



INFORMATIONAL MEMORANDUM

TO: **Mayor Ekberg
Finance & Governance Committee**

FROM: **David Cline, City Administrator**

BY: **Cheryl Thompson, Executive Assistant**

DATE: **October 17, 2022**

SUBJECT: **Contract for Public Defense Services**

ISSUE

The current contract for public defender services provided by Kirshenbaum & Goss expires December 31, 2022. The proposed contract for 2023-2024 is attached.

BACKGROUND

The Sixth Amendment of the United States Constitution requires that people accused of serious crimes who cannot afford to pay for private counsel be provided with an attorney. Responsibility for upholding the mandate of the Sixth Amendment lies with the states although in Washington State this responsibility has been delegated to counties and municipalities that have judicial branches. The City of Tukwila contracts for public defense services to provide legal representation for indigent criminal defendants who qualify for appointment of counsel. Representation is provided from the time of screening for eligibility through trial, sentencing and appeals to the superior court, if necessary.

Two significant occurrences have impacted the provision of public defense services in the recent past: 1) Effective January 1, 2015, Public Defense Standards were adopted by the Washington State Supreme Court. These standards delineate the number of cases each attorney can handle per year and mandates that compensation include administrative and training costs. 2) The federal court decision, *Wilbur v. Mt. Vernon* provided additional emphasis on requirements for timely contact with clients, provision of support services for public defense attorneys to provide adequate representation like investigation services, interpreter services and expert witnesses, and reasonable compensation.

The City has developed a Public Defense program that fully complies with the Public Defense Standards and *Wilbur v. Mt. Vernon*.

DISCUSSION

The City has historically contracted with Kirshenbaum & Goss, Inc. P.S. for the provision of public defense services. In September 2022 the City advertised a Request for Proposals for the

provision of public defense services. Kirshenbaum & Goss was the only firm to submit a proposal. The proposal requests a modest increase to the monthly base compensation with provisions for additional compensation if the quarterly caseload exceeds 240 cases, and if a case is appealed to King County Superior Court.

In 2021-2022 we paid a flat rate of \$29,100 per month for public defense services with \$27,600 per month being paid from the general fund and \$1,500 per month from the Office of Public Defense (OPD) grant funds as allowed by the OPD Grant Agreement. The proposed Base Compensation rate for 2023-2024 is \$29,500 per month, with an additional \$400 per case for each case assigned over the 240 quarterly caseload and an additional \$800 for any case that is appealed to King County Superior Court where the firm has to prepare and submit a brief. This represents a minimum annual increase of \$4,800 to the general fund. We do not anticipate exceeding 240 case assignments per quarter and the City has averaged less than one appeal per year to Superior Court in the past five years.

The Agreement allows for compensation review in two circumstances: 1) When the City receives notice from the Office of Public Defense regarding the 2024-2025 Grant Application, to adjust compensation, if needed; and 2) If the Tukwila Municipal Court implements a Community Court during the term of the Agreement, the impact to provision of public defense services for the Community Court will be assessed and compensation may be adjusted accordingly.

RECOMMENDATION

The Committee is being asked to move this item forward to the November 14, 2022 Committee of the Whole meeting for further discussion.

ATTACHMENTS

Draft Contract for Public Defense Services for 2023-2024



CONTRACT FOR PUBLIC DEFENSE SERVICES

This Agreement is entered into by and between the CITY OF TUKWILA, Washington, a non-charter optional municipal code city hereinafter referred to as “the City,” and Kirshenbaum & Goss, Inc. P.S., a Washington Corporation, hereinafter referred to as “the Contractor” (collectively, “the Parties”).

