contractors rather than employees.

We concluded the following:

1. *OPA has not complied with the State Procurement Code.*

From FY 06 through FY 12, over \$17.8 million in state funds were paid for improperly obtained professional services.

2. *OPA has not prudently administered its contracts.*

An evaluation of OPA's contracts and invoices found administrative deficiencies, including contract amendments that were not supported; contract prepayments that were not made in accordance with state rules; novations⁵ used incorrectly to increase contract amounts; and contract invoices that were not adequately supported. Additionally, OPA did not use the compensation requirements established in OPA's regulations.

3. *OPA's professional service workers were appropriately classified as contractors.*

The deficiencies were caused by a number of factors including insufficient understanding of state laws by OPA personnel and inadequate oversight by DAS management. The deficiencies limited fair and open competition, led to overspending state resources, and increased the potential for fraud, waste and abuse. Our audit recommends that OPA and DAS management ensure that professional service contracts are secured and administered in accordance with state laws. OPA's procurement authority should be limited until improvements are made.

⁵*Novation* is the substitution of a new contract for an old one. Within the State's regulatory framework, the novation process is used to substitute one contractor for another or recognize a change in an entity's name.

OPA's noncompliance with the State Procurement Code resulted in approximately \$17.8 million in state funds being paid for improperly obtained professional services from FY 06 through FY 12.

OPA did not comply with the State Procurement Code when procuring professional services. As a result, over \$17.8 million in state funds were paid to vendors without the appropriate safeguards and without fair and open competition from FY 06 through FY 12.

Rather than following the State's rules, OPA relied on inadequate historical practices to secure services. OPA management lacked sufficient understanding of state procurement rules and incorrectly believed that OPA attorneys working on criminal cases, investigators, experts, and transcriptionists were exempt from the procurement code. Insufficient DAS oversight over OPA's activities also contributed to the persistent disregard of the procurement code in favor of processes instituted by OPA's management.

OPA did not comply with the State Procurement Code for three types of procurements: large procurements, services that were exempt from procurement, and small procurements. Detailed conclusions, as they relate to each type of procurement, are discussed below.

1. *Large procurements.* From FY 06 through FY 12, OPA paid over \$13.2 million to 88 vendors without a contract and not secured in accordance with the State Procurement Code. Seventy-three of the 88 vendors were attorneys, whose payments totaled \$12 million. Instead of following the State Procurement Code, OPA management obtained attorney services by inappropriately using an internal process. OPA's internal procurement process is noncompetitive and lacks transparency and accountability. Exhibit 2 provides information on control deficiencies related to OPA's internal process.

Table 1 of Attachment 1 of this letter summarizes OPA's expenditures by type of vendor and fiscal year for vendors that should have been secured in accordance with large procurement requirements.

This finding is further discussed in Recommendation No. 1.

Exhibit 2

Control Deficiencies in OPA's Internal Procurement Process

OPA used its internal process, referred to as "court appointment," to obtain the services of attorneys, court visitors, and GALs. This process contains the following deficiencies.

- There is an inadequate segregation of duties in the process of placing attorneys on an authorized list because the entire process is performed by one member of OPA management.
- There are no established guidelines for the assignment of a compensation rate because it is negotiated by one member of OPA management and not reviewed by any other party.
- There is no public process for notifying attorneys of the possibility of being placed on OPA's authorized attorney list.

2. *Services exempt from the State Procurement Code.* From FY 06 through FY 12, OPA paid approximately \$4.3 million to 99 vendors (attorneys, GALs, and court visitors) exempt from the State Procurement Code. The vendors were selected without documentation of the rational and reasonable basis for the vendors' selection that is required by rules for exempt services. Instead, OPA management used an internal procurement process. OPA's internal procurement process is not rational and reasonable. Table 2 of Attachment 1 summarizes expenditures for exempt professional services, by type of vendor and fiscal year, that were not selected using an appropriate method.

This finding is further discussed in Recommendation No. 1.

3. *Small procurements.* Of the 11 small procurement contracts sampled for this audit, there was no documentation to support that small procurement code requirements⁶ were followed. The 11 small procurement contracts totaled over \$330,000.

This finding is further discussed in Recommendation No. 2.

OPA's contracts were not prudently administered.

