

Joint Legislative Audit and Review Committee (JLARC)



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 Tami Green
 Kathy Haigh, *Chair*
 Ed Orcutt
 Gerry Pollet
 Derek Stanford
 Hans Zeiger

April 23, 2014

JOINT LEGISLATIVE AUDIT AND REVIEW COMMITTEE REGULAR COMMITTEE MEETING MINUTES

COMMITTEE BUSINESS

- Representative Kathy Haigh, JLARC Chair, called the meeting to order at 10:00 a.m.
- *A motion was made to approve the minutes from the January 7, 2014, JLARC meeting. Motion was seconded and carried unanimously.*
- Legislative Auditor Keenan Konopaski introduced new JLARC staff members Ryan McCord and Ashley Elliot.
- The Legislative Auditor reviewed a handout to the Committee describing the legislation passed in the 2013 Session that impacts the Committee workload. Four new assignments were added in the session, and two assignments were removed. Bills were introduced to address some challenges facing the JLARC staff in completing future assignments on the LIFT program and K-12 employee health benefits, but those bills did not pass. There was also a Governor veto of one study proviso in the Operating Budget, but it remains within the purview of the Committee to determine if it wants to proceed with that study. The Executive Committee would like to use some of the September meeting for a work session with the Committee to discuss the future work plan. This discussion will include the possibility of Committee members bringing forward ideas for one additional study the staff could undertake.

REPORTS, PRESENTATIONS, DISCUSSIONS

Forensic Accounting Audit of the Columbia River Crossing—SAO Report

Jan Jutte and Chris Cortines, staff with the State Auditor's Office (SAO), presented this study. In the 2013-2015 Transportation Budget (ESSB 5024), the Legislature directed JLARC to conduct a forensic accounting audit of the Interstate 5/Columbia River Crossing (CRC) project to investigate possible misuse of public funds. As authorized by the Legislature, the Legislative Auditor contracted with the State Auditor's Office to complete the financial audit. The SAO audit did not identify any financial misconduct or abuse. SAO did identify opportunities to improve controls over consultant service contracts on future projects. SAO also identified excess and questionable costs attributable to Washington State Department of Transportation (WSDOT) policies and procedures.

Senator Mullet asked what steps would need to be taken to determine if certain payments included overpayments. SAO staff explained that, for most of the consultant charges, the consultants submitted invoices that broke out labor costs per hour by certain positions, the overhead markup, and the profit markup, which allowed WSDOT to review

these three components on the incoming invoices. For \$12.3 million in invoices, the consultants did not break out the three separate components, so SAO was not able to review what the profit markup was.

Representative Haigh asked for additional information about the Disadvantaged Business Enterprise (DBE) program and the court decision about that program. SAO staff clarified that they did not audit the DBE program. He explained however that the DBE program was struck down by the Ninth Circuit Court of Appeals because WSDOT's goals for its program were overly broad. He described WSDOT beginning a conversation with the engineering community about how to go forward with DBE firms and encourage large firms to use DBE firms.

Senator Mullet asked how WSDOT arrived at its policy of determining profit markups as 29 to 31 percent of labor costs when other states use a profit markup of 10 to 12 percent on total labor and overhead costs combined. SAO responded that WSDOT's consultant services manual indicates that limiting the markup to labor will discourage rising overhead rates.

Representative Orcutt pointed out what he characterized as a misleading statement in the report's Executive Summary: "the Washington State Legislature declined to vote on further financing for the project." He noted that the transportation budget that passed the Legislature included \$81 million to continue work on the CRC but that the Governor vetoed that provision.

Representative Orcutt returned to the DBE program being struck down and the four percent markup for the use of sub-consultants and asked whether the DBE program was using sub-consultants already. He also asked if the consultants were expected to use some small businesses at the time they signed the contracts. He commented that the policy change allowed the larger firms four percent on top of what they had already signed contracts for. SAO staff acknowledged that Representative Orcutt was correct, then further clarified that, while DBE firms are subcontractors, not all subcontractors are DBE firms.

Representative Orcutt noted the audit's use of a five percent inflator and asked what actual inflation rates were during the period covered in the SAO analysis. SAO staff responded that he did not have that information but would provide it.

