ALASKA STATE LEGISLATURE

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SUMMARY OF: A Special Report on the Department of Administration (DOA), Office of Public Advocacy (OPA), Select Procurement Issues, October 19, 2012

PURPOSE OF THE REPORT

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we have conducted a performance audit of OPA. 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 contactors were appropriately classified as contractors rather than as employees.

REPORT CONCLUSIONS

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.

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

The deficiencies were caused by a number of factors including insufficient understanding of state laws by OPA personnel and inadequate oversight by DOA's Division of Administrative Services (DAS) management. The deficiencies limited fair and open competition, led to overspending state resources, and increased the potential for fraud, waste, and abuse.

OPA's professional service contractors were appropriately classified as contractors rather than as employees.

FINDINGS AND RECOMMENDATIONS

1. DAS' director should ensure that OPA professional services are obtained in accordance with state law. As a part of improvements, OPA management should not procure large contracts as they do not have large procurement authority.

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

3. DAS' director should improve oversight of OPA's contract administration to ensure compliance with the State Procurement Code and the *Alaska Administrative Manual*.

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December 11, 2012

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENT OF ADMINISTRATION
OFFICE OF PUBLIC ADVOCACY
SELECT PROCUREMENT ISSUES

October 19, 2012

Audit Control Number
02-30069-13

This performance audit evaluates the Department of Administration, Office of Public Advocacy's professional service procurement, contract administration, and worker classification for the period FY 06 through FY 12.

The audit was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Fieldwork procedures utilized in the course of developing the findings and recommendations presented in this report are discussed in the Objectives, Scope, and Methodology.

Kris Curtis, CPA, CISA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we have conducted a performance audit of the Office of Public Advocacy's (OPA) professional service contracts.

Objectives

The primary objectives of this audit were to:

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

Scope

This audit reports on procurement, contract administration, and contractor classification for the period FY 06 through FY 12.

Methodology

To address the audit objectives, we:

- Examined 19 contract files[1] along with the associated request for proposals (RFP), scoring sheets, and accounting records to determine whether:
  - RFPs were issued containing unduly restrictive specifications favoring one candidate over others.
  - Contracts were amended in accordance with the amendment process described in applicable regulations.
  - Payments were processed for professional service contracts before the services were provided.
  - Payments to contractors were discontinued after the contracts expired.
  - Contractors were properly classified in accordance with guidelines from the Internal Revenue Service and the *Alaska Administrative Manual* (AAM).
- Judgmentally selected and evaluated 11 small procurement contracts for compliance with small procurement requirements.

[1]Ten contract files were randomly selected, and nine were judgmentally selected.

- Identified the FY 06 through FY 12 OPA vendors that were without a contract and paid over $50,000 to determine the amounts paid to vendors subject to and exempt from the procurement code.

- Analyzed OPA's process for securing vendors without a contract for compliance with the State Procurement Code.

- Evaluated OPA's process for obtaining professional services exempt from the procurement code for compliance with the AAM.

- Examined 33 contract invoices[2] to determine whether the invoices were: properly approved, supported, paid in accordance with the contract terms, and paid for performed services.

- Evaluated OPA's contractor classifications by examining the Department of Administration, Division of Finance's calendar year 2011 employee and contractor cross-match report for OPA. [3]

Additional procedures included:

- Interviewing OPA, Division of Administrative Services, and Division of General Services staff to understand OPA's procurement, contract administration, and contractor classification processes.

- Gaining an understanding of OPA's case management system to determine how the system is used to facilitate OPA's contract administration.

- Inquiring with Alaska Court System and Department of Law representatives to understand the procurement and contract administration practices in legal agencies.

- Reviewing Office of Administrative Hearings case results regarding OPA's procurement and contract administration practices.

- Assessing the control procedures related to various objectives of the audit, including controls over the procurement, contract administration, and contractor classification.

[2]Thirty invoices were randomly selected, and three were judgmentally selected.
[3]The Division of Finance biennially performs a cross-match between individuals receiving the W2 form and 1099 form and sends a list of individuals receiving both forms to state departments' finance officers for review of contractors' classifications.

ORGANIZATION AND FUNCTION

In 1984, the legislature created the Office of Public Advocacy (OPA) as a division within the Department of Administration. Its mission is to provide legal advocacy and guardianship services to vulnerable Alaskans.

Per AS 44.21.410(a), OPA's statutory powers and duties include:

1. Performing public guardianship duties and providing court visitors and experts in guardianship proceedings.

2. Providing *guardian ad litem* (GAL) services to children in child protection actions and to wards and respondents in guardianship proceedings.

3. Providing legal representation and GAL services in cases involving a group or an issue that includes but is not limited to: guardianship proceedings to respondents who are financially unable to employ attorneys; representation for indigent[4] parties in child custody cases in which the opposing parties are represented by counsel provided by a public agency; petitions to adopt a minor or to terminate parental rights; and representation for indigent parents of children with disabilities.

4. Developing and coordinating a program to recruit, select, train, assign, and supervise volunteer GALs from local communities to aid in delivering services in cases in which OPA is appointed as the GAL.

5. Investigating complaints and bringing civil actions in cases involving fraud committed against state residents who are 60 years of age or older.

OPA has offices in five communities: Anchorage, Bethel, Fairbanks, Juneau, and Palmer. Elsewhere around the State, OPA provides services through individual contractors.

Based on OPA's organizational chart, the total number of filled positions in FY 12 was 56. Out of the 56 positions, 50 were full-time positions, four were on-call and two were temporary positions. The breakdown of positions by function is presented in Exhibit 1.

Exhibit 1

Number of OPA Positions by Function as of April 30, 2012

Attorneys	25
Paralegals	6
Law Office Assistants	11
Investigators	3
Administration and Management	5
Accounting	6
Total	56

OPA's budget increased by 47 percent from FY 06 ($16.5 million) to FY 12 ($24.3 million). The

[4] *Indigent* refers to a person who cannot afford a lawyer.

majority of OPA's budget is allocated between two accounts: personal services, which include employee salaries and benefits, and contractual services, which primarily include professional service contract expenses.

BACKGROUND INFORMATION

State Procurement Code Provides 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.

In regards to procuring professional services,[5] the State's procurement rules vary depending on the professional service contract amount and can be separated between 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

[5]The 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.*

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.

Professional Services Exempt from the State Procurement Code

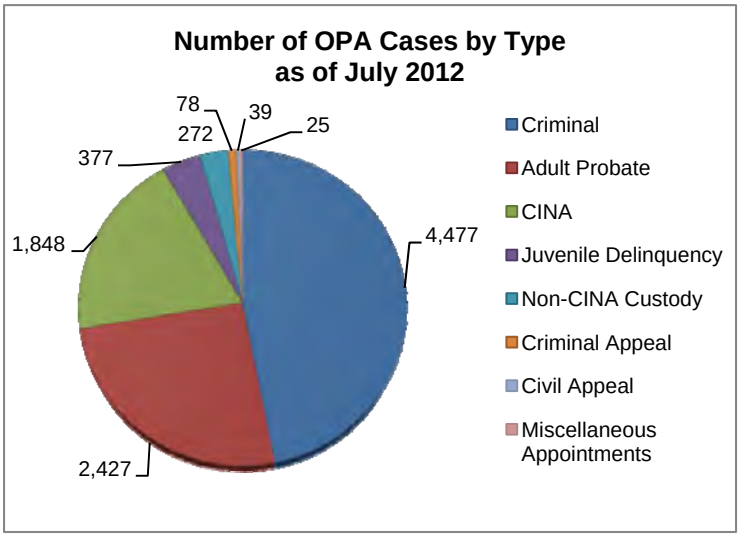
The State Procurement Code defines specific services that are exempt from the procurement code.[6] Exempt services must comply with guidance from Appendix 1 of the *Alaska Administrative Manual* (AAM). The guidance states, "*Expending funds for these items [not covered by the procurement code] should have a rational, reasonable method of selecting the recipients of the expended funds*."

The Office of Public Advocacy's (OPA) 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* (GAL), 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 employed by 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 largest percentage, $30.74 million or 73 percent.

Exhibit 2



The significant 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

[6]Alaska Statute 36.30.850(b).

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. Exhibit 2 (previous page) documents the number of OPA cases as of July 9, 2012, and provides a representative snapshot of OPA's workload. Approximately 50 percent of OPA's ongoing workload is related to criminal cases.