OPA managed 70 contracts from FY 06 through FY 12. A sample of 19 contracts and a separate sample of 33 contract invoices (not necessarily related to the 19 contracts) concluded that OPA management did not adhere to the State Procurement Code and the AAM when administering contracts. Prudent contract administration is essential to ensuring that OPA obtains the expected quantity and quality of professional services.

The findings were caused by OPA's reliance on inadequate historical practices, insufficient training of OPA personnel, poor understanding of procurement requirements, and unreliable or nonexistent internal controls over contract administration. Imprudent contract administration resulted in overspending state resources and increased the potential for fraud, waste, and abuse.

Detailed findings include:

- Thirty-two flat rate contractors received advance payments totaling over \$7 million during the audit period. In accordance with the AAM 35.100 and AAM 35.170, payments cannot be made in advance of the receipt of goods or services unless it is in the State's best interest. OPA was not able to demonstrate that the advance payments were in the State's best interest.

⁶According to 2 AAC 12.400(d)(3), "(A) a copy of the solicitation made [...]; (B) the names of the firms or persons contacted and copies of all written quotations or informal proposals received; and (C) documentation of and justification for the award." Furthermore, 2 AAC 12.400(b)(5) states, "A purchasing agency [should have used] reasonable and adequate procedures and [made] records that facilitate auditing of the purchasing agency."

- Four contracts contained unanticipated amendments, totaling \$717,600, that lacked written justification.
- Five contracts incorrectly used a novation process to increase contract amounts by a total of \$234,978.
- Two contracts were inappropriately transferred to new contractors without documentation.
- Three contractors were overpaid by a total of \$83,476.
- Six contractors received multiple payments totaling \$161,031 for services performed after the contracts expired.
- Fifteen invoices reviewed contained one or more of the following errors.
 - Eight invoices totaling \$80,908 were not adequately supported.
 - Eight invoices totaling \$96,716 were not in accordance with contract terms.
 - Two invoices totaling \$80,565 were missing and were not provided for review.
- Two contracts were not signed by the “*Head of Contracting Agency or Designee.*”
- Thirty-one attorneys and GALs were paid above regulatory limits.

This finding is further discussed in Recommendation No. 3.

One OPA request for proposal (RFP) issued by DAS contained two unduly restrictive requirements that limited competition.

There were 65 OPA contracts issued by DAS between FY 06 and FY 12 and five additional contracts that were issued in FY 05 with contract extensions in FY 10.

An analysis of a sample of RFPs showed that, except for one contract issued to a criminal defense investigator in FY 11, OPA’s RFPs did not contain unduly restrictive specifications favoring one candidate over others. The terms of the one exception were reviewed in an administrative hearing,⁷ and the administrative hearing judge concluded that the proposal contained two unduly restrictive requirements that limited competition. The restrictive requirements were prior experience investigating in rural Alaska and training in crime scene reconstruction.

⁷*Office of Administrative Hearing No. 11-0235-PRO, Joseph Austin versus Office of Public Advocacy.*

OPA professional service contractors were appropriately classified as contractors versus employees.

The Division of Finance's calendar year 2011 employee and contractor cross-match report for OPA⁸ and 17 of 70 contract files were examined. The examination showed that OPA professional service contractors were appropriately classified as contractors rather than as employees in accordance with guidelines from the State of Alaska's Administrative Manual and the Internal Revenue Service.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

DAS' director should take action to ensure that all OPA professional services are obtained in accordance with state procurement laws.

From FY 06 through FY 12, OPA paid approximately \$17.5 million in state expenditures related to large procurements and exempt professional services that were not acquired in compliance with state procurement requirements.

The State Procurement Code⁹ defines procurement requirements for state agencies and outlines the services that are exempt from procurement. Appendix 1 of the AAM states that, for exempt services, state agencies "*should have a rational, reasonable method of selecting the recipients of the expended funds.*"

OPA paid over \$13.2 million to vendors that were subject to large procurement rules¹⁰ but not selected in accordance with the State Procurement Code. An additional \$4.3 million were paid to vendors exempt from the State Procurement Code¹¹ but not selected using a rational and reasonable method. Instead of following the State Procurement Code, OPA used inadequate internal procurement processes.

⁸The Division of Finance biannually performs a cross match between individuals receiving the W2 form and 1099 form and sends a list of individuals receiving both forms to the departments' finance officers for review of the workers' classification.

⁹Alaska Statute 36.30 and 2 AAC 12.