Representative Haigh asked if there was any impact from use of the design-build process, with some higher costs earlier on perhaps offset by fewer change costs later if the project had gone to completion. SAO staff answered that the preliminary engineering work that was done through August 2013 would have happened whether the project was using the design-build approach or the design-bid-build approach, so there was no effect on the cost.

Representative Wilcox asked if SAO staff were able to interview the decision-maker at WSDOT who created the new policy and if there was any reflection within WSDOT about what had been the motivation for the policy. SAO staff responded that the people who approved the policy go back two Secretaries [of Transportation] and that others involved in the decision-making have since retired. He said it is possible that WSDOT was sympathetic to the argument that there were some additional costs the firms were not recovering when they were using sub-consultants. As the report indicates, such costs are fully recovered, either through direct charging on a contract or in a pooled cost that is part of the overhead rate.

Representative Wilcox asked if SAO could share any insights on whether there was more or less inattention to detail on this large project as compared to a typical project. SAO staff responded that there were attentive CRC staff who were scrutinizing invoices. He indicated that the biggest item the report speaks to is about \$2.3 million in work that was negotiated after the work was performed, which he said is clearly not a good practice.

Representative Pollett asked if the contracts specified that the subcontract rates should be broken out and if the contract or WSDOT rules required that the rates be specified and that a rate specified in the prime contract for Work X could not have a higher rate when done by a subcontractor. SAO staff answered that the contract made reference to two exhibits that both the prime contractors and the subcontractors were supposed to use for their hourly rates. He explained that those exhibits included a column for labor, a column for overhead, and a column for profit, which SAO interprets as requiring a breakout into those components. He explained further that WSDOT also had a practice in place to not require those breakouts for smaller firms, which he said he believes was in place because WSDOT was trying not to burden those firms. SAO staff indicated that, for the CRC project, there was a contractual requirement in conflict with a WSDOT practice. He added that, whether it is a burden or not, you cannot tell the profit markups without the breakout.

Representative Haigh reminded members that this was a forensic financial audit more than a performance audit, and that overall the audit did not identify any financial misconduct or abuse, though there are certainly concerns. She said she would ask the Transportation Committees to hold further hearings about this audit so everyone can know what was learned from mistakes made and how that can help in the future. She thanked the SAO staff for the briefing they had provided to her and indicated she thought they would be available to brief other Committee members if they wished.

Representative Orcutt asked what was happening with financial auditing during the time period covered by the report and why these items were not picked up or whether any other financial audits had been done on this project. SAO staff explained that they have a limited budget and so must make choices, that they are unable to audit every agency and every agency contract.

Representative Haigh invited a representative from WSDOT (Cam Gilmour, Deputy Secretary) and from the Office of Financial Management (Robin Rettew, Senior Budget Assistant) to come before the Committee.

WSDOT staff reiterated the audit's conclusion that there was no financial misconduct or abuse. He noted that the CRC was a complicated project in a complicated environment. He thanked SAO for the audit, indicating the audit has given the agency nine or ten things to look at, some of which are complicated and somewhat nuanced. He reported that the agency does plan to review a number of items as indicated in the agency response letter, with responses back to the Legislature and others by the end of October. He added that the markup question will be given a great deal of scrutiny. OFM staff indicated she was available for questions.

Representative Orcutt asked if the DBE requirement was a state statute or an agency rule. WSDOT staff answered that DBE participation is a federal requirement, for contracts that include funding from the Federal Highway Administration. He explained that, in order to assign a DBE goal to a prime contract, there has to be evidence of discrimination and that there has to be an actual study showing that there is a disparity in the percentage of work going to non-DBE firms and DBE firms. He explained the court ruled that the percentages WSDOT was using on this project were not well-supported by such a study. He added that the department has recently completed a disparity study that is now under review by the Federal Highway Administration as a necessary step for establishing a programmatic DBE goal for a three-year period.

Representative Orcutt asked if WSDOT had contacted the Chairs of the House and Senate Transportation Committees to let them know about the court decision so that the issue could be addressed in a legislative session rather than addressed by WSDOT working with an industry group. WSDOT staff responded that he was uncertain.

Representative Pollett asked if the agency's response in October will address the conflict between WSDOT's policy of not requiring a breakout of labor, overhead, and profit rates compared to good contractual practices of breaking out

those items and capping the rates. WSDOT staff indicated that the response would address this and that there is a lot more information about this that he would like to share if the member wanted to discuss this further.