WHEREAS, the City has a need to have legal services available for those charged with a crime in Tukwila Municipal Court who are deemed indigent and are entitled to the effective assistance of counsel at the public expense; and

WHEREAS, the Federal Court decision *Wilbur v. Mt. Vernon* emphasizes the need for the City to provide indigent defense services to clients of the Tukwila Municipal Court in a manner which fully complies with the City’s obligations under the Sixth Amendment to the United States Constitution; and

WHEREAS, the City desires to have the Contractor perform such services pursuant to certain terms and conditions; now, therefore,

IN CONSIDERATION OF the mutual benefits and conditions hereinafter contained, the Parties hereto agree as follows:

1. **Scope and Schedule of Services to be Performed by Contractor.** The Contractor shall perform those services described on Exhibit A attached hereto and incorporated herein by this reference as if fully set forth. In performing such services, the Contractor shall at all times comply with all federal, state, and local statutes, rules and ordinances applicable to the performance of such services and the handling of any funds used in connection therewith, including the provisions of Washington Supreme Court Order 25700-A-1013 and the public defense standards adopted by the City pursuant to TMC 2.70. Compliance with these standards goes to the essence of this Agreement. The Contractor shall request and obtain prior written approval from the City if the scope of work or schedule of services is to be modified in any way.
2. **Compensation and Method of Payment.** The City shall pay the Contractor for services rendered according to the rate and method set forth on Exhibit B attached hereto and incorporated herein by this reference. Base Compensation is in consideration of a caseload not to exceed 960 cases per year. In compliance with the public defense standards, the case counts include the Contractor’s appearance at 48 arraignment calendars per year.
3. **Duration of Agreement.** This Agreement shall be in full force and effect for a period commencing January 1, 2023 and ending December 31, 2024 unless sooner terminated under the provisions hereinafter specified.

4. **Independent Contractor.** Contractor and City agree that Contractor is an independent contractor with respect to the services provided pursuant to this Agreement. Nothing in this Agreement shall be considered to create the relationship of employer and employee between the parties hereto. Neither Contractor nor any employee of Contractor shall be entitled to any benefits accorded City employees by virtue of the services provided under this Agreement. The City shall not be responsible for withholding or otherwise deducting federal income tax or social security or contributing to the State Industrial Insurance Program, or otherwise assuming the duties of an employer with respect to the Contractor, or any employee of the Contractor.
5. **Indemnification.** The Contractor shall defend, indemnify and hold the City, its officers, agents, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with the performance of this Agreement, except for injuries and damages caused by the sole negligence of the City. Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Contractor and the City, its officers, officials, employees, and volunteers, the Contractor's liability hereunder shall be only to the extent of the Contractor's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the Contractor's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.
6. **Insurance.** The Contractor shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Contractor, their agents, representatives, employees or subcontractors. Contractor's maintenance of insurance, its scope of coverage and limits as required herein shall not be construed to limit the liability of the Contractor to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity.
 - A. **Minimum Scope of Insurance.** Contractor shall obtain insurance of the types and with the limits described below:
 1. **Automobile Liability:** The Contractor shall procure and maintain in full force throughout the duration of this Agreement Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident. Automobile liability insurance shall cover all owned, non-owned, hired, and leased vehicles. Coverage shall be written on Insurance Services Office (ISO) form CA 00 01 or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage.
 2. **Commercial General Liability:** The Contractor shall procure and maintain in full force throughout the duration of this Agreement Commercial General Liability insurance with

limits no less than \$2,000,000 each occurrence, \$2,000,000 general aggregate, and \$2,000,000 products-completed operations aggregate limit. Commercial General Liability insurance shall be written on ISO occurrence form CG 00 01 and shall cover liability arising from premises, operations, stop-gap independent contractors, personal injury and advertising injury. The City shall be named as an insured under the Contractor's Commercial General Liability insurance policy with respect to the work performed for the City using ISO Additional Insured endorsement CG 20 26.

3. Workers' Compensation: The Contractor shall procure and maintain Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.
4. Professional Liability Insurance: The Contractor shall procure and maintain in full force throughout the duration of this Agreement Professional Liability insurance with a minimum coverage of \$2,000,000 per claim and \$2,000,000 aggregate. Contractor shall provide evidence of such coverage in a manner and form acceptable to the City in the City's sole discretion. Cancellation of the required insurance shall automatically result in termination of this Agreement.