¹⁰Attorneys working on criminal cases, investigators, transcriptionists, and experts are subject to procurement.

¹¹GALs, court visitors, and attorneys working on CINA, juvenile delinquency, and vulnerable adult cases are exempt from procurement code.

Rather than comply with the State Procurement Code, OPA management relied on historical practices and the belief that the agency was exempt from the State Procurement Code for all court appointments. (See Exhibit 3 for a discussion of court appointments using Administrative Rule 12.) Current management also reported lacking understanding of the State Procurement Code. Furthermore, insufficient oversight by DAS over OPA's activities contributed to the persistent disregard of procurement regulations in favor of processes instituted by OPA's management.

OPA's internal processes are noncompetitive procurement methods that lack transparency and accountability. These methods do not promote fair and open competition. Additionally, because there are no contract specifications and no open solicitations, vendors may not have been treated equally.

We recommend DAS' director take action to ensure that all OPA professional services are obtained in accordance with state law. As a part of improvements, OPA management should not procure large contracts since they do not have large procurement authority.

Recommendation No. 2

DAS' director should take action to ensure that OPA complies with small procurement rules.

OPA management was not able to demonstrate that small procurement requirements were followed for any of the 11 small procurement contracts reviewed as part of this audit.

The State Procurement Code requires specific documentation of the procurement process, depending on the contract amount. For ten of 11 contracts, OPA should have used reasonable

Exhibit 3

Court Appointments Using Administrative Rule 12(b)

The Administrative Rules govern the operations of all courts in the State and for practice and procedure in civil and criminal cases established by the Supreme Court under the authority of the Alaska Constitution.

OPA's management interprets the Alaska Court System's Administrative Rule 12(b) as an exemption from the State Procurement Code for "court-appointment" work. However, Administrative Rule 12(b), does not give OPA this authority; it only requires the court to appoint OPA in specific circumstances. The rule states that for criminal cases:

Appointments shall be made first to the public defender agency. If the agency files a motion to withdraw on the grounds that it cannot represent the person because of a conflict of interest, if the parties stipulate on the record that the agency has a conflict of interest, or if the court on its own motion finds an obvious conflict of interest, the court accepting such motion or stipulation or making such finding shall appoint the office of public advocacy [emphasis added] to provide counsel.

The rule also states, "The office of public advocacy [emphasis added] shall be responsible for compensating any attorney appointed under this subparagraph."

This rule does not address how OPA should obtain attorney services to meet the court appointment requirements. Obtaining professional services is addressed by the OPA's authorizing statute (AS 44.21.420) and the State Procurement Code (AS 36.30).

and adequate procedures and created records that facilitated auditing.¹² For the remaining contract, documentation should have included a copy of the solicitation, the names of the contacted parties, copies of all the written informal proposals received, and documentation of and justification for the award.¹³

OPA management did not have supporting documentation for the 11 contracts due to lacking understanding of small procurement requirements. OPA's undocumented processes do not demonstrate that OPA management promoted fair and open competition. Additionally, OPA management could have paid a higher price for potentially lower quality services than they would have paid if the appropriate procurement process was followed.

We recommend DAS' director take action to ensure that OPA complies with small procurement rules. As a part of the improvement, DAS' director should consider limiting OPA's small procurement authority until OPA personnel is sufficiently trained.

Recommendation No. 3

DAS' director should improve the oversight of OPA contract administration procedures to ensure compliance with the State Procurement Code and the AAM.

Analyses of 19 of 70 contracts administered by OPA from FY 06 through FY 12, and 33 contract invoices showed that OPA did not prudently administer its contracts. Lack of fiscal controls resulted in overpayments for services received; potential payments for services not received; payments for services unrelated to contracts; waste of state resources due to increased staff time for researching and correcting inappropriate processes; disparity in treating vendors; and increased risk of litigation.

The findings were caused by reliance on inadequate historical practices, insufficient training of OPA personnel, poor understanding of state requirements, and unreliable or nonexistent internal controls over contract administration. Even though some of the findings are attributed to OPA's prior administration, lack of internal controls makes OPA susceptible to future findings.

The findings presented below are based on samples of OPA contracts and invoices. Since the cause of the errors is systematic and pervasive, more deficiencies likely exist.

