

2010-2011 GRAND JURY REPORT

Riverside County Indigent Defense Contract

Background

The roots of the modern right to counsel for the defendant who cannot afford to pay a private lawyer can be found more than a century ago. In *Webb v. Baird* the Indiana Supreme Court in 1853 recognized a right to an attorney at public expense for an indigent person accused of crime is grounded in the principles of a civilized society not in constitutional or statutory law. The Supreme Court affirmed this right in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Under provisions of the California Penal Code §987.2 any person, including a minor, who is unable to hire defense counsel, is entitled to a qualified defense attorney at no cost for cases involving criminal, juvenile and probate matters. In Riverside County, this is provided by the Office of the Public Defender.

A “conflict” is declared by the Public Defender’s Office in cases where there are multiple indigent clients charged in the same crime or there is a representational conflict of interest. When a conflict has been declared, the first level of conflict defense is handled by the Public Defender. Additional conflict defendants are assigned to outside private law firms herein after called Indigent Defense. Requiring Indigent Defense in conflict situations is not unusual when the charge involves multiple defendants such as a gang-related crime. The Public Defender handles approximately 5,400 cases per year with an additional 3,700 cases assigned to Indigent Defense. Penal Code §987.2 also requires these entities provide legal defense for conflict cases be separate from the Office of the Public Defender. In 2010, Riverside County’s Indigent Defense cases were handled by three-contracted law firms comprised of sub-contracted defense attorneys.

To address the challenge of the size of Riverside County, providing Indigent Defense involves dividing the County into three areas: adults in Riverside/Southwest portions of the County, adults in the Eastern County from Indio to Blythe and juvenile defense. Also included in these contracts are provisions for funds that are placed in trust accounts to cover costs for professional witnesses, special evaluations of defendants, and other non-attorney services.

In 2002, the County contracted with a law firm to provide Indigent Defense for Riverside and Southwest sections of the County. This was the largest Indigent Defense contract of the three contracts approved at that time and has been renewed every year per request from the Riverside County Executive Office and approved by the Board of Supervisors.

Findings

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

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

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

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

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

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

An Indigent Defense contract is issued in two parts. The largest dollar part covers the attorney services provided in conflict cases. The other smaller part provides a trust account for ancillary non-attorney services. There is an existing provision in an Indigent Defense contract that stipulates the County **may** “audit/inspect files/books and/or financial records at any time”. However, investigation has revealed the Executive Office has been negligent in not requesting any audits of the larger contract portion, which provides attorney services.

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

3. The Riverside County Executive Office has no approved written policies and procedures for processing monthly Indigent Defense payments for legal services or handling monthly payments to their trust accounts. Investigation revealed that prior to April 2010, the Indigent Defense contractors’ documentation submitted to the Riverside County Executive Office was in the form of brief memoranda rather than detailed invoices or activity reports. The Riverside County Executive Office authorized monthly payments for Indigent Defense legal services *before* the Riverside County Executive Office received any specific activity reports. This demonstrates that validation of contracted services did not occur before payments were processed. Investigation also revealed that as a result of the Riverside County Executive Office becoming aware of this lack of documentation for work performed, the Riverside County Executive Office demanded Indigent Defense contractors submit activity reports *before* any payments would be issued.
4. Investigation into Indigent Defense reporting revealed that Indigent Defense contractors stated they were unable to provide hours per case to the Riverside County Executive Office. Conversely, as Riverside County is one of nineteen counties in California which houses State prisons, when hearings for prisoners incarcerated in a State facility occur and defense is provided by the local County, Penal Code sections 4750-4755 and 6005 allow for reimbursement to the County that provides these defense services on behalf of the State of California. Evidence also revealed that the FAM-27 form has been submitted by the County to the State for reimbursement and required the County to include the number of hours of Indigent Defense provided.

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

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

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

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

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

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

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

Recommendations

**Riverside County Board of Supervisors
Riverside County Executive Office
Riverside County Public Defender
Riverside County Purchasing Department**

1. The Board of Supervisors should review and place a finalized version of B.R.U.T.E. on its agenda for final vote as soon as possible. This finalized version should be expanded and refined as follows:
 - B.R.U.T.E. should state that responsibility of receipt of all proposals remain with the Purchasing Department and ensure a second witness is available when the proposals are delivered and certified.

- The Purchasing Department should continue handling the administration of the proposal process including providing a certified copy to the Clerk of the Board and posting RFP's online including qualified evaluators. B.R.U.T.E. should identify which contract bids are to be opened at public Board of Supervisors meetings and which may be unsealed in another approved manner, and would include public oversight and therefore provide transparency. All RFP's over \$1 million should be placed on the Board of Supervisors agenda for Board of Supervisors approval.
 - B.R.U.T.E. should require all Riverside County contracts over \$1 million contain an audit provision and include the following:
 - Define specifically what type of audit is to be conducted such as financial, physical or operational to ascertain appropriate deliverables are being made.
 - Further define "regular" audits by such terms as annually or biennially.
 - Define who performs the audit and who pays for the audit.
2. The Riverside County Executive Office has a fiscal responsibility to the County taxpayers to request audits, either internally or externally, of one of its largest contracts and verify that the terms of contracts are being adhered to.

The scope of specified audits of entities should include:

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

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

3. The Riverside County Executive Office should immediately prepare and distribute detailed written policies and procedures for processing payments on all Indigent Defense contracts including the trust account payments. Activity reports must continue to be submitted by Indigent Defense contractors. The Indigent Defense contracts should be amended to provide provisions to withhold monthly payments until required documents have been submitted.
4. Future Indigent Defense contracts should require legal contractors report the number of hours of defense services, track on a regular basis (i.e. monthly, quarterly) and at the conclusion of each case. This is important in establishing benchmarks for tracking appropriateness of legal services, cost relative to contracted services, and a viable audit trail for validating the cost of legal services provided.
5. To restore credibility and integrity to the Board of Supervisors, they should work together with the Purchasing Department to construct a workable RFP process to ensure transparency in future Indigent Defense contracts. Lack of oversight invites potential abuse in the use of County funds.

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