Senator Becker asked for additional detail on the process WSDOT uses when paying invoices to compare the invoice to the contract. She asked if there is an auditing process within the department or was review dependent on the Legislature's asking for this audit. WSDOT staff answered that the agency has individuals who review the invoices on an on-going basis as payments are made. He reported that the agency can also do internal post-completion audits, adding that the department has not at this point made a determination to do that because these audits are expensive. He also noted that the SAO audit has called into question several things that the agency will be re-examining.

Senator Kohl-Welles moved to approve for distribution the Columbia River Crossing Project report. Representative Orcutt asked if the clarification to the Executive Summary of the report could be made. Legislative Auditor Keenan Konopaski indicated that it was not within the purview of the Committee to amend the audit itself but that a member could make a request to SAO staff to make that clarification. Representative Orcutt made that request to SAO staff (the change was subsequently made by SAO). *Senator Kohl-Welles's motion was seconded and carried unanimously.*

Competency to Stand Trial, Phase II: DSHS Has Not Met Performance Targets—Better Management and Analysis Could Help It Do So—Proposed Final Report

Eric Thomas and Zane Potter from the JLARC staff presented the proposed final report for this study. The 2012 Legislature passed a bill (SSB 6492) to “sustainably improve the timeliness of services related to competency to stand trial” and established performance targets for competency evaluations and referrals to state hospitals. The Department of Social and Health Services (DSHS) is not consistently meeting the statutory performance targets and has not implemented its plan to address new requirements. The agency has also struggled to provide accurate and timely performance information, and it has not completed the basic planning and analysis necessary to identify the best approach to meet the targets. This report identifies the kinds of analysis the agency can undertake to help identify the best path forward. Three Legislative Auditor recommendations are intended to help DSHS meet statutory requirements and manage its resources. Two recommendations are intended to improve coordination and communication among the judicial system partners involved in competency services. DSHS concurs or partially concurs with the five recommendations.

Senator Becker asked where people are as they await admission to one of the state hospitals. Staff answered that the defendants wait in county jails. Senator Becker asked if the study looks at the cost to the jails for this: staff answered that it does not.

Representative Haigh asked if there is information on how many defendants involved in the competency to stand trial process are veterans who should be getting mental health assistance earlier and how the number of returning veterans may have contributed to the challenges DSHS is facing. Staff responded that, as part of Phase 1 of the report, they spoke with staff with the Department of Corrections who were working to identify veterans. Representative Haigh commented that this has been a national discussion and that there are veterans who are not getting the services they deserve and who should be helped before they enter the criminal justice system.

Representative Orcutt asked why there were so many resignations within the one unit at Western State Hospital and what level these evaluators are. Staff answered that the evaluators are Ph.D. psychologists and that the turnover in that one unit represents 75 percent of the total turnover among evaluators. He added that DSHS and the Department of Labor and Industries are conducting a study of the work environment at Western State Hospital.

Senator Mullet asked how many evaluators there are currently. Staff answered that there are 22 allocated positions at Western State Hospital and seven positions at Eastern State Hospital, for a total of 29 positions.

Senator Kohl-Welles noted that there have been concerns over the years about safety for employees working at Western and asked if the forensic evaluators were part of the groups looked at for safety concerns or if that effort was more focused on the people doing the hands-on work with the patients: staff suggested that DSHS might be able to respond.

Senator Becker asked if the defendants who were receiving multiple evaluations were being referred by different agencies or different departments and could that be more coordinated. Staff answered that the referrals are coming from the courts and pointed to Recommendation 5 on the sharing of promising practices that other counties are using. He used the example of Spokane County where there is an effort underway to look at alternatives when the same person has been referred for multiple evaluations.

Representative Green reminded the Committee that the Legislature undertook a huge expansion of the Involuntary Treatment Act taking effect July 1 and that this change will be adding another layer on top of all this.

Representative Zeiger noted there is a conflict between what the staff recommendations report as the fiscal impact and what DSHS reports as the fiscal impact and asked how the staff arrived at the fiscal impact estimates. Staff answered that the estimates were based on DSHS's response in Phase 1 of the audit in terms of what the agency planned to do and knowledge that DSHS staff had already engaged in meetings with the local judicial system partners. Staff added that they did not do a workload study themselves and so cannot comment on whether or not the FTEs in the DSHS response are needed.