- *Thirty-two flat rate contractors were paid over \$7 million in advance without proper documentation.*

AAM 35.100 and 35.170 states that payments cannot be made before the receipt of goods or services unless they are in the State's best interest. Furthermore, the distributing agency is responsible for clearly documenting why the prepayment is in

¹²Title 2 of the Alaska Administrative Code, section 12.400(b)(5).

¹³Title 2 of the Alaska Administrative Code, section 12.400(d)(3).

the State's best interest. OPA staff was not able to provide documentation demonstrating that the advance payments were in the State's best interest. OPA management and staff were not aware that prepayments require additional documentation.

- *Four contracts contained unanticipated amendments, totaling \$717,600, lacking required written explanations for changes in contract terms.*

The amendments lacked Request for Alternate Procurement (RAP) forms and other explanations. According to the 2 AAC 12.485(d):

Unanticipated contract amendments which exceed the lesser of 20 percent of the amount of the original term of the contract, or a subsequent current term of the contract, as applicable, or \$50,000, may be made only if the Chief Procurement Officer [...] determines in writing that the amendment is in the state's best interest. A request by a purchasing agency to amend a contract which exceeds these limits must be accompanied by a written explanation listing specific reasons why the amendment is in the state's best interests."

Furthermore, the AAM 81.550 states:

When an unanticipated amendment to an existing contract would be beyond the limits [above ...], the agency must send its request to exceed the amendment limits to the Division of General Services on a completed RAP (form #02-100). [...] The RAP [form] must be accompanied by a written explanation listing specific reasons why the amendment is in the State's best interest.

- *Five contracts incorrectly used the novation process to increase contract amounts by \$234,978.*

Novation is the substitution of a new contract for an old one. Regulations specify novations are only for transferring or assigning contracts. For changes that do not require contract transfers or assignments, the agency should use the amendment process in accordance with 2 AAC 12.485.

- *Two contracts were inappropriately transferred to new contractors without documentation.*

Title 2 of the Alaska Administrative Code, section 12.480(b) requires procurement officers to use a novation agreement to recognize a contract successor; however, two contracts were transferred to different contractors without the novation process.

- *Three contractors' pay rates were increased by a total of \$83,476 without consideration of the contract terms.*

According to the contract terms, contract "*renegotiation [should have been] limited to a percentage of the most recent Consumer Price Index (CPI) data.*" For these three contractors, the pay rate increases exceeded the CPI. There was no evidence that the CPI was considered.

- *There were multiple payments, totaling \$161,031, made to six contractors for services performed after contract expiration dates.*

In FY 10, six contracts expired, but services continued to be provided after the contracts' expiration dates. Paying vendors after the contract expiration date is not in accordance with AAM 35.080 which requires agencies to ensure the reasonableness of invoiced dollar amounts by reference to the contract awards.

- *Fifteen of 33 invoices contained one or more of the following errors.*
 - *Eight of 33 invoices totaling \$80,909 were not adequately supported:*
 - *Six of eight invoices totaling \$53,059 were missing support for flat rate monthly payments as required by the contract terms. According to contract terms, contractors should "submit monthly caseload information showing number of cases assigned and closed in the format prescribed by Office of Public Advocacy." No documentation of the caseload was included for support.*
 - *Two of eight invoices totaling \$27,851 had discrepancies in the supporting documentation or included insufficient support.*
 - *Eight of 33 invoices totaling \$96,716 were not in accordance with contract terms:*
 - *The pay rate for six of eight invoices was increased by novations instead of contract amendments. Since a novation is not an adequate way to change the pay rate, payments were not in accordance with the contract terms.*
 - *One of eight invoices was paid at a higher rate than the contract rate.*

- One of eight contract payments was paid in advance of services even though the contract language states:

Payment for services provided under the contract will be made monthly upon receipt of the contractor's billing statement submitted no more than five days following the last day of the billing month in a format prescribed by OPA.

Thus, the advance payments were not in accordance with contract terms.

- Two of 33 invoices totaling \$80,565 were missing.

AAM 35.020 requires "an invoice [to] support every payment made by the state." Furthermore, according to the AAM 35.050:

Upon receipt of an invoice, it is the responsibility of the agency to determine that the state has received the goods or services and to verify the reasonableness and propriety of the charge.

- *Two contracts were not signed by the "Head of Contracting Agency or Designee."*

The contract form requires the signature of the "Head of Contracting Agency or Designee." OPA management does not have procurement authority for large procurement contracts. Thus, the contracts should have been signed by DAS' director rather than OPA's director.