B. **Other Insurance Provision.** The Contractor's Automobile Liability and Commercial General Liability insurance policies are to contain, or be endorsed to contain, that they shall be primary insurance with respect to the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of the Contractor's insurance and shall not contribute with it.

C. **Acceptability of Insurers.** Insurance is to be placed with insurers with a current A.M. Best rating of not less than A: VII.

D. **Verification of Coverage.** Contractor shall furnish the City with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of the Contractor before commencement of the work.

E. **Notice of Cancellation.** The Contractor shall provide the City and all Additional Insureds for this work with written notice of any policy cancellation, within two business days of their receipt of such notice.

7. **Record Keeping and Reporting.**

A. The Contractor shall maintain accounts and records, including personnel, property, financial and programmatic records which sufficiently and properly reflect all direct and indirect costs of any nature expended and services performed in the performance of this Agreement and other such records as may be deemed necessary by the City to ensure the performance of this Agreement.

B. These records shall be maintained for a period of seven (7) years after termination hereof unless permission to destroy them is granted by the office of the archivist in accordance with RCW Chapter 40.14 and by the City.

8. **Termination.** This Agreement may at any time be terminated by the City giving to the Contractor thirty (30) days written notice of the City's intention to terminate the same. If the Contractor's insurance coverage is canceled for any reason, the City shall have the right to terminate this Agreement immediately.
9. **Discrimination Prohibited.** The Contractor, with regard to the work performed by it under this Agreement, will not discriminate on the grounds of race, religion, creed, color, national origin, age, veteran status, sex, sexual orientation, gender identity, marital status, political affiliation, the presence of any disability, or any other protected class status under state or federal law, in the selection and retention of employees or procurement of materials or supplies.
10. **Assignment and Subcontract.** The Contractor shall not assign or subcontract any portion of the services contemplated by this Agreement without the written consent of the City.
11. **Entire Agreement.** This Agreement, together with attachments or addenda, represents the entire and integrated Agreement between the City and the Contractor and supersedes all prior negotiations, representations, or agreements written or oral. No amendment or modification of this Agreement shall be of any force or effect unless it is in writing and signed by the parties.
12. **Notices.**
Notices to the City of Tukwila shall be sent to the following address:

City Clerk
City of Tukwila
6200 Southcenter Blvd.
Tukwila, Washington 98188

Notices to the Contractor shall be sent to the following address:

Kirshenbaum & Goss, Inc. P.S.
1314 Central Ave S Ste. 101
Kent, WA 98032-7430
13. **Severability and Survival.** If any term, condition, or provision of this Agreement is declared void or unenforceable or limited in its application or effect, such event shall not affect any other provisions hereof and all other provisions shall remain fully enforceable. The provisions of this Agreement, which by their sense and context are reasonably intended to survive the completion, expiration or cancellation of this Agreement, shall survive termination of this Agreement.

14. **Applicable Law, Venue, Attorney’s Fees.** This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. In the event any suit, arbitration, or other proceeding is instituted to enforce any term of this Agreement, the parties specifically understand and agree that venue shall be properly laid in King County, Washington. The prevailing party in any such action shall be entitled to its attorney’s fees and costs of suit.

DATED this ____ day of _____, 2022.

CITY OF TUKWILA

CONTRACTOR:

Allan Ekberg, Mayor

David Kirshenbaum

Attest/Authenticated:

Approved as to Form:

