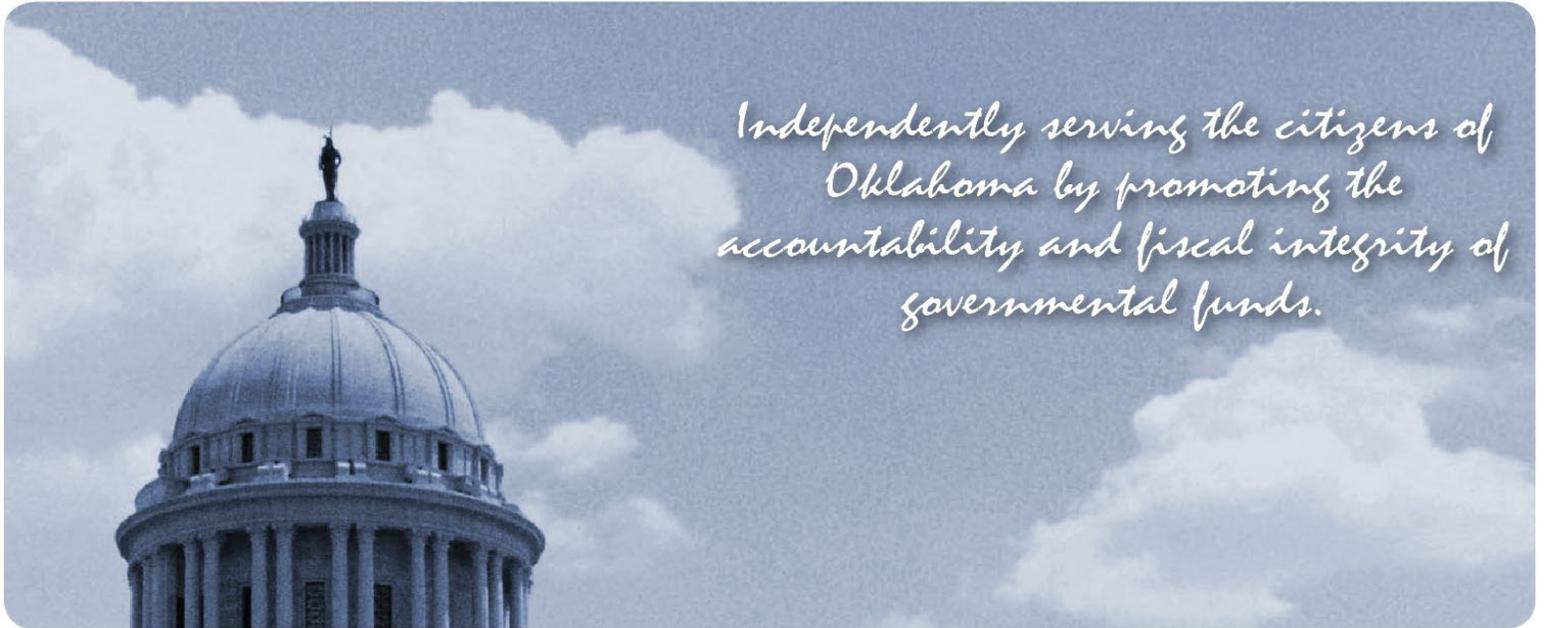


PERFORMANCE AUDIT

OKLAHOMA DEPARTMENT OF TRANSPORTATION RIGHT-OF-WAY ACQUISITION AND CONDEMNATION PROCESS

For the period January 1, 2012 through December 31, 2016



*Independently serving the citizens of
Oklahoma by promoting the
accountability and fiscal integrity of
governmental funds.*



Oklahoma State
Auditor & Inspector
Gary A. Jones, CPA, CFE

**Performance Audit Report of the
Oklahoma Department of Transportation
Right-of-Way Acquisition and Condemnation Process**

**For the Period
January 1, 2012 through December 31, 2016**



Oklahoma State Auditor & Inspector

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December 20, 2018

TO THE OKLAHOMA DEPARTMENT OF TRANSPORTATION COMMISSION

This is the audit report of the Oklahoma Department of Transportation for the period January 1, 2012 through December 31, 2016. The goal of the State Auditor and Inspector is to promote accountability and fiscal integrity in state and local government. Maintaining our independence as we provide this service to the taxpayers of Oklahoma is of utmost importance.

We wish to take this opportunity to express our appreciation for the assistance and cooperation extended to our office during our engagement.

This report is a public document pursuant to the Oklahoma Open Records Act (51 O.S. § 24A.1 et seq.) and shall be open to any person for inspection and copying.

Sincerely,

A handwritten signature in blue ink that reads "Gary A. Jones".

GARY A. JONES, CPA, CFE
OKLAHOMA STATE AUDITOR & INSPECTOR

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Background

The mission of the Oklahoma Department of Transportation is to provide a safe, economical and effective transportation network for the people, commerce and communities of Oklahoma.