Senator Mullet asked who controls whether an evaluation is to take place in the jail or in the hospital. Staff answered that the Legislature took some action on this in 2012, making the jail setting the default.

Representative Haigh invited a representative from DSHS to come before the Committee (Jane Beyer, Assistant Secretary for Behavioral Health and Service Integration).

DSHS staff stated that the agency cares deeply about the well-being of people who have mental illness and/or chemical dependency and does not believe that a jail is a therapeutically appropriate environment for a person who is seriously mentally ill. She explained that the 2012 legislation was passed during a very difficult fiscal time and that the infrastructure was never funded that was needed to implement the Legislature's expectations. She said these are the most aggressive expectations about timelines for competency referrals and competency restoration.

DSHS staff indicated that the fiscal challenges the state hospitals face are not just about competency evaluations and restoration, that the pressures for hospital beds on the civil side and the forensic side are equally intense. She explained that DSHS does not have control over the court referrals. She said they have worked with the courts to shift where the evaluation occurs from hospitals to jails. She asked members to remember that every time a person is found not competent, this means a commitment to one of the hospitals for competency restoration, meaning the more efficient they are in meeting the timelines to complete the evaluations, the greater the demand on the hospitals for restoration services. She indicated the agency is in discussion with stakeholders about a proposal on alternatives to competency restoration services in state hospitals.

DSHS staff reiterated Representative Green's point that, effective July 1, the standard for involuntary commitment will broaden somewhat. She said one of the hopes with the investments the Legislature has made in crisis diversion and evaluation and treatment center funding is to not have as many mentally ill people arrested, because they will

instead be able to access the services they need in the community or by new means to have a person involuntarily committed to get treatment.

DSHS staff indicated complete agreement with the agency's need to work more closely with the Administrative Office of the Courts, the prosecutors, the defenders, the judges, and regional support networks, plus law enforcement.

DSHS staff reported that the data used in the JLARC study ran to April 2013. She provided a comparison for Western State Hospital of 554 referrals for competency evaluations for the first quarter of Calendar Year 2011 compared to the first three months of 2014 with 906 referrals, a 40 percent increase in requests for competency evaluations. She also reported a 58 percent decrease in the number of people who are waiting. She stated that the only way to get the volume down is to work with the courts and the regional support networks to try to get people into treatment earlier.

DSHS staff indicated that there is only one person at headquarters to support the work of competency evaluations and restoration, and that the agency needs more staff to work on recommendations such as improving the integrity of the data, improving consistency of practices, and to work more with the courts. She reported they are preparing a budget decision package to build the infrastructure that they need to support the system so that the performance can improve. She also reported that the new CEOs at the state hospitals are putting a greater focus on forensics, and that the CEO at Western has put in place a new forensic clinical director who is working with headquarters on implementing evidence-based practices for competency restoration services. She indicated work is underway at Western to address the turnover there, with compensation and safety key issues, and that Western is also undertaking LEAN analyses and value stream mapping on topics such as admissions to the forensics unit.

With regard to the recommendations, DSHS staff report that they largely agree. She says she is pushing back on doing a workload study to determine how many evaluators they need, stating they are reticent to delay putting in the request for additional evaluators until a workload study is completed.

Senator Becker outlined some of the work the audit reports DSHS has not completed such as accurate and timely performance reporting, determination of why its own assumptions are not being met, and implementing other key statutory requirements and asked why the agency has not been able to complete these tasks. DSHS staff answered that, especially at Eastern State Hospital, the IT infrastructure is very dated, limiting their ability to build a data system to support a reporting structure. She said this is a reason for their request of one FTE to work at headquarters to build a more robust data system across Eastern and Western state hospitals, reporting that Western has improved their data integrity, in part because they have a better IT system and in part because they have dedicated staff to that effort. She added that the staff at Western are working with the staff at Eastern to try to improve the data integrity at Eastern.

A motion was made to approve for distribution the Competency to Stand Trial, Phase II Proposed Final Report. Motion was seconded and carried unanimously.