Once notified of a criminal case by the court, OPA staff assigns the case to an attorney by first checking the case management system[7] to identify an attorney 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 and without contracts. 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).

Attorneys without a formal contract do not participate in a formal procurement process. OPA management obtains non-contract attorney services by first placing potential attorneys on an availability list. The opportunity to be placed on OPA's attorney list is not publicly noticed. 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 minors or adults with cognitive impairments 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.

[7]OPA'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.

Though GALs are exempt from the State Procurement Code, from FY 06 through FY 11, OPA paid most of its GALs using flat rate pre-arranged contracts that were formally procured by DAS. In June 2011, the original contracts expired and contractors continued to be paid without a current contract. In December 2011, OPA issued an RFP in an effort to formally procure GALs. According to OPA management, due to a lack of response by vendors to the RFP, new contracts were issued to the same contractors in March 2012. Additionally, 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 a GAL. The court visitor then advises the court as to the best GAL to assign, given these factors.

- *To assess a ward and GAL's relationship*. Court visitors periodically conduct independent reviews of GAL 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 assistance from investigators, various experts, and 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 management 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 staff 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 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.

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REPORT CONCLUSIONS

We were asked to conduct an audit of the Office of Public Advocacy (OPA) procurement activities covering the period FY 06 through FY 12. The audit objectives were to:

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

We concluded the following.

- *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.

- *OPA has not prudently administered its contracts*. An evaluation of OPA's contracts and invoices identified administrative deficiencies including: contract amendments that were not supported; contract prepayments that were not made in accordance with state rules; novations[8] 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.

- *OPA's professional service contractors were appropriately classified as contractors rather than as employees*.

The deficiencies were caused by a number of factors including insufficient understanding of state laws by OPA personnel and inadequate oversight by Division of Administrative Services (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 law. OPA's procurement authority should be limited until improvements are made.

[8]*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 exempt from the procurement code, 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 that was noncompetitive and lacked transparency and accountability. Exhibit 3 provides information on control deficiencies related to OPA's internal process.

   Table 1 of Appendix A 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 3

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 *guardians ad litem* (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 another 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 documenting a rational and reasonable basis for the vendors' selection. Instead, OPA management used an internal procurement process that was not rational and reasonable. Table 2 of Appendix A summarizes expenditures for professional services that were exempt from the procurement code.

   This finding is further discussed in Recommendation No. 1.

3. *Small procurements.* All 11 small procurement contracts examined as part of this audit contained no supporting documentation to corroborate that small procurement code requirements[9] 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. An examination of 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 *Alaska Administrative Manual* (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 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 the following.

1. Thirty-two flat rate contractors received advance payments totaling over $7 million during the audit period. In accordance with 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.

[9]According to 2 AAC 12.400(d)(3), documentation should include, "*(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*."

2. Four contracts contained unanticipated amendments, totaling $717,600, that lacked written justification.

3. Five contracts incorrectly used a novation process to increase contract amounts by a total of $234,978.

4. Two contracts were inappropriately transferred to new contractors without documentation.

5. Three contractors were overpaid by a total of $83,476.

6. Six contractors received multiple payments totaling $161,031 for services performed after the contracts expired.

7. Fifteen invoices 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.

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

9. Thirty-one attorneys and GALs were paid at rates above regulatory limits.

This finding is further discussed in Recommendation No. 3.

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

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,[10] 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.

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

OPA professional service contractors were appropriately classified as contractors rather than as employees.

The Division of Finance's calendar year 2011 employee and contractor cross-match report for OPA, 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.

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FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Department of Administration's Division of Administrative Services (DAS) director should ensure that all Office of Public Advocacy (OPA) professional services are obtained in accordance with state procurement laws.

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

The State Procurement Code[11] defines procurement requirements for state agencies and outlines the services that are exempt from procurement. Appendix 1 of the *Alaska Administrative Manual* (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 rules[12] but not selected in accordance with the State Procurement Code. An additional $4.3 million were paid to vendors exempt from the State Procurement Code[13] but not selected using a rational and reasonable method. Instead of following state procurement rules, OPA used inadequate internal procurement processes.

Exhibit 4

Court Appointments Using Administrative Rule 12(b)

The *Administrative Rules* govern the operations of all courts in the State and govern the practices and procedures in civil and criminal cases as 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 OPA's authorizing statute (AS 44.21.420) and the State Procurement Code (AS 36.30).

[11]Alaska Statute 36.30 and 2 AAC 12.
[12]Attorneys working on criminal cases, investigators, transcriptionists, and experts are subject to procurement.
[13]*Guardians ad litem* (GAL), court visitors, and attorneys working on child-in-need-of-aid, juvenile delinquency, and vulnerable adult cases are exempt from the 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. (Exhibit 4, on the previous page, discusses court appointments using *Administrative Rule 12*.) Insufficient understanding of the State Procurement Code by current OPA management caused the deficiencies. Furthermore, insufficient oversight by DAS contributed to the persistent disregard of procurement regulations in favor of processes instituted by OPA management.

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

We recommend DAS' director 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 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, totaling over $330,000, analyzed 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 and adequate procedures and created records that facilitated auditing.[14] 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.[15]

OPA management did not have supporting documentation for the 11 contracts because management did not sufficiently understand small procurement requirements. OPA's undocumented process did 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.

[14] *Title 2 of the Alaska Administrative Code, section 12.400(b)(5).*
[15] *Title 2 of the Alaska Administrative Code, section 12.400(d)(3).*

We recommend DAS' director ensure that OPA complies with small procurement rules. As a part of improvements, 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 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 concluded 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 insufficient training of OPA personnel, poor understanding of state requirements, and unreliable or nonexistent internal controls over contract administration. Some of the findings are attributed to OPA's prior administration; however, lack of internal controls makes OPA susceptible to future findings.

The findings presented below are based on a sample 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.*

  Alaska Administrative Manual 35.100 and *35.170* states that payments cannot be made before the receipt of goods or services unless advance payments are in the State's best interest. Furthermore, the distributing agency is responsible for clearly documenting why the prepayment is in the State's best interest. OPA staff was not aware that prepayments require additional documentation.

- *Four contracts containing unanticipated amendments totaling $717,600 lacked 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, 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 existing contract. 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*." The pay rate increases exceeded the CPI for the three contracts. 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 11, 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 amounts by reference to the contract terms.

- *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.

  Alaska Administrative Manual 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 attorney GALs exceeded the rates established in regulations.*

  The actual rates paid to attorneys and attorney GALs ranged between $65 and $125 per hour. Regulations require attorneys and attorney GALs to be compensated at $60 per hour for in-court and $50 per hour for out-of-court work. OPA regulations establishing compensation requirements[16] have not been amended since 1986.

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

[16] *Title 2 of the Alaska Administrative Code, sections 60.010* and *60.030.*

Appendix A

Table 1

Professional Services Subject to the State Procurement Code
OPA Vendors Paid $50,000[17] or More from FY 06 through FY 12
Service Not Obtained in Accordance with the State Procurement Code

	Attorneys		Investigators		Transcriptionists		Experts		Total	
Fiscal Year	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	1,109,623
2008	47	1,417,144	7	108,192	3	51,625	4	26,506	61	1,603,467
2009	47	1,444,721	7	69,436	3	52,831	4	40,992	61	1,607,980
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	2,912,804
2012	50	2,610,215	3	96,141	2	43,001	4	19,002	59	2,768,359
Total		$11,966,487		$680,250		$ 322,288		$ 238,339		$13,207,364

Table 2

Professional Services Exempt from the State Procurement Code
OPA Vendors Paid $50,000[17] or More from FY 06 through FY 12
Service Not Obtained in Accordance with the Alaska Administrative Manual

	Attorneys		Court Visitors		Guardians ad Litem		Total	
Fiscal Year	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	$ 369,189
2007	26	266,026	7	130,153	5	111,375	38	507,554
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	613,527
2011	37	226,962	10	259,720	7	260,004	54	746,686
2012	34	270,009	9	266,890	6	237,014	49	773,913
Total		$ 1,839,247		$1,248,100		$1,215,442		$ 4,302,789

[17]Vendors identified in the tables above were paid $50,000 or more over a seven year period.

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THE STATE
of ALASKA
GOVERNOR SEAN PARNELL

BECKY HULTBERG, COMMISSIONER

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Department of Administration

January 3, 2013

Ms. Kris Curtis, CPA, CISA
Legislative Auditor
Division of Legislative Audit
PO Box 113300
Juneau, AK 99811-3300

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

Dear Ms. Curtis:

Thank you for the opportunity to respond to your October 31, 2012, letter in regards to the procurement audit findings for the Office of Public Advocacy.