The Right-of-Way & Utilities Division was originally organized in 1925. The functions were limited at that time to the preparation of needed materials and the acquisition of rights-of-way for simple rural widening requiring only narrow strips of land from abutting ownerships. In many cases, the required rights-of-way were donated and any problems encountered were of a minor nature.

The Division experienced comparatively normal evolution until late 1955. The accounting procedures were few and elementary and the filing system was simple. These functions required the services of only five people with all records being posted by hand. The responsibilities pertaining to the relocation of utilities were negligible and were accomplished by one individual. The engineering functions were more demanding and required the services of nine people. During this time, the properties from which rights-of-way were required were not appraised prior to negotiation, necessitating acquisition by "horse trading" methods and required the services of fifteen people. The small number of condemnations was handled by the office of the Attorney General.

The advent of the Federal Interstate System, together with the accompanying regulations, resulted in a revolutionary change in the basic concepts governing the acquisition of rights-of-way. This drastic change was experienced by every state charged with the responsibility of securing right-of-way for Federal Interstate Highways.

The primary problem of the Right-of-Way & Utilities Division was no longer one of "horse-trading" for easements covering a narrow strip along a section line road. Rather, it must now secure suitable title to an area of 160 acres on which a major interchange would be constructed, or perhaps a strip 400 feet wide must be secured through the heart of an industrial or residential area.

These complex takings also increased the number of condemnation proceedings and brought about the creation of the Legal Division to handle the condemnation cases.

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The Oklahoma Department of Transportation is overseen by an eight-member commission that is appointed by the Governor. Commission members serve staggered eight-year terms (two commission members are appointed every other year).

Transportation Commission

(As of December 2018)

J. David Burrage	Chairman (District 2)
Bradley W. Burgess	Vice-Chairman (District 7)
Todd Huckabay	Secretary (District 5)
John Fidler	District 1
Dan B. Overland	District 3
Greg Love	District 4
Bobby J. Alexander	District 6
Robert Peterson	District 8

Key Personnel

(As of December 2018)

Mike Patterson	Secretary of Transportation/Executive Director
Russell Hulin	Deputy Director and Director of Finance
Darren Saliba	Director of Operations
Tim Tegeler	Director of Engineering
Dawn Sullivan	Director of Capital Programs

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Objectives

The objectives of our audit were to:

1. Determine if the process of condemning properties complies with applicable laws and regulations;
2. Determine if the process of contracting with appraisal service vendors for condemnation court cases complies with applicable laws and regulations; and
3. Determine if internal controls provide reasonable assurance that expenditures for condemnation appraisal services are adequately supported by detailed documentation.

Scope and Methodology

At the request of the Executive Director of the Oklahoma Department of Transportation (ODOT or agency) and in accordance with 74 O.S. §213.2(B), we conducted a performance audit of the agency's Right-of-Way Acquisition and Condemnation Process.

We conducted this performance audit 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.

In planning and conducting our audit, we focused on the Right-of-Way Division's compliance with applicable laws, regulations, and agency procedures with respect to properties that were condemned or cases that were closed during the period January 1, 2012 through December 31, 2016.

We subsequently analyzed the process for appraiser contracts and the associated expenditures with respect to appraisals conducted in support of the agency's Legal & Business Services Division. Our audit procedures included inquiries of appropriate personnel, inspections of documents and records, review and analysis of relevant federal regulations, statutory language, agency policies, and detailed analysis of contracts and invoices. Further details regarding our methodology are included under each objective conclusion.

Because of the inherent limitations of an audit, combined with the inherent limitations of internal control, errors or fraud may occur and not be detected. Also, projections of any evaluation of internal control to future periods are subject to the risk that conditions may change or compliance with policies and procedures may deteriorate.

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OBJECTIVE 1 Determine if the process of condemning properties complies with applicable laws and regulations.

Conclusion The agency appears to be in compliance with the Code of Federal Regulations (CFR) 49, Oklahoma statute 27 O.S. §§ 13 and 18, and ODOT Right-Of-Way (ROW) policies regarding ROW.

Right-of-Way procedures for condemning properties complied with the following:

- 27 O.S. § 13 – Policies
- 27 O.S. § 18 – Landowner’s Bill of Rights
- CFR Title 49 §24.102 – Basic Acquisition Policies
- ODOT Policy¹

Objective Methodology To accomplish our objective, we performed the following:

Reviewed 26 randomly selected ROW cases from 344 cases where property was condemned (7% of cases in the population tested) to ensure compliance with CFR 49, 27 O.S. § 13 and §18, and ODOT Policy. Each case was reviewed to ensure:

- An appraisal was conducted for each property (for offers =>\$10K);
- The initial offer to the property owner was made in writing and stated the earliest time the State intended to take possession;
- Negotiations were conducted by someone authorized; and
- A minimum of three contacts were made by someone authorized prior to referring a case for condemnation.

