



20 E Main St Suite 820  
PO Box 1466  
Mesa, Arizona 85211-1466

Date: November 18, 2014

To: Audit, Finance and Enterprise Committee

From: Jennifer Ruttman, City Auditor

Subject: Audit of Public Defender Contract Administration

cc: Mayor and Council  
Scott Butler, Assistant to the City Manager  
Matt Tafoya, Presiding City Magistrate

Pursuant to the Council-approved Audit Plan, the City Auditor's office has completed an audit of public defender contract administration. The audit report is attached and will be presented at the next scheduled meeting of the Audit, Finance & Enterprise Committee. We wish to extend our appreciation to Charlotte McDermott, Assistant City Attorney I (formerly Council Assistant), who served as the contract administrator during the audit period, for her professionalism and cooperation throughout the audit process.

Please feel free to contact me with any questions or concerns.

## **AUDIT REPORT**

**CITY AUDITOR**

**Report Date: November 18, 2014**  
**Department: City Manager**  
**Subject: Public Defender Contract Administration**  
**Lead Auditor: Tami Steadman**

### **OBJECTIVE**

This audit was conducted to determine whether adequate controls are in place to ensure the City's public Defender contracts are administered in accordance with applicable regulations and policies; and that any related risks to the City are minimized.

### **SCOPE & METHODOLOGY**

To achieve our objective, we:

- Interviewed City staff members from the Municipal Court, the City Attorney's office (both civil and prosecutors), the Public Defender Contract Administrator (PDCA), and others.
- Reviewed Mesa's public defender contracts, court system data reports, attorneys' case log reports, invoices, and payment records for FY 2014.
- Reviewed contracts and other methods used by other Arizona municipalities to provide public defense services.
- Reviewed applicable laws, professional standards and other authoritative guidance for government entities contracting for public defense services.

It should be noted that our scope did not include analyzing the processes related to determining indigent status or assessing/collecting fees associated with public defense services, as both of those processes relate more to defendants than to public defenders. We did, however, review the administrative processes related to the distribution of the total workload among the contracted public defenders.

### **BACKGROUND**

The City of Mesa contracts individually with 12 attorneys to provide public defense services for indigent defendants as required by the Sixth Amendment to the U.S. Constitution and in accordance with the Arizona Rules of Criminal Procedure. These contracts provide 1 public defender for the In Custody Courtroom, 1 for the Arraignment Courtroom, and 2 for each of 5 other courtrooms. There is no regular rotation or reassignment of attorneys among the various courtrooms. According to data provided by court staff, approximately 23% of all new criminal cases filed in the Mesa Municipal Court are assigned public defenders.

In order to maintain independence from both the Court and the City Prosecutor's office, Public defender service contracts are administered in the City Manager's office. Historically, however, there has been no consistent ownership of this process by a subject matter expert, and essentially no additional oversight. Currently, the PDCA role is assigned to a Council Assistant, who performs essentially all of the administrative tasks, from overseeing the procurement of contracts to approving monthly payments. However, this is not one of her primary duties and contract administration is not typically a responsibility of a Council Assistant. Fortunately, the current PDCA does have a legal background and, since assuming this role, she has made several improvements to the contracts and the processes used to monitor them.

### **Fiscal Impact**

In FY 2014, payments for the 12 public defender contracts totaled \$848,480, including:

- \$20,800 for 1 Arraignment Court public defender, 2 mornings/week, \$50/hour.
- \$45,000 for 1 Jail Court public defender, 4 mornings per week, fixed rate/year.
- \$782,680 for the 10 other public defenders, \$170/case.

To offset a small portion of the administrative costs related to providing public defense services, the judge may order a defendant to pay a \$25 Court Indigent Administrative Assessment Fee. If it is determined that a defendant can afford to contribute to the cost of his/her own defense, the judge may also assess a Public Defender Fee. If applicable, these fees are due when the case is completed. In FY 2014, the City collected a combined total of approximately \$90,341 for these fees.

### **CONCLUSION**

In our opinion, except as noted below, adequate controls are currently in place to ensure the City's public defender contracts are administered in accordance with applicable regulations; and the risk of improper payments or other losses has been effectively mitigated.

However, we did identify a few areas of risk as well as opportunities to improve internal controls. If the role of PDCA were to be transitioned to a different employee in the future, these risks are likely to increase unless additional compensating controls are implemented. A summarized list of our observations and recommendations is included below. For additional details and responses from management, please see the attached Corrective Action Plans (CAPs).