Please note that we have requested the Office of Public Advocacy to respond to the specific allegations of the audit. OPA's response is attached. You will note that OPA's response implicates issues of statutory interpretation and differential treatment vis a vis the Department of Law. It may be appropriate for the legislature to review these matters and consider whether to explicitly extend AS 36.30 procurement exemptions available to the Department of Law to OPA and the Public Defender Agency.

Also, in general, please note that regardless of whether procurement exemptions attach or do not attach to a specific circumstance, we strongly believe that in all cases robust internal controls should be in place to protect the public interest of the State of Alaska. Over the past year, we have directed the Division of Finance to enhance the training and information it makes available to departments with respect to internal controls. We routinely emphasize the importance of internal controls with our directors and staff, and we are in the process of standardizing DAS certification processes and oversight to ensure that all divisions within this department are appropriately and accurately executing accounting and procurement functions.

Finally, please note that we concur in principle with each of the recommendations. We will always concur with a recommendation to follow applicable law, regulation and policy, subject to governing constitutional principles.

Recommendation No. 1

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

Without conceding the statutory interpretation or constitutional equal protection issues raised by OPA, we concur with the recommendation to ensure that all OPA professional services are obtained in accordance with the state procurement laws. Over the past year OPA and DAS began discussions regarding the contracting processes that OPA used to contract for attorney services and will continue the discussion for all other procurement processes.

To date, the current processes for contracting with attorneys have been reviewed and options were discussed with OPA and the Division of General Services (DGS). Requirements were gathered and an RFP was issued on November 2, 2012 in order to create an attorney "pool" wherein all attorney services are provided by offerors responding to the RFP and obtaining a contract with OPA through the RFP procurement process.

With regard to investigators, OPA is planning to release an RFP in order to create a "pool" of investigators that will be made available to attorneys for their use in ongoing and future OPA cases. This process is similar to that for the attorney contracts.

DAS procurement is in the process of discussing the potential use of the contract the Courts have for those transcription services that are not provided directly from the Courts. If OPA is unable to "piggyback" on this contract, DAS procurement staff will conduct a formal procurement for this service.

OPA asserts that AS 36.30.850(2) provides a specific exemption from the procurement code for the retention of expert witnesses. Additionally, OPA believes that DLA's strict interpretation of the procurement code with respect to the retention of expert witnesses can potentially impair the effective representation of a client, and may materially violate equal protection, since the procurement of expert witnesses by the prosecution is not subject to the procurement code. That being said, some procurement process should be put in place in order to ensure that state interests and OPA client interests are safeguarded. Legislative action may be needed to address this.

Recommendation No. 2

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

We concur with the recommendation to ensure that OPA complies with the small procurement rules. In order to accomplish this, DAS will ensure that staff that make procurements have the appropriate DGS procurement delegation and will look at current processes and bring certification to the DAS fiscal staff in Juneau.

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.

We concur with the recommendation and have begun the process to centralize the department's procurement staff into DAS to ensure that there is sufficient oversight. This will include an audit of each procurement staff's duties looking for workload and efficiencies with oversight of staff by DGS for the initial transition period. Additionally, as noted above, the department has begun the process of standardizing DAS certification procedures with respect to the entire department.

Thank you for the opportunity to respond to these findings and recommendations. If you need anything further for this process, please do not hesitate to contact me.

Sincerely,

Becky Hultberg
Commissioner

Cc: Rick Allen
Mike Barnhill
Curtis Thayer
Cheryl Lowenstein

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MEMORANDUM

STATE OF ALASKA

Department of Administration
Office of Public Advocacy

Phone Number: 269-3500
FAX Number: 269-1071

TO: Michael Barnhill,
Deputy Commissioner
Department of Administration

DATE: January 3, 2012

FROM: Richard K. Allen,
Director
Office of Public Advocacy

SUBJECT: Response to Management Letter No. 1 12/13/12

Below please find OPA's response to Management Letter No. 1 received by the Alaska State Legislature December 13, 2012 relating to the Office of Public Advocacy (OPA) Procurement

State Procurement Code Fiscal Safeguards and professional Services Exempt from the State Procurement Code

The audit letter references various sections of the state procurement code as promulgated in AS 36.30. Additionally, the audit letter addresses the fact that CINA cases are exempt from the procurement code. OPA agrees with this exemption. The analysis however fails to discuss or contemplate other exemptions from the state procurement code that apply to OPA. AS 36.30.850 specifically sets forth exemptions from the procurement code.

AS 36.30.850(2)

AS 35.30.850 (2) states that "contracts for professional witnesses to provide for professional services relating to existing or probable lawsuits in which the state is or may become a party". This exemption applies expressly to expert witnesses. OPA asserts that this exemption applies to its use of "experts" as set forth further below.

Every criminal case – which are the cases to which these procurement issues of the audit letter are directed – is a case or "lawsuit" in which the state is a party. Additionally, every criminal case has the probability of becoming a civil post-conviction lawsuit in which the state will be a party.[1] Every criminal defendant has a right to file a post-conviction petition under Criminal Rule 35.1 and AS 12.72.010-12.72.040. The "experts" hired in OPA criminal cases and post-conviction cases are the same types of experts or professional witnesses contemplated in the AS 36.30.850(2) exemption. The audit letter analysis fails to contemplate or apply this exemption to its determination related to OPA's procurement of expert witnesses. OPA should and must stand in the same position as the Department of Law Criminal Section in criminal prosecutions in order for the State of Alaska to meet Due Process and Equal Protection Constitutional standards for criminal defendants. To the best of OPA's knowledge, the Department of Law Criminal Section (DOL) is not required to procure expert witnesses under the strictures of the procurement code. While AS 36.30.850 (31) exempts DOL specifically from procurement provisions for attorney services, there is no separate exemption, other than AS 36.30.850(2) for expert witness provisions. If this exemption is being applied to DOL criminal cases it must equally be applied to OPA or such different treatment for the prosecution in criminal cases would be unconstitutional under both the Federal and State of Alaska Constitutions.

AS 36.80.850(4)

AS 36.80.850(4) specifically sets forth an exemption for contracts with medical doctors and dentists from the procurement code. The audit letter analysis fails to contemplate, discuss or apply this exemption to OPA experts. Many OPA experts that have been retained during the

[1] "A post-conviction relief action is a civil lawsuit brought by an already-convicted criminal" *see Lockuk v. State* No. 10499 2011 WL 5027060 (Alaska App. October 19, 2011) and *Nelson v. State*, 273 P.3d 608 (Alaska 2012).

2006-2012 review period and many experts that will be retained in the future are medical doctors. In its review of procurement violations the audit does not discuss why this exemption would not apply to OPA's hiring of a medical doctor for services related to its cases.

AS 36.30.380(27)

AS 36.30.380(27) specifically sets forth an exemption for expenditures when rates are set by law or ordinance. With respect to OPA's attorney/GAL services expenditures the Alaska Administrative Code 2 AAC 60.010 - Compensation For Court-Appointed Attorneys- sets forth the rates for each type of case that OPA handles and has authority to contract out. 2AAC 60.010-060 contemplates various levels of compensation and provides direct authority for the Public Advocate related to that compensation. The audit letter analysis fails to contemplate or analyze this exemption in relation to the rates set forth in the Alaska Administrative Code specifically directed to the Office of Public Advocacy.

Types of OPA Professional Services and Procurement Methods

The audit letter asserts that "[t]hough GALs are exempt from the State Procurement Code, from FY 06 through FY 10, OPA paid most of its GALs using flat-fee pre-arranged contracts that were formally awarded 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." This statement is not completely accurate. The majority but not all of OPA's contracts with GAL's around the State expired on June 30, 2011. OPA was told by DAS procurement that GAL CINA representation was exempt from the procurement code. A decision however, was made by OPA Administration, in conjunction with DAS procurement, to attempt to obtain GAL services through an RFP process in order to determine whether there was in fact a pool of individuals available to compete for the work. OPA, in conjunction with DAS procurement,

released RFP 2012-0200-0821 on 12/9/11. The RFP received NO bidders. Based upon the RFP results DAS procurement directed OPA that it had completed its due diligence related to procurement through the release of this RFP, that it could be determined that a sufficient pool of contractors was unavailable and that OPA, with the aid of DAS procurement, could negotiate contracts with known GALs to complete the required work. OPA subsequently negotiated similar contracts to the original GAL contracts that had been issued as the result of the 2006 RFP's with the known GALs.