Alternative Process for UW Medical Facility Construction Projects: Sunset Review—Proposed Scope and Objectives

Mark Fleming from the JLARC staff presented the proposed scope and objectives for this study. The 2010 Legislature authorized the University of Washington (UW) to use an alternative process for awarding contracts to construct, remodel, or improve facilities used for critical patient care or highly specialized medical research. The UW's authority to use this alternative process sunsets on June 30, 2015, unless reauthorized by the Legislature.

JLARC staff will complete a sunset review of the UW's use of this alternative process prior to the 2015 Legislative Session.

Representative Haigh noted that there is a cap in statute of \$5 million on the size of the projects that can use the alternative process and that the issue often comes back to the Legislature whether it should increase the cap. She asked if the review or interviews could include discussion on whether the amount needs to be increased. Staff answered that they will be able to report on how the UW has used the alternative process, the types of projects they are using it for, and what their costs have been. Representative Orcutt commented that he sees this as a very specialized area, so he is wondering if the question should be one of whether the cap might need to be raised for this circumstance but not for all others.

Gasoline Vapor Regulation—Proposed Scope and Objectives

Zane Potter from the JLARC staff presented the proposed scope and objectives for this study. In the 2013-2015 Transportation Budget (ESSB 5024), the Legislature directed JLARC to conduct a study of the registration and inspection fee programs regulating gasoline stations and other businesses that may emit gasoline vapors. JLARC staff will conduct a study of the regulations and registration fees administered by Ecology and seven local clean air agencies that regulate businesses that emit gasoline vapors. JLARC staff will also compare Washington's approach to regulating gasoline vapors with the approaches used by other states and the U.S. Environmental Protection Agency.

Costs and Economic Impacts of Public Recreation and Habitat Lands—Proposed Scope and Objectives

Rebecca Connolly, Ryan McCord, and Stephanie Hoffman from the JLARC staff presented the proposed scope and objectives for this study. In the 2013-2015 Capital Budget (ESSB 5035), the Legislature directed JLARC to conduct a study of public recreation and habitat lands that would describe the characteristics and costs of recent acquisitions, evaluate cost and benefit measures for these lands, and address potential effects of these lands on county economic vitality. Much of the Legislature's assignment focuses on lands acquired by three state agencies: the Department of Natural Resources (DNR), the State Parks and Recreation Commission (Parks), and the Department of Fish and Wildlife (WDFW). JLARC staff will create an inventory of the recreation and habitat acquisitions made by these three agencies over the last ten years. JLARC staff will work with natural resource economists to evaluate the measures used to estimate benefits and costs, and to identify mechanisms to estimate the impact of public recreation and habitat lands on the economic vitality of Washington's counties.

Senator Becker asked if the study will inventory what has been purchased prior to the ten years referenced in Part 1. Staff answered that the Part 1 inventory was limited to the last ten years, but that Part 3 of the study will look at all public and tribal habitat and recreation land ownership.

Senator Becker asked if the study will provide information on whether people can access the habitat land. Staff noted that the categorization should include distinguishing habitat land with limited public access and habitat land that allows passive recreation. Senator Becker asked if the study will include information on when there is movement from one habitat category to the other and include a definition of what would cause the change from one category to the other. Staff indicated such information should be available.

Representative Orcutt expressed his concern about whether land purchased by an agency for habitat actually improves habitat or degrades habitat. He asked if the study will address this issue. Staff answered that the issue is outside of the scope of the proviso though it is a topic of interest to many people.

With no further business before the Committee, the Chair adjourned the meeting.

ATTENDANCE

JLARC Members Present: Senators Randi Becker, Annette Cleveland, Jeanne Kohl-Welles, and Mark Mullet; Representatives Tami Green, Kathy Haigh, Ed Orcutt, Gary Pollet, Derek Stanford, J.T. Wilcox, and Hans Zeiger.

JLARC Staff Present: Keenan Konopaski, Legislative Auditor; John Woolley, Deputy Legislative Auditor; Valerie Whitener, Audit Coordinator; Linda Byers, Rebecca Connolly; Ashley Elliott, Tracey Elmore, Mark Fleming, Stephanie Hoffman, Ryan McCord, Zane Potter, Marilyn Richter, Matt Stoutenburg, and Eric Thomas.

ADJOURNMENT

The meeting was adjourned at 12:06 p.m.

CHAIR

VICE CHAIR