### **OBSERVATIONS**

1. There are no written procedures for the administration of Mesa's public defender contracts.

2. Mesa's public defender contracts do not limit the number of cases that can be assigned to each attorney. According to professional standards and relevant case law, a maximum of 400 misdemeanor cases is recommended for a full time contracted public defender, to prevent excessive caseloads from negatively impacting the quality of defense counsel provided. All other cities' contracts we reviewed included such limits. Although individual caseloads varied considerably among Mesa's public defenders, the average number of cases assigned per attorney in FY 2014 was 460.
3. Public defenders do not always submit complete and accurate monthly case log reports in full compliance with their contracts. In addition, the current reporting processes do not provide the PDCA with the data needed to perform an annual summary reconciliation between public defender payments and court records; therefore, differences may not be detected and corrected.

### **RECOMMENDATIONS**

1. Formal written procedures should be developed for the administration of public defender contracts. In addition, at least one additional employee should be familiar with the process.
2. The City's public defender contracts should be revised to include caseload limits, to be exceeded only upon approval of the Presiding City Magistrate. This control would provide assurance that the City actively monitors caseloads as required by legal standards for the provision of effective counsel. Additionally, to maximize independence and to help ensure an equitable distribution of cases among contracted attorneys, we recommend that public defenders rotate between the different courtrooms rather than being assigned to a single courtroom.
3. Public defenders should be required to submit accurate and complete monthly reports as required by their respective contracts. However, the reporting requirements for each type of contract should be reviewed and revised to ensure only relevant information is collected. In addition, invoice data should be reconciled with updated court records at the close of each year, to capture any changes entered after the monthly reports were produced and to identify and correct any differences which may have been overlooked during monthly processing.

## **CAP#1: Lack of Written Procedures**

**Observation:** There are no written procedures for the administration of Mesa's public defender contracts.

**Criteria:** Written procedures should be maintained for significant business processes or functions, to ensure management's objectives are achieved in a consistent, efficient and reliable manner. They also help ensure checks and balances are maintained by preventing key process steps from being omitted, particularly when turnover occurs. The provision of public defense services is a federal mandate and the City has 12 public defender contracts with a total annual budget of \$900,000. As such, this process is significant enough to warrant formal written procedures.

**Comments:** The City's public defender contracts are administered in the City Manager's office. This responsibility is currently assigned to one Council Assistant as an extra duty. Upon "inheriting" this assignment, she was trained by the former contract administrator on the various tasks and processes involved, but no written procedures were provided.

There is also no back-up staff person with the background knowledge and training necessary to administer these contracts. Therefore, if the contract administrator were to become unavailable, it would be difficult for another employee to take over this assignment. In the interim, the City would be at increased risk for delinquent and/or incorrect payments being made to contractors, non-compliance with contract terms, failure to renew/renege contracts, etc.

**Recommendation:** 1-1. The PDCA should develop formal written procedures for the administration of public defender contracts. In addition, at least one additional employee should be familiar with the process.

**Management Response:** 1-1. We concur with the City Auditor's recommendation. Formal written procedures for administering the public defender contracts will be developed. Additionally, a person will be identified as a backup for the PDCA and will become familiar with the administration of the contracts.

## **CAP#2: Contracts Do Not Limit Caseloads**

**Observation:** The City's public defender contracts do not specify a maximum allowable caseload for each attorney.

**Criteria:** Standards and other authoritative guidance<sup>1</sup> have been established for government entities contracting for public defense services, to help ensure the adequacy of counsel provided to indigent defendants. These standards recommend that contracted full time public defenders be assigned a maximum of 400 misdemeanors per year. In accordance with these standards, caseload maximums are included in all of the other public defender contracts we reviewed, including those in Chandler, Glendale, Scottsdale, Tempe and Phoenix.

**Comments:** Although individual caseloads varied considerably among Mesa's public defenders, the average number of cases assigned per attorney in FY 2014 was 460.

Unlike other cities' contracts, City of Mesa's public defender contracts do not limit the number of cases that can be assigned to each attorney. The lack of this internal control increases the risk that excessive caseloads could expose the City to increased liability from claims of inadequate provision of counsel.

The standards also indicate that the total workload of each attorney (from all sources) should be considered when evaluating caseloads. Based on the hours reported by each of our public defenders, Mesa's cases average 68% of their workloads, yet the average number of cases they are assigned exceeds the maximum for a full time attorney.