Investigators, Experts and Transcriptionists

The audit letter notes the OPA pre-authorization process. Additionally, it notes that the pre-authorizations are entered into its database management system for enabling billing. OPA would add that the billing information is also properly added into the State AKSAS system and the ALDER system for tracking of payments not just by OPA but by the State through its normal accounting system.

The audit letter notes that "[i]nvestigators, experts and transcriptionists bill OPA monthly for hours incurred." This is not an accurate statement. While investigators may bill monthly for an ongoing case, some bill monthly and some bill at other points in the case and some bill at the conclusion of all of their work. Experts bill typically at the conclusion of their work or at the conclusion of a phase of their work such as an initial report where court testimony may be months if not a year into the future. Transcriptionists ONLY bill after they have completed their work and it has been delivered to the attorney who has ordered and received the authorized transcript.

As set forth above – OPA asserts that AS 36.30.850(2) provides a specific exemption from the procurement code for the retention of expert witnesses. Therefore, OPA has not violated the procurement code as it relates to expert witnesses.

With regard to investigators, OPA is planning to release an RFP in order to create a "pool" of investigators that will be made available to attorneys for their use in ongoing and future OPA cases.

With regard to transcriptionists, OPA can also issue an RFP to create a "pool" for transcriptionists as well. It should be noted that the majority of transcripts being rendered for OPA cases are grand jury and appellate transcripts. Through an RSA with the Alaska Court System, the Alaska Court System specifically completes these transcripts, provides them to OPA and charges OPA accordingly and private transcriptionists are not used for these transcripts.

Attorney Services

OPA asserts that, as discussed above, AS 36.30.380(27) specifically exempts OPA from the procurement code for obtaining these services. In order to further the transparency of OPA's attorney services contracting methods, OPA issued RFP 2013-0200-1579 on November 2, 2012 in order to create an attorney "pool" wherein all attorney services are provided by offerors responding to the RFP and obtaining a contract with OPA through the RFP procurement process. It should be noted that OPA previously issued RFP's for attorney services in Nome – 2011-0200-0265 (issues 6/6/11); Kotzebue – 2011-0200-0266 (issued 6/6/11); and Juneau – 2011-0200-0267 /11) and only received one bidder bid on each of these separate RFP's.

Administrative Rule 12 and AS 44.21.410-44.21.430

Administrative Rule 12 was modified in 1985 in order to accommodate the newly created Office of Public Advocacy. Several elements of Rule 12 and the above mentioned statutes are

inconsistent with a strict application of the procurement code regarding the acquisition of private attorneys by OPA. Importantly, the Public Advocate (through the Commissioner) is given authority to contract with private attorneys and to set compensation rates based on experience and skill level AS 44.210.420(c) and in accordance with the rates set forth in 2AAC 60.010-060. Attached are several memorandums from Arthur Snowden at the court system which give an insight into the intentions of Rule 12 and the statutes as they have been applied to OPA since its inception in 1984 and as they were contemplated with respect to the newly formed OPA.

The Alaska procurement code was being drafted at the same time that the Administrative Rule 12 modifications were being made to account for the newly created Office of Public Advocacy. The procurement code does not discuss Administrative Rule 12 and Rule 12 has not been modified in any relevant way since the inception of the procurement code as it relates to OPA. In fact, the implication of the lack of modification and/or interaction between Administrative Rule 12, AS 44.21.410-430 and the state procurement code strongly supports OPA's position that the drafters of the procurement code did not intend to alter OPA's process of securing attorney services other than under the provisions set forth in Administrative Rule 12 or AS 44.21.410-44.21.430. And OPA has historically, since its inception in 1984, secured attorney services through the Administrative Rule 12 and AS 44.21.210-44.21.430 means as well as through RFP's. The audit letter asserts that OPA has violated the procurement code during the 2006-2012 review period because it has followed the historic application and intent of Administrative Rule 12 and its enabling statute. OPA asserts that this is an improper assertion. The audit letter is holding OPA to a new analysis and application that did not exist prior to the current review. OPA asserts that this is an inappropriate analysis to use in order to find current procurement violations.

Administration of OPA contracts

The audit letter discusses a number of alleged deficiencies regarding the administration of OPA contracts and bills. Unfortunately the letter is so lacking in specificity that it is impossible to adequately respond and therefore denies OPA due process. As a specific example, the audit letter asserts on page 9 that various contracts, documentation and invoices have issues but the audit letter fails to direct OPA to the specific documents in order to address the issues presented. A recent procurement investigation was conducted by the Chief Procurement Officer of DGS related to specific contract issues. A report was issued November 1, 2012 setting forth the results of that investigation. As the Chief Procurement Officer pointed out at the conclusion of that recent investigation, OPA has changed many of its procedures in recent years. The audit letter fails to note which contract problems have been corrected – such as OPA's discontinuance of the use of novations – and which contract issues may still be an ongoing problem.

Going forward

OPA is constantly seeking more effective, efficient ways of doing the state's business. In recent months OPA has issued numerous RFPs for attorney services, as discussed above, and also the Office plans to issue an RFP for an investigator pool in the near future. OPA has undertaken these RFP's because they assist in good management, however, given the complexity that exists with finding conflict free counsel for criminal defendants, it is entirely likely that situations may arise in complex criminal matters in which hiring an attorney outside of the RFP process is necessary. OPA would rely upon its authority under Administrative Rule 12 and its enabling statutes and rate setting regulations set forth above in order to obtain the necessary attorney services for constitutional representation of criminal defendants.

If DAS recommends that OPA issue an RFP for transcriptionists OPA will certainly do so. Regarding expert witness and medical doctor services such an RFP would be wholly inappropriate as outlined above. It appears that the legislature wisely exempted expert witnesses from the procurement code in such situations. It would be impossible for OPA to meet the constitutional obligations associated with its criminal defense responsibilities and strictly comply with procurement regulations for the retention of every conceivable expert in every criminal case.

Some clarity is needed regarding the application or non-application of the procurement code to OPA. As noted above, recently the Chief Procurement Officer recommended that some OPA staff undergo specific procurement training. To the extent that OPA is subject to the procurement code, the Office will gladly accept training in proper administration of the code.

Since its inception the lawyers and staff at OPA have zealously represented the interests of Alaska's most vulnerable adults and children. Tens of thousands of Alaskans have benefited from the hard work and sacrifice of OPA staff and vendor professionals. As a percentage of casework, OPA is likely utilizing attorney vendors less now than ever in its history. OPA has altered its basic structure in order to handle far more matters in-house. This change, along with some legal clarity and training, should greatly reduce the likelihood of service acquisition problems in the future.

Memorandum *Alaska Court System*

Arthur H. Snowden, II
Administrative Director

July 16, 1984

To: Chief Justice Burke
Justice Rabinowitz
Justice Matthews
Justice Compton
Justice Moore

Subject: Multiple criminal conflicts and the public advacate

It is my understanding that the attorney general will be asked to address the manner in which criminal conflicts will be handled by the office of public advocacy. The Department of Administration believes the office should handle only the first level of conflicts, and that the court should continue to appoint counsel for any additional levels of conflict (although the office might pay for such appointments).

The court system's intent in requesting this legislation was that all conflicts would be handled through the executive branch. The legislation does not spell out the procedure for separating the levels of conflict, but instead leaves this determination to the office of public advocacy under the Department of Administration.

All funds identified by the court for administration of criminal conflicts were deleted from the court's budget when this legislation was passed, so a determination that only one level of conflict can be handled through the office would have a substantial and detrimental fiscal impact.

The court system's approach to criminal conflicts is supported by your decision in Flores v. Flores, in which you saw the possibility of Alaska Legal Services furnishing counsel to take both sides of a case, given appropriate regulations and procedures. A copy of that decision is attached, as well as a copy of the legislation. Directly following this memo is a memorandum legal analysis outlining the provisions of the advocacy statute which, in my opinion, assigns all conflicts responsibility to the public advocate.

It is my hope that the court in its administrative capacity will support my view of the intent of this legislation.