Christy O’Flaherty, City Clerk

Kari L. Sand, City Attorney

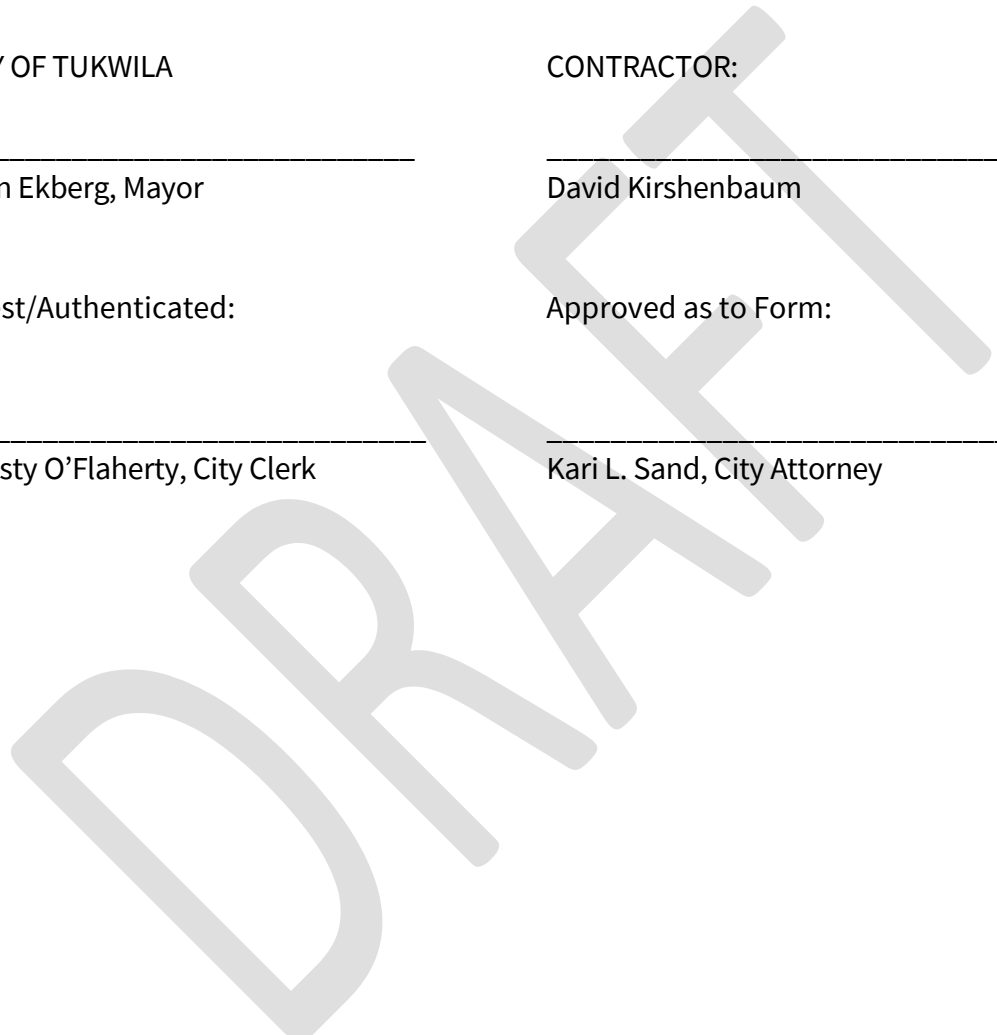


EXHIBIT A - SCOPE OF SERVICES

1. General Scope of Representation. Provide legal representation services in accordance with the standards adopted by the City in TMC 2.70, the standards set forth by the Washington State Bar Association Standards for Indigent Defense Services, the Rules of Professional Conduct, *Wilbur v. Mt. Vernon*, other related case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases for all indigent criminal defendants charged with a misdemeanor or gross misdemeanor under ordinances of the City who qualify for appointment of counsel. The Contractor agrees to attempt to contact the client within 72 hours of notification of appointment. The Contractor shall provide legal representation for each of these defendants from time of screening for eligibility through trial, sentencing and appeals to the superior court, if necessary.
2. Video Court Services. Provide daily video court public defense services to defendants charged under ordinances of the City who are detained at the SCORE Jail and qualify for public defense services in a manner consistent with the accepted practices for similar services, performed to the City's satisfaction.
3. Attorney of the Day Services. Provide an attorney for weekly arraignment calendars, available to all unrepresented defendants for consultation.
4. Screening. Determination of indigency for eligibility for appointed counsel under this Agreement shall be determined by an independent screening process established by the City. Should the Contractor determine a defendant is not eligible for assigned counsel prior to the establishment of the attorney/client privilege, the Contractor shall so advise the City to reconsider the screening of that particular individual.
5. 24-Hour Contact Information. The Contractor shall provide to the City Police Department, a telephone number or numbers at which an attorney may be reached 24-hours each day for "critical stage" advice to the defendants during the course of police investigations and/or arrest for misdemeanor violations of City Ordinances.
6. Authority to practice. Any counsel associated with or employed by the Contractor shall have the authority to perform the services called for herein and the Contractor may employ associate counsel to assist him/her at the Contractor's expense and with written consent from the City in compliance with Section 11 of this Agreement. The Contractor and any other attorneys retained pursuant to this section shall be admitted to practice pursuant to the rules of the Supreme Court of the State of Washington and shall have read and be fully familiar with the provisions of the Washington Supreme Court rule and the standards adopted by the City pursuant to TMC 2.70, as well as the *Wilbur v. Mt. Vernon* decision.