Recognizing that there may be circumstances under which a public defender could provide high quality counsel while maintaining a caseload that exceeds standard limits, most cities have added contract terms that allow for exceptions to be granted when appropriate.

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<sup>1</sup> Sources of authoritative guidance include: National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, The Defense (1973); National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976); American Bar Association Standards for Criminal Justice, Providing Defense Services (3rd ed. 1992); NLADA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services, (1984); National Conference of Commissioners on Uniform State Laws, Model Public Defender Act (1970); State of Arizona v. Joe U. Smith, 681 P. 2d 1374 (1984)

- Recommendations:**
- 2-1. The City's public defender contracts should be revised to include caseload limits, to be exceeded only upon approval of the Presiding City Magistrate. Objective criteria should be established to ensure consistent and appropriate evaluation of requests for exceptions. Consideration should be given to the types of cases assigned, the average amount of time required to complete those cases, any relevant performance issues, and other appropriate criteria as determined by the Presiding City Magistrate.
  - 2-2. To maximize independence (in both fact and appearance) and to help ensure an equitable distribution of cases among contracted attorneys, public defenders should be rotated between the different courtrooms rather than being assigned to a single courtroom.

**Management  
Response:**

- 2-1. We concur with the City Auditor's recommendation and the public defender contracts will be revised to include this language. The new contract will be implemented in June 2015 when the public defender contracts are renewed.
- 2-2. We concur with the City Auditor's recommendation. The distribution of cases is determined by the Mesa City Court staff. The PDCA will recommend and request that Court staff rotate the courtroom assignment for each regular public defender on a yearly basis.

### **CAP#3: Inaccurate/Incomplete Monthly Reports and Invoices**

**Observations:** Public defenders do not always submit complete and/or accurate monthly case log reports as required by their contracts.

In addition, the current contract administration process does not provide the PDCA with the data needed to perform an annual summary reconciliation between public defender payments and court records; therefore, small differences may not be detected and corrected.

**Criteria:** Section 10.b of the "standard" public defender contract states (in part):

*"ATTORNEY shall maintain current Public Defender case logs, including but not limited to, total number of assigned cases, types of cases, method of disposition, and time spent on MESA cases, and shall provide monthly written reports containing sufficient and pertinent information requested as required by MESA for the purpose of audit and evaluation of ATTORNEY's performance under this Agreement. ...."*

Section 5 of the Agreement for Counsel Services in the Arraignment Court states:

*"ATTORNEY shall keep monthly coverage reports as required by the CITY, to include types of cases, methods of disposition, and time spent at arraignment court. This report shall be provided to the CITY no later than 10 calendar days following the end of each month. Additionally, no later than the tenth (10th) day of the calendar month the ATTORNEY shall provide the CITY with Attorney's back-up coverage report from the previous month."*

**Comments:** The contract terms noted above serve to ensure that the City obtains the information needed to adequately monitor the caseloads and performance of contracted public defenders. Reporting requirements are reviewed annually by the PDCA as part of the contract renewal process; however, we noted that there has been some debate over the relevance and usefulness of some of these requirements. This uncertainty has contributed to a lack of consistent compliance/enforcement in this area.

When a public defender submits an invoice to the City, the PDCA reconciles the invoice to summary data provided by the court. Occasional discrepancies due to timing differences and manual processes are expected and are routinely reconciled by the parties. However, in the sample of invoices we tested, we noted discrepancies which were not ultimately reconciled through the normal process; and no periodic summary analysis is performed to verify that all discrepancies are resolved over time. This increases the risk that incorrect payments will not be identified and corrected.

- Recommendations:**
- 3-1. Public defenders should be required to submit accurate and complete monthly reports as required by their respective contracts.
  - 3-2. The reporting requirements for each type of contract should be reviewed and revised to ensure only relevant information is collected.
  - 3-3. Invoice data should be reconciled with updated court records at the close of each year, to capture any changes entered after the monthly reports were produced and to identify and correct any differences which may have been overlooked during monthly processing.

- Management Response:**
- 3-1. We concur with the City Auditors recommendation. The PDCA will ensure all relevant information is collected on a monthly basis.
  - 3-2. We concur with the City Auditors recommendation. The PDCA will determine what information is relevant and will revise the public defender contract language to collect only the necessary information.
  - 3-3. We concur with the City Auditors recommendation. Annually (at the end of the yearly public defender contract) the PDCA will ask the Court to generate a report of all the activity for each public defender over the past year. The PDCA will reconcile their monthly reports using this information.