AHS, II

BILL SHEFFIELD, GOVERNOR

OFFICE OF PUBLIC ADVOCACY

900 W. 5TH AVENUE
SUITE 525
ANCHORAGE, ALASKA 99501
PHONE: (907) 274-1684

May 23, 1985

Chief Justice Jay A. Rabinowitz
303 K Street
Anchorage, AK 99501

Dear Chief Justice Rabinowitz:

I attended a meeting between you, the presiding judges, and members of the Board of Governors of the Alaska Bar Association on Wednesday, May 15, 1984. At that time Harold Brown, on behalf of the Board of Governors, gave notice of their intention to refuse to cooperate in the development of a list of eligible attorneys for court appointment pursuant to Administrative Rule 12(b).

Subsequent to the meeting, I discussed with several judges and board members the idea of increasing the compensation amounts prescribed in Administrative Rule 12 in order to attract sufficient volunteers to an appointment list. The purpose of the proposal was to avoid a confrontation between the Supreme Court and the Alaska Bar Association. The proposal was well received although certainly differences remain over the precise amounts of compensation to be paid to appointed attorneys.

Since my return from Sitka, I have received over 75 affirmative responses to the call for volunteers. It appears that your faith in the willingness of the bar to respond voluntarily to provide representation to indigent dependents was well justified. I believe that even more volunteers will be recruited if the rates of compensation are increased. Obviously, an increase in the number of volunteers will decrease the number of cases which each volunteer attorney will receive each year. The burden would be shared among many and thus would encourage further growth of the volunteer list.

I propose that the rates of compensation under Administrative Rule 12(e) be increased to $50.00 per hour for out-of-court work and $60.00 an hour for in court representation. I further propose that the schedule ceilings for the following types of cases be changed to the amounts listed below:

1. Misdemeanors disposed of following a plea of guilty or nolo contendere, or by dismissal . . . $400.00.

2. Misdemeanors disposed of following trial . . . $800.00.

3. Felonies disposed of following a plea of guilty or nolo contendere, or by dismissal . . . $2,000.00.

4. Felonies disposed of following trial $4,000.00.

I have recommended the following further change to Administrative Rule 12(g).

> The Public Advocate may authorize payment of compensation or expenses in excess of the amounts prescribed under this rule in extraordinary cases. Applications for such compensation must be submitted within thirty days of the appointment.

The purpose of this proposed change is to allow compensation above the prescribed amounts wherever justified by the facts of each individual case. The proposed change will allow the Public Advocate to receive notice early in each case that additional compensation may have to be awarded. The Public Advocate can also authorize payment above the prescribed amounts in other types of cases whenever early notice is provided.

I believe that the results of your suggestion to make a call for volunteers has effectively defused the confrontation between the board and the bar. I hope these proposed increases in compensation will engender further growth in the volunteer list and early abolition of what many bar members view as a coercive system.

Thank you for your time and consideration.

Sincerely,

OFFICE OF PUBLIC ADVOCACY

Brant McGee
Public Advocate

mw

RECOMMENDED CHANGES TO ADMINISTRATIVE RULE 12

(d) All claims for compensation shall be submitted on forms provided by the court within 30 days of the appointment and every 30 days thereafter. Claims shall be submitted to the director of the Office of Public Advocacy. The director of the Office of Public Advocacy shall approve or disapprove the claim.

(g) The Public Advocate may authorize payment of compensation or expenses in excess of the amounts prescribed under this rule in extraordinary cases. Applications for such compensation must be submitted within 30 days of the appointment.

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

OFFICE OF PUBLIC ADVOCACY

900 W. 5TH AVENUE
SUITE 525
ANCHORAGE, ALASKA 99501
PHONE: (907) 274-1684

May 8, 1985

Dear Colleague:

Recent changes in the Administrative Rules have made me, as the Public Advocate, responsible for the compilation of a list of attorneys eligible for court appointed cases. Administrative Rule 12(b) states that I am to develop such a list "in cooperation with the Alaska Bar Association." Chief Justice Rabinowitz has suggested a call for volunteers for the list as a first step in the resolution of a problem that has long been a primary source of strain in Bench/Bar relations.

The creation of the Office of Public Advocacy and its erection of a statewide contract structure will, I believe, drastically reduce the number of cases in which court appointed attorneys will be required. It is inevitable, however, that there will be temporary gaps in the contract system. These cases will arise primarily in multiple co-defendant prosecutions and in rural areas where there are few lawyers.

Obviously, the success of a volunteer program would obviate the need for what many members of the Bar have come to see as a coercive and unfair system of appointment and compensation. Volunteers would be compensated at $40.00 per hour within the limits of the fee schedule prescribed in Administrative Rules 12 and 13. Please place a check by the area in which you are willing to do occasional court appointed cases.

A. Criminal
   1. Misdemeanors _____
   2. Felonies _____
   3. Unclassified Felonies _____
   4. Appeals _____

B. Civil
   1. Children's cases (primarily guardian ad litem) and representation of parents in Child in Need of Aid proceedings _____
   2. Representation of wards and respondents in Guardianship proceedings _____

C. Will you accept appointments in rural areas if paid travel and per diem? Yes_____ No_____

We would appreciate your earliest response to this recruitment effort.

Sincerely

Brant McGee
Public Advocate

BILL SHEFFIELD, GOVERNOR

OFFICE OF PUBLIC ADVOCACY

900 W. 5TH AVENUE
SUITE 525
ANCHORAGE, ALASKA 99501
PHONE: (907) 274-1684

March 15, 1985

Karla Forsythe
Alaska Court System
303 K Street
Anchorage, AK 99501

Dear Ms. Forsythe:

I suggest the insertion of the following language wherever appropriate in order to clarify the appointment process:

Where the Public Defender Agency has a conflict of interest, the Office of Public Advocacy or its contract representative shall be appointed. If the Office of Public Advocacy cannot provide representation within a reasonable time, consistent with the circumstances of the case, the court shall appoint counsel pursuant to the Rules of Court. The Office of Public Advocacy shall be responsible for payment to counsel appointed by the court.

I am not wedded to any of the specific language above and would be happy to discuss any changes. The final sentence does not include a provision for payment at the prevailing contract rate because I can anticipate situations where such a disparity may well be justified, i.e., a contract attorney with five years experience and an appointed attorney with two years experience.

I understand that you intend to prepare a proposed rule that would dictate, with some precision, all the circumstances under which the court can appoint counsel. I support the formulation of a comprehensive rule that would guide both mandatory and discretionary appointments. I look forward to working with you on drafts of this rule.

I am not enthusiastic about the notion that OPA should be responsible for compiling a list of attorneys available for appointment that includes a three-tiered system of classification according to skill level. My office has no capacity to make classification decisions concerning every attorney in the state. I have considered the idea of sending a questionnaire to all attorneys through the bar association

which would ask that they answer questions relating to their individual levels of experience. This idea suffers from two important defects. First, attorneys would know the purpose of the questionnaire and may therefore tend to minimize their level of experience. Second, attorneys may simply choose not to return the questionnaire. I remain, however, anxious participate in resolving this problem.

Thank you for your time and consideration.

Sincerely,

OFFICE OF PUBLIC ADVOCACY

By: _____
Brant McGee
Public Advocate

mw

Superior Court
State of Alaska
THIRD JUDICIAL DISTRICT
303 K Street
Anchorage, Alaska 99501-2083

CHAMBERS OF
DOUGLAS J. SERDAHELY
Presiding Judge

MEMORANDUM

TO: Chief Justice Rabinowitz

INFO: Art Snowden, Administrative Director
Karla Forsythe, Staff Counsel

FROM: Presiding Judge Serdahely

DATE: March 28, 1985

RE: Attorneys Appointments List

I understand that the Supreme Court has taken the position, at its last administrative conference, that some type of attorneys appointments list should still be maintained and utilized by presiding judges throughout the state, despite the existence of the Office of Public Advocacy.

I would ask the Court to reconsider its views on this matter for the following reasons.

First, it appears to me that the language of the statute establishing the Office of Public Advocacy flatly commits to that agency the entire responsibility of providing representation in conflict cases. Nothing in the statute contemplates or suggests that the Court maintain some degree of involvement in this process. Accordingly, the language of AS 44.21.410 provides in part: "a) The Office of Public Advocacy shall ... (5) provide legal representation ... in cases involving indigent persons who are entitled to representation under AS 18.85.100 and who cannot be represented by the Public Defender Agency because of a conflict of interest."