7. Conflicts. In the event representation of a defendant hereunder raises a conflict of interest such that the Contractor cannot ethically represent the defendant, said defendant shall be referred

back to the City for further assignment, without being included in the caseload assignments for the Contractor.

8. Discovery. The City shall provide to the Contractor, at no cost, one copy of all discoverable material concerning each assigned case. Such material shall include, where relevant, a copy of the abstract of the defendant's driving record.
9. Training. Contractor agrees to attend seven (7) hours of criminal defense training each year. The training must be approved by the Washington State Office of Public Defense (OPD) in compliance with the OPD Improvement Program Training requirements. This requirement also applies to all associate counsel. Each attorney will submit a copy of their Continuing Legal Education (CLE) Credits transcript from the Washington State Bar Association (WSBA) with the Annual Report.
10. Case management. Pursuant to TMC 2.70.050 Standard 8, the Contractor shall maintain a case reporting and case management system that includes number & type of cases, attorney hours and disposition.
11. Reporting. Contractor agrees to submit the following reports:
 - Monthly Case Assignment List: Includes Cause Number, Name, Charges, Date of Assignment and Date of First Effort to Contact;
 - Monthly Statistics Report: This report shall take substantially the same form as that attached hereto as Exhibit C and shall be submitted with the monthly invoice;
 - Quarterly Certification of Compliance: The Contractor shall certify compliance with the standards required by CrRLJ 3.1. The Certification shall take substantially the same form as that attached hereto as Exhibit D and shall be filed quarterly with the Tukwila Municipal Court on the following dates: January 1, April 1, July 1, and October 1, or the next court day, if the filing day falls on a weekend or holiday;
 - Annual Report: Detailing the number of other public defense contracts including jurisdiction, the number and type of non-public defense cases handled, and the total hours billed for non-public defense cases.
12. Client Contact Prior to Court Hearings. Contact all clients 1-2 business days prior to their court hearing to confirm access to and knowledge of how to utilize the necessary technology to appear before the court.
13. Additional Coverage for Review Calendars. Provide a minimum of two attorneys at each review calendar to expedite efficient hearings.