- *The hourly compensation rates for 31 of 33 attorneys and GALs exceeded the regulatory established rates.*

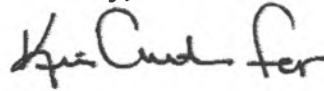
The actual rates paid to attorneys and GALs ranged between \$65 and \$125 per hour. Regulations require attorneys and GALs to be compensated at \$60 per hour for in-court and \$50 per hour for out-of-court work. OPA regulations establishing compensation requirements¹⁴ have not been amended since 1986.

¹⁴Title 2 of the Alaska Administrative Code sections 60.010 and 60.030.

We recommend DAS' director improve the oversight of OPA's contract administration procedures to ensure compliance with the State Procurement Code and the AAM.

If you have any questions regarding this letter, please feel free to contact me at (907) 465-3830.

Sincerely,

A handwritten signature in cursive script, appearing to read "Anna Tchernykh".

Anna Tchernykh, CPA
In-Charge Auditor

Attachment 1

Table 1

Professional Services Subject to the State Procurement Code OPA Vendors Paid \$50,000 or More for FY 06 through FY 12 Not Obtained in Accordance with the State Procurement Code										
Fiscal Year	Attorneys		Investigators		Transcriptionists		Experts		Total	
	Number of Vendors	Total Payment	Number of Vendors	Total Payment	Number of Vendors	Total Payment	Number of Vendors	Total Payment	Number of Vendors	Total Payment
2006	29	\$ 953,946	5	\$111,820	3	\$ 36,380	3	\$ 27,804	40	\$ 1,129,950
2007	37	937,201	6	89,826	3	58,357	4	24,239	50	1,109,624
2008	47	1,417,144	7	108,192	3	51,625	4	26,506	61	1,803,467
2009	47	1,444,721	7	69,436	3	52,831	4	40,992	61	1,807,979
2010	49	1,938,900	6	65,855	3	34,615	4	35,811	62	2,075,181
2011	55	2,664,360	5	138,980	3	45,479	4	63,985	67	2,912,805
2012	50	2,610,215	3	96,141	2	43,001	4	19,002	59	2,768,360
Total		<u>\$11,966,487</u>		<u>\$680,251</u>		<u>\$ 322,268</u>		<u>\$ 238,339</u>		<u>\$13,207,365</u>

Table 2

Professional Services Exempt from the State Procurement Code OPA Vendors Paid \$50,000 or More for FY 06 through FY 12 Not Obtained in Accordance with the AAM								
Fiscal Year	Attorneys		Court Visitors		Guardians ad Litem		Total	
	Number of Vendors	Total Payment	Number of Vendors	Total Payment	Number of Vendors	Total Payment	Number of Vendors	Total Payment
2006	24	\$ 178,286	6	\$ 124,135	3	\$ 66,768	33	\$ 369,188
2007	26	266,026	7	130,153	5	111,375	38	507,553
2008	33	311,227	8	132,921	5	166,999	46	611,147
2009	34	351,603	10	160,868	5	168,302	49	680,773
2010	29	235,134	11	173,413	7	204,980	47	613,528
2011	37	226,962	10	259,720	7	260,004	54	746,687
2012	34	270,009	9	266,890	6	237,014	49	773,913
Total		<u>\$ 1,839,246</u>		<u>\$1,248,100</u>		<u>\$1,215,443</u>		<u>\$ 4,302,789</u>

**Representative
Lindsey Holmes**

Capitol Room 415
465-4919
465-2137 fax



MEMORANDUM

Date: 12 February 2014

To: Chair Bob Lynn,
House State Affairs Committee

From: Representative Lindsey Holmes

RE: Hearing Request for HB 262 An Act exempting the Public Defender Agency and the office of public advocacy from certain provisions of the State Procurement Code; and providing for an effective date.

I would like to respectfully request a hearing for House Bill 262 in the House State Affairs Committee. If you have any questions about the bill, please feel free to contact me or my aide Robert Ervine (his direct line is 465.8186).

Attached to this memo is:

- 1) A copy of the bill in its current form;
- 2) A sponsor statement for the bill;
- 3) A copy of the audit performed by legislative audit;
- 4) The committee should expect possible testimony from:
 - a. Deputy Commissioner Mike Barnhill
 - b. Public Defender Quinlan Steiner