Second, the appointments of attorneys from any list to criminal cases -- now particularly in non-major

urban areas such as Kodiak, Kenai, etc. -- is perhaps the most sensitive Bar-Bench relations issue. Unquestionably, the greatest amount of hostility and adverse reaction I have experienced so far from Bar members has resulted from these appointments, and the limited amounts of funds available with which to compensate attorneys. It is my impression that Presiding Judge Rowland also experienced ongoing difficulties with the Bar in this area. In short, to keep the Court System and the presiding judges involved in the appointment process will be to keep alive one of the major sources of tension between the Bench and the Bar.

Third, the compilation of the lists, and the administration of the appointments process, requires a significant amount of administrative time by both presiding judge and the calendaring staff. Currently, I receive as many as a half dozen letters, personal visits, telephone calls from attorneys each week, complaining about their appointments, attempting to be relieved of their assignments of a result of various excuses, and complaining about the amount of money they will be paid as a result of these assignments. Checking the attorneys' excuses, investigating the procedural status of the cases to which they have been assigned (generally in non-Anchorage areas), and the like frankly eats up a considerable amount of time each week. Candidly, dealing with the appointments process and attorneys' attempting to be excused from the appointments has turned out to be the single biggest pain in the neck associated with the presiding judges' duties so far.

Finally, if the Supreme Court's position remains the same regarding this issue, additional guidance as to the manner in which the Court would like us to interrelate with the Office of Public Advocacy would be appreciated. Specifically, should OPA or the Court compile, maintain, and administer the appointments list? Should OPA or the Court establish criteria for excusals from appointments? Should OPA or the Court resolve questions as to an individual attorney's competence to try criminal cases? Again, guidance on this issue will be sincerely appreciated.

M E M O R A N D U M May 31, 1985

To: Presiding Judge Schulz
Presiding Judge Tunley
Presiding Judge Serdahely
Presiding Judge Hodges
Judge Carlson
Area Court Administrator Carlisle
Area Court Administrator Hall
Area Court Administrator Szal
Area Court Administrator Gibson
Dana Fabe, Public Defender
Brant McGee, Director, Office of Public Advocacy
Deborah O'Regan, Executive Director,
Alaska Bar Association

From: Karla L. Forsythe KLF
General Counsel

Subject: Administrative Rules 12 and 13

I have attached a proposed revision to Administrative Rule 12, relating to the procedure for counsel and guardian ad litem appointments at public expense. Since this proposal addresses both attorney and guardian ad litem appointments, present Administrative Rule 13 would be repealed. The provisions of Administrative 13 would be adopted as an interim order expiring on August 30, 1985 or upon promulgation of regulations by the Commissioner of Administration.

The supreme court will review these proposals at an administrative meeting on Thursday, June 6. The proposed effective date is July 1. An interim fee schedule has been adopted in a separate order (copy attached), and is not incorporated in the rule.

The revised rule would be supplemented at a later date by three additional rules addressing topics not covered in the current rules: new Administrative Rule 13, dealing with counsel and guardians ad litem for non-indigent parties, new Administrative Rule 12.1, setting forth those specific circumstances under which an appointment to the public defender agency is authorized, and new Administrative Rule 12.2, setting forth those specific circumstances under which an appointment to the office of public advocacy is authorized. I will be sending you copies of these proposals for comment.

Please review this proposed revision, and call me as soon as you can with your comments and suggestions for changes.

cc: Chief Justice Rabinowitz
Arthur H. Snowden, II
Stephanie Cole
Dan Bauermeister
Bob Fisher

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. _____

Relating to procedures for counsel and guardian ad litem appointments at public expense

IT IS ORDERED:

Administrative Rule 12 is repealed and re-enacted to read as follows:

ADMINISTRATIVE RULE 12: PROCEDURE FOR COUNSEL AND GUARDIAN AD LITEM APPOINTMENTS AT PUBLIC EXPENSE

(a) Intent

The court shall appoint counsel or a guardian ad litem only when the court specifically determines that the appointment is clearly authorized by law or rule, and that the person for whom the appointment is made is financially eligible for an appointment at public expense.

(b) Appointments under AS 18.85.100(a) (Public Defender Agency)

(1) Appointment procedure

(A) When a person is entitled to counsel under AS 18.85.100(a), 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 or the parties stipulate on the record that the agency has a conflict of interest, the court accepting such motion or stipulation shall appoint the office of public advocacy to provide counsel.

(B) Upon a showing by the office of public advocacy that the office has made a good faith and reasonable effort to provide counsel either by staff or by contract to represent the defendant, but has been unable to do so, the court shall appoint an attorney to provide representation. Lists of attorneys eligible to handle misdemeanors, felonies, unclassified felonies and appeals in each court location shall be compiled annually by the director of the office of public advocacy in cooperation with

the Alaska Bar Association. The list for each court location shall be provided to the clerk of that court and to the presiding judge of the judicial district. Appointments shall be made from the list on a rotating basis as far as is practical.

(C) All claims for payment for services performed after July 1, 1984 by attorneys appointed by the court shall be submitted to the director of the office of public advocacy, under such procedures as the director may prescribe. The director shall approve, modify or disapprove the claim.

(2) Determination of indigency Determination of indigency or financial inability for appointments under paragraph (B) of this rule must be made in accordance with the provisions of Criminal Rule 39.

(3) Assessment of costs To the extent that a person for whom counsel is appointed under paragraph (B) of this rule is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court shall order the person to pay for these items. When counsel is appointed for a child when the child's parents or custodian are financially able but refuse to employ counsel to assist the child, the court may, when appropriate, assess as costs against the parents, guardian or custodian the cost to the state for providing such counsel.

(c) Appointments Under AS 44.21.410 (Office of Public Advocacy)

(1) Appointment Procedure

(A) When a person qualifies for counsel or guardian ad litem services under AS 44.21.410, the court shall appoint the office of public advocacy. The court in its order appointing the office of public advocacy must state the authority for the appointment. In the case of a discretionary appointment, the court must give specific reasons for the appointment. In the case of a guardian ad litem appointment, the court shall limit the appointment to the pendency of the proceedings affecting the child's welfare, shall outline the guardian ad litem's responsibilities, and shall limit the guardian's authority to those matters related to the guardian's effective representation of the minor's best interests in the pending legal proceeding.

(B) Upon a showing by the office of public advocacy that the office has made a good faith and reasonable effort to provide counsel either by staff or by contract to represent the party, but has been unable to do so, the court shall appoint an attorney to provide representation. Upon a showing by the office of public advocacy that the office has made a good faith and reasonable effort to provide a guardian ad litem either by staff or by contract, but has been unable to do so, the court may appoint an attorney to provide these services, or may appoint a person who is not an attorney who agrees to provide these services. Lists of attorneys in each court location shall be compiled annually by the director of the office of public advocacy in cooperation with the Alaska Bar Association. The list for each court location shall be provided to the clerk of that court and the presiding judge of that judicial district. Appointments shall be made from the list on a rotating basis as far as is practical.

(C) Claims for payment for services performed on or after July 1, 1984 shall be submitted to the director of public advocacy, under such procedures as the director may prescribe. The director shall approve, modify or disapprove the claim.

(2) Indigency determination For appointments to the office of public advocacy under this rule, other than an appointment required because of a conflict of interest with the public defender agency, a person is indigent if the person's income does not exceed the maximum income level for Alaska set forth in 45 CFR 1611, Appendix A, for eligibility for representation by the legal services corporation. A person whose income exceeds the maximum amount for legal services representation may be determined indigent only if a judge makes a specific finding of indigency on the record, taking into account the funds necessary for the person to maintain employment, to provide shelter, and to clothe, feed and care for the person and the person's immediate family, the person's outstanding contractual indebtedness, the person's ability to afford representation based on the particular matter and the complexity of the case, the costs of living and

attorneys fees in different regions of the state, and any liquid assets which could be counted as income.

(3) Assessment of costs In an appointment under AS 25.24.310 for representation of a minor, the court shall enter an order for costs, fees and disbursements in favor of the state. If the appointment is made in a proceeding in which custody, support or visitation is an issue, the court shall, if possible, avoid assigning costs to only one party by ordering that costs of the minor's legal representative or guardian services be paid from property belonging to both parents before a division of property is made.

(d) Other appointments at public expense.

(1) Withdrawal from unauthorized appointment. The public defender agency and the office of public advocacy shall accept appointments only in those cases for which the basis for the appointment is clearly authorized. If the agency or office determines that the basis for an appointment is not clearly authorized, the agency or office shall file with the court a motion to withdraw from the appointment.