EXHIBIT B - COMPENSATION AND METHOD OF PAYMENT

1. **Base Compensation Rate.** Effective January 1, 2023 for all public defense services set forth in Exhibit A, Contractor shall be paid a flat monthly fee of \$29,500, which includes \$1,500 per month Office of Public Defense (OPD) grant funds to compensate for additional services provided as outlined in Exhibit A Sections 12 & 13. Should provision of the additional services be modified in any way, compensation will be adjusted accordingly. OPD grant funds have been awarded for 2023. If needed, a mid-contract review will be conducted to adjust compensation based on grant funding.
2. **Caseload Compensation.** Caseload assignments will be evaluated on a quarterly basis. For each case per quarter over 240 cases additional compensation will be provided at the rate of \$375 per case.
3. **Appeals.** The City shall pay the Attorney an additional sum of \$800 per RALJ appeal filed with the King County Superior Court in which a brief has been filed by the Contractor.
4. **Community Court.** The Tukwila Municipal Court is researching implementation of a cross-jurisdictional Community Court. If a Community Court is implemented during the term of this contract, the impact to provision of public defense services for the Community Court will be assessed and compensation will be adjusted accordingly.
5. **Preauthorized Non-Routine Expenses.** Non-routine case expenses requested by Attorney and preauthorized by order of the Tukwila Municipal Court. Non-Routine expenses include, but are not limited to:
 - a. Medical and psychiatric evaluations;
 - b. Expert witness fees and expenses;
 - c. Interpreters for languages not commonly spoken in the city or interpreters for services other than attorney/client communication;
 - d. Investigation expenses;
 - e. Medical, school, birth, DMV, 911, emergency communication recordings and logs, and other similar records when the cost of an individual item does not exceed \$75; and
 - f. Any other non-routine expenses the Tukwila Municipal Court finds necessary and proper for the investigation, preparation, and presentation of a case.
6. **Invoices.** The Contractor shall invoice the City by the fifth day of the month for all cases assigned to him/her for the previous month. The bill shall delineate the following:
 - City compensation;
 - Miscellaneous Charges: Copies of invoices and or receipts for miscellaneous charges shall be attached to the bill; and
 - A list of the cases assigned for the month including the defendant's full name, case number, charges, date of assignment & date of first contact.

EXHIBIT C – PUBLIC DEFENSE MONTHLY REPORT – Kirshenbaum & Goss

CLIENT CONTACT	# per month
Jail Visits	
Out of Court Meetings	
Phone Calls	
Email Correspondence	
MOTIONS PRACTICE	
Motions	
RESOURCES UTILIZED	
Expert Consulted	
Immigration Case Assistance/Resources (WDA)	
Interpreter (out of court)	
Investigator	
Referred for Mental Health/Competency Evaluation	
Social Services Liaison	
COMPLAINTS	
Complaint Forms Received from Clients	
Complaints Filed with the WSBA	
TRAINING (in hours)	
WDA	
WACDL	
Other	

EXHIBIT D – CERTIFICATION OF COMPLIANCE

**MUNICIPAL COURT FOR
CITY OF TUKWILA
STATE OF WASHINGTON**

[] No.: _____

[] Administrative Filing

CERTIFICATION BY:

FOR THE

___ CALENDAR QUARTER OF _____

CERTIFICATION OF APPOINTED COUNSEL OF
COMPLIANCE WITH STANDARDS REQUIRED BY CrR
3.1/CrRLJ 3.1/JuCR 9.2

The undersigned attorney hereby certifies that for the past quarter and for the remainder of the year:

1. Approximately _____% of my practice time is devoted to indigent defense cases for the City of Tukwila.

Approximately _____% of my practice is devoted to indigent defense cases for the following jurisdictions: _____

Approximately _____% of my practice is devoted to private practice.

2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and certify that:
- a. **Basic Qualifications:** I meet the minimum basic professional qualifications in Standard 14.1.
 - b. **Office:** I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.
 - c. **Investigators:** I have investigators available to me and will use investigation services as appropriate, in compliance with Standard 6.1.
 - d. **Caseload:** I will comply with Standard 3.2 during representation of the defendant in my cases. I will not accept a greater number of cases than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time.
 - e. **Case Specific Qualifications:** I am familiar with the specific case qualifications in Standard 14.2, Sections B-K and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case.
 - f. **Training:** I will attend seven (7) hours of criminal defense training approved by the Washington State Office of Public Defense (OPD) in compliance with the OPD Improvement Program Training requirements each calendar year.

Attorney, WSBA No.

Date