(2) Constitutionally required appointments. If the court determines that counsel or a guardian ad litem should be appointed for a indigent person, and further determines that the appointment is not authorized by AS 18.85.100(a) or AS 44.21.410, but in the opinion of the court is required by law or rule, the court shall inform the administrative director of the specific reasons why the appointment is required. All such appointments shall be made on a rotating basis from the attorney lists compiled in accordance with this rule. Claims for compensation shall be submitted to the Alaska Court System within 30 days following the disposition of a case, on forms provided by the court system. Attorneys appointed under this paragraph shall be compensated at the rate of $40.00 per hour. The maximum compensation for any one case shall not exceed $1500.00 unless excess compensation is approved by the administrative director.

DATED: _____

EFFECTIVE DATE: July 1, 1985

_____
Chief Justice Rabinowitz

_____
Justice Burke

_____
Justice Matthews

_____
Justice Compton

_____
Justice Moore

APPENDIX A OF PART 1611—LEGAL SERVICES CORPORATION POVERTY GUIDELINE

Size of family unit	Poverty guideline
For all States except Alaska and Hawaii size of family unit: [1]	
1	5,225
2	6,400
3	10,575
4	12,750
5	14,925
6	17,100
7	19,275
8	21,450
For Alaska: size of family unit: [2]	
1	7,900
2	10,512
3	13,225
4	15,937
5	18,650
6	21,362
7	24,075
8	26,787
For Hawaii: size of family unit: [3]	
1	7,162
2	9,662
3	12,162
4	14,662
5	17,162
6	19,662
7	22,162
8	24,662

[1] For family units with more than eight members, add $2,175 for each additional member in a family.
[2] For family units with more than eight members, add $2,712 for each additional member in a family.
[3] For family units with more than eight members, add $2,500 for each additional member in a family.

(Sec. 1007(a)(2), Legal Services Corporation Act; (42 U.S.C. 2996f(a)(2)))

[49 FR 24731, June 15, 1984]

PART 1612—RESTRICTIONS ON LOBBYING AND CERTAIN OTHER ACTIVITIES

Sec.
1612.1 Definitions.
1612.2 Public demonstrations and activities.
1612.3 Organizing.
1612.4 Training.
1612.5 Legislative and administrative representation.
1612.6 Administrative representation under Pub. L. 98-166.
1612.7 Legislative representation under Pub. L. 98-166.
1612.8 Enforcement.
1612.9 Posting of notices.

AUTHORITY: Secs. 1006(b)(5), 1007(a)(5), (6) and (7), 1011, 1008(e), Legal Services Corporation Act of 1974, as amended (42 U.S.C. 2996e(b)(5), 2996f (a)(5), (6) and (7), 2996j, 2996g (e)); Pub. L. 95-431, 92 Stat. 1021; Pub. L. 96-68, 93 Stat. 416; Pub. L. 96-536, 94 Stat. 3166; Pub. L. 97-161, 96 Stat. 22; Pub. L. 97-377, 96 Stat. 1874; Pub. L. 98-166, 97 Stat. 1071.

SOURCE: 49 FR 23635, May 31, 1984, unless otherwise noted.

§ 1612.1 Definitions.

(a) "Legal assistance activities," as used in this part, means any activity:

(1) Carried out during an employee's working hours or while on official travel;

(2) Using resources provided by the Corporation or a recipient, directly or through a subrecipient; or

(3) That, in fact, provides legal advice or representation to an eligible client.

(b) "Legislation", as used in this part, means any potential action of the Congress, any State legislature or other body of elected officials acting in a legislative capacity (including action on constitutional amendments, the ratification of treaties and intergovernmental agreements, approval of appointments and budgets, adoption of resolutions not having the force of law, and approval or disapproval of actions of the executive). The term includes proposals for legislative action but it does not include those actions of a legislative body which adjudicate the rights of individuals under existing laws (such as action taken by a local council sitting as a Board of Zoning Appeals). "Legislature" as used herein does not include any Indian Tribal Council.

§ 1612.2 Public demonstrations and activities.

(a) While carrying out legal assistance activities under the Act no employee shall:

(1) Knowingly participate in any public demonstration, picketing, boycott, or strike, except as permitted by law in connection with the employee's own employment situation; or

(2) Intentionally exhort, direct, or force others to engage in such activities, or otherwise use or threaten the rightful authority of a client to determine what course of action to take.

(b) While carrying out legal assistance activities under the Act no employee may take part in any

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. _____

Repealing Administrative Rule 13, and making interim provisions for payment of attorneys appointed by the court to represent persons under the Rules of Children's Procedure, pursuant to statute, or where constitutionally required.

IT IS ORDERED:

1. Administrative Rule 13 is repealed.
2. The compensation procedures and fee schedules described below will remain in effect until August 30, 1985, or until the promulgation of regulations by the Commissioner of Administration pursuant to AS 44.21.410(b)(1), whichever occurs first:

(A) Attorneys appointed by the court to represent persons under the Rules of Children's Procedure, pursuant to statute, or where the appointment of counsel is constitutionally required, shall be compensated at the rate of $40.00 per hour. The maximum compensation for any one case shall not exceed $1,500.00 unless excess compensation is approved by the director of the Office of Public Advocacy.

(B) Guardians ad litem appointed by the court under the Rules of Children's Procedure or pursuant to statute, shall be compensated as follows:

(1) An attorney appointed as guardian ad litem shall receive $40.00 per hour; provided, that if the attorney has been appointed to act as both counsel and as guardian ad litem, he shall be compensated only as an attorney.

(2) A person other than an attorney appointed as guardian ad litem shall receive compensation if the court deems it appropriate, not to exceed $25.00 per hour.

(3) The maximum compensation for any one case shall not exceed $1,500.00 unless excess compensation is approved by the director of the Office of Public Advocacy.

(C) Claims for compensation shall be submitted, on forms provided by the court, within 30 days following disposition of the case. Claims shall be submitted for approval to the director of the Office of Public Advocacy.

(D) If the assigned judge determines that the party or parties have legal responsibility for the support of a child for whom an attorney or guardian ad litem has been appointed are able, without undue financial hardship, to pay the costs of such services, the judge shall:

(1) Order that all or an equitable portion of the costs be paid by such party or parties directly to the person providing the services; or

(2) Assess as costs to such party or parties all or an equitable portion of the cost to the state of providing such services.

(E) The director of the Office of Public Advocacy may award compensation at a higher rate than provided in this rule in unusually complex or protracted cases.

(F) Reimbursement for costs and expenses incurred shall not exceed $250.00 unless prior authorization has been obtained from the director of the Office of Public Advocacy.

(G) All unpaid billings submitted for services described in former Administrative Rule 13 or in this order performed on or after July 1, 1984, and all unpaid billings submitted for all services described in AS 44.21.210 performed on or after July 1, 1984, will be forwarded to the Office of Public Advocacy, 900 West Fourth Avenue, Suite 525, Anchorage, Alaska 99501 for processing and payment.

DATED: _____

Chief Justice Rabinowitz

EFFECTIVE DATE: _____

Justice Burke

Justice Matthews

Justice Compton

Justice Moore

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. 628

Interim order providing for payment of court appointment claims by the Office of Public Advocacy

WHEREAS the Office of Public Advocacy is charged under AS 44.21.410 with the obligation of providing legal representation to indigent persons who cannot be represented by the Public Defender Agency because of a conflict of interest, and whereas the Office of Public Advocacy has requested that the court establish the rate of the compensation for private attorneys appointed by the court in the amounts set forth below until the Commissioner of Administration adopts regulations establishing the compensation rate,

IT IS ORDERED:

1. Attorneys shall be compensated at the rate of $60.00 per hour for in court representation and $50.00 per hour for out-of-court work. Total compensation for any case shall not exceed the following schedule:

(1) Misdemeanor disposed of following a plea of guilty or nolo contendere, or by dismissal.....$ 400.00

(2) Misdemeanor disposed of following trial.....800.00

(3) Felony disposed of following a plea of guilty or nolo contendere, or by dismissal.....2,000.00

(4) Felony disposed of following trial.....4,000.00

(5) Probation or parole revocation proceeding or a proceeding under Criminal Rule 35(b):

(i) Misdemeanor.....350.00

(ii) Felony 1,000.00

(6) Appeal, including combined sentence and merit appeals:

(i) From the district court.....500.00

(ii) From the superior court.....1,500.00

(7) Sentence appeal:

(i) From the district court.....250.00

(ii) From the superior court.....750.00

(8) Petition for review, including any additional or successive petitions in the same case:

(i) From the district court.....350.00

(ii) From the superior court.....1,000.00

(9) Petition for hearing; including successive petitions to the court of appeals and the supreme court in the circumstances permitted by statute:

(i) If denied.....750.00

(ii) If granted.....1,000.00

Multiple court or charges in an indictment or information are to be considered as a single case for purposes of compensation under this rule, but in the discretion of the presiding judge, they may be treated as separate cases if separate trials have been ordered under Criminal Rule 14. Additional compensation for proceedings not specifically listed in this schedule may not be awarded except under paragraph 4 of this order.

2. Extraordinary expenses for attorneys appointed under subparagraph (ii) of this rule will be reimbursed only if prior authority has been obtained from the director of the office of public advocacy. In this paragraph, "extraordinary expenses" are limited to expenses for:

(1) Investigation;

(2) Expert witnesses; and

(3) Necessary travel and per diem by the defendant, appointed counsel, and witness. Travel and per diem may not exceed the rate authorized for state employees.

3. All claims for compensation shall be submitted on forms provided by the court within 30 days of the appointment and every 30 days thereafter. Claims shall be submitted to the director of the Office of Public Advocacy. The director of the Office of Public Advocacy shall approve or disapprove the claim.

4. The director of the Office of Public Advocacy may authorize payment of compensation or expenses in excess of the

amounts prescribed under this order in extraordinary cases. Applications for such compensation must be submitted within 30 days of the appointment.

5. The compensation procedures and fee schedule described in this order will remain in effect until August 30, 1985, or until the promulgation of regulations by the Commissioner of Administration pursuant to AS 44.21.410(b)(1), whichever occurs first.

6. Paragraphs (d), (e), (f), (g) and (h) of Rule 12, Rules Governing the Administration of All Courts, are repealed.

DATED: May 30, 1985

EFFECTIVE DATE: May 30, 1985

Chief Justice Rabinowitz

Justice Burke

Justice Matthews

Justice Compton

Justice Moore

Memorandum

Alaska Court System

TO: Arthur H. Snowden, II
Administrative Director

DATE : July 17, 1984

FROM: Don C. Bauermeister
Court Rules Attorney

SUBJECT: Interpretation of A.S. 44.21.400 on Public Advocacy

This memorandum will discuss a facial analysis of the provisions of the above bill as they relate to all conflicts appointments where the public defender is unavailable to represent indigent criminal defendants. My conclusion is that a reasonably strong case can be made for interpreting the bill to require the office of the public advocate to assume responsibility for all conflicts appointments. Several sections of the bill are listed below and each is followed by my analysis that supports the above conclusion.

A.S. 44.41.410 provides in pertinent part:

> (a) The office of public advocacy shall:
>
> . . .
>
> (5) provide legal representation . . . in cases involving indigent persons who are entitled to representation under A.S. 18.85.100 and who cannot be represented by the public defender agency because of a conflict of interest.

The import of this section is that it creates but a single class of persons to receive conflict representation by the public advocate. The plain meaning of the language would be that all of those who cannot be represented by the public defender because of a conflict would be then represented by the public advocate.

A.S. 44.21.410 provides in pertinent part:

> (c) . . . The Commissioner may contract with attorneys to provide legal representation . . . as needed to perform the duties set out in A.S. 44.21.410. The Commissioner may determine the rate of compensation for contractual services, taking into account the time involved, the skill and experience required, and other pertinent factors.

This section suggests that the office of public advocacy is given full authority to contract with attorneys to provide complete representation of all those in need of legal services as set out in A.S. 44.21.410. It is clear that this section exists to provide the public advocate with

authority to do contract service provision. Since later sections of the act talk about legal representation by office employees, the strong inference is that a typical duty of the public advocate will be to do additional contract work. Since the office will be presumably staffed to handle the initial conflict caseload that is received, it is only logical to assume that additional contracting work would be done to handle the third and fourth level conflict cases. Additionally, it would be illogical to give the Commissioner a grant of authority to determine the rate of compensation for contractual services if that is how the basic work of the public advocate was going to be done. It is presumed that the lawyers who do the basic work will be non-contractual and will be paid the same salary as other state employees doing similar work.

A.S. 44.21.440 provides in pertinent part:

> CONFLICTS OF INTERESTS. Services and representation rendered by the office of public advocacy, whether performed by a person under contract or by an employee of the office, shall be provided in a manner that avoids conflicts of interests.

This particular provision implies that the public advocate will routinely provide legal services both by office employees and by persons under contract. The section creates a duty to provide such services in a manner that avoids conflicts of interests. Since to my knowledge no other legislation creating legal duties in a governmental entity specifically addresses the conflicts question, it can be inferred that the legislature specifically intended the public advocate to be concerned with the continuing possibility of conflicts within the range of duties the public advocate is responsible for. This section clearly provides the public advocate with the responsibility of ensuring that the services it does offer avoid conflicts of interests. That could be done in a variety of ways, but reading the legislation as a whole would suggest strongly that the public advocate should use its specifically granted contracting authority to cover areas where it is specifically directed to avoid conflicts.

A.S. 18.85.110(d) provides in pertinent part:

> (d) If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the agency or the office of public advocacy.

This section on its face clearly provides the court with authority to appoint either the public defender or the public advocate. Most telling is the language that was deleted when the alternative of appointing the public advocate was added to the section. That language read, "or assign a private attorney for him under A.S. 18.85.130." Obviously, the legislative intent here was to drop the alternative of private attorney assignments in favor of the appointment of the office of the public advocate. Clearly, the legislature could merely have added the office of public advocacy as an additional choice to public defender appointments or private counsel

appointments. The legislature did not do this. The choice of assigning a private attorney under the statute was dropped.

A.S. 18.85.110(e) reads in pertinent part:

> (e) Upon notification or assignment under this section, the agency or the office of public advocacy shall represent the person with respect to whom the notification or assignment is made.

Interpreting this section is similar to the job of interpreting the one preceding it. When the legislature added the office of public advocacy as a possible receiver of an assignment under this section, it deleted the words, "or assigned private attorney". It appears the direct intent of the legislature was to make all assignments either to the public defender or the public advocate with no provision for private attorneys recognized by the statute.

For the above reasons, it is fairly difficult to make a contrary argument that the facial language of the statute provides for responsibility in the public advocate for first level conflicts only. The language of the statute appears clearly to assign the public advocate the responsibility of handling all conflicts surrounding indigent appointments. The language gives the advocate this responsibility, provides a contracting authority as well as an in-house staff to take care of this responsibility, and directs that however legal representation is provided that it shall be done so in a manner that avoids conflicts of interests. Thus, the clear thrust of the legislation is to provide conflicts counsel to indigent defendants through either staff counsel or contracting authority of the public advocate.

Apparently, the legislature has taken to heart the statement of the supreme court in Jackson v. State, 413 P.2d 488, 490 (Alaska 1966), that, "The problem of providing some means of adequately compensating counsel in representing indigents, . . . is a matter fundamentally for legislative and not judicial treatment." Under the above legislation the responsibility, authority, and means for providing adequate legal representation to indigent defendants now lies with the executive branch of government through its offices of the public defender and the public advocate.

DCB:lae

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

P.O. Box 113300
Juneau, AK 99811-3300
(907) 465-3830
FAX (907) 465-2347
legaudit@akleg.gov

January 8, 2013

Members of the Legislative Budget
and Audit Committee:

We have reviewed the Department of Administration (DOA) and the Office of Public Advocacy (OPA) managements' responses to our preliminary audit report. Nothing contained in the responses causes us to revise or reconsider the report's conclusions and recommendations. However, there are two points we wish to clarify and/or emphasize.

We disagree with OPA management's interpretation of statutes. Court Administrative Rule 12 is not a valid exemption from state procurement law and thus cannot be used as the basis for not following statutory procurement requirements. Secondly, for OPA services that are legally exempt, we emphasize that the agency must still follow rules that require procurement methods be rational and reasonable. OPA management has failed to meet these minimum standards. Additionally, OPA management has not prudently administered contracts. We caution against reducing the procurement requirements that must be met by the agency.

We reaffirm our recommendation that DOA's Division of Administrative Services director take action to ensure OPA professional services are obtained and administered in accordance with state procurement laws and the Alaska Administrative Manual.

Kris Curtis, CPA, CISA
Legislative Auditor

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