FINDINGS AND RECOMMENDATIONS

No exceptions were noted as a result of our procedures.

¹ Right-of Way & Utilities Division Management Guide System, Volume I Policy Manual

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OBJECTIVE 2 Determine if the process of contracting with appraisal service vendors for condemnation court cases complies with applicable laws and regulations.

Conclusion The agency does not appear to be in compliance with ODOT Internal Purchasing Procedures, sections 3.2.7 and 6.9, with respect to contracts for expert witness appraisal service vendors involved in condemnation court cases.

Objective Methodology To accomplish our objective, we performed the following:

- Reviewed ten expert witness appraisal service vendor contracts supporting condemnation cases. Each vendor contract was reviewed to ensure:
 - Proper contract approval;
 - Contract amount; and
 - Vendor contract performance was evaluated post contract completion.

FINDINGS AND RECOMMENDATIONS

Non-Compliance with Internal Purchasing Procedures The State Purchasing Director approved ODOT Internal Purchasing Procedures, Section 3.2.7, Duties and Responsibilities, state in part that the purchasing staff shall manage and coordinate the acquisition of all services utilized by each Division or Program within ODOT. Those duties include maintaining records of vendor performance and quality on behalf of all ODOT Divisions.

In addition, Section 6.9 Professional/Personal Services Contract, states that "Contract evaluations are mandatory."

Based on discussions with ODOT legal staff and a review of ten expert witness appraiser contracts and supporting documentation, ODOT did not comply with their approved internal purchasing procedures requiring contract evaluations.

The former Chief of Legal and Business Service Division was unaware of the contract evaluation requirement.

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The agency is not in compliance with internal purchasing procedures. Without contract evaluations, expert witness appraisers may not be operating within the terms of the contract and substandard performances may not be identified.

Recommendation

We recommend ODOT management implement contract evaluation procedures for all expert witness appraiser contracts.

Views of Responsible Officials

The Department concurs that, during the audit period, the Legal and Business Division staff did not complete evaluations on these contracts as required by ODOT Internal Policy, Section 6.9. The following changes have or are being implemented by the Department to address the findings and recommendations:

1. Effective starting July 1, 2018, Legal Division staff attorneys are required to ensure that a vendor contract performance review is completed in every case they are assigned to work and/or monitor.
2. Performance evaluation reviews are to be completed within 30 days after the case is closed using the OMES "Supplier Performance Evaluation" form (OMES Form CP-016).
3. These "Performance Evaluation" forms will be sent to the Chief of the Litigation and Business Division for review and she will forward the completed forms to the Department's Procurement Division Manager.
4. The contract review forms will be maintained and used by the Division to make future contracting decisions.

OBJECTIVE 3

Determine if internal controls provide reasonable assurance that expenditures for condemnation appraisal services are adequately supported by detailed documentation.

Conclusion

Internal controls do not provide reasonable assurance that expenditures for condemnation expert witness appraisal services are adequately supported by detailed documentation.

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**Objective
Methodology**

To accomplish our objective, we gained an understanding of internal controls and performed the following:

- Identified significant internal controls related to condemnation expert witness appraiser contracts and change orders.
 - We reviewed all 27 change order requests from 20 condemnation cases, totaling \$334,700, for cases that closed during the audit period, to determine if the request for increased funds was for a reason authorized in the contract (if unforeseen events occur, if extensive research or motions are required, or if a mistrial or an appeal is granted).
 - We reviewed all contracts related to one specific ODOT attorney and one specific appraiser, that resulted in a trial, to determine if the appraiser conducted work prior to the approved contracts being in place.
- Identified significant internal controls related to condemnation expert witness appraiser invoices.
 - We reviewed the initial invoices for all contracts involving one specific ODOT attorney and one specific appraiser to determine if the invoices contained sufficient detail, were for reasonable time periods, and were properly reviewed.
 - We reviewed invoices and supporting documentation for site visits totaling 15 hours on the same date, conducted by one specific appraiser, to verify that the work had been conducted.

FINDINGS AND RECOMMENDATIONS

**Inadequate
Review and
Improper
Payment of
Appraisal
Related
Expenditures**

The United States Government Accountability Office's (GAO) Standards for Internal Control in the Federal Government² states, "Key duties and responsibilities need to be divided or segregated among different people to reduce the risk of error or fraud. This should include separating the responsibilities for authorizing transactions, processing and recording them, reviewing the transactions, and handling any related assets. No one individual should control all key aspects of a transaction or event."

² Although this publication addresses controls in the federal government, this criterion can be treated as best practices. The theory of controls applies uniformly to federal or state government.

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Based on a review of 21 invoices, we determined that expenditures (invoices) are approved without proper review.

- One invoice spanned work conducted over a 5-year period;
- One invoice stated “49.5 hours at \$90 per (\$4,455) with no further breakdown of activity;
- Expenditures that have exceeded the authorized limit for an individual case are paid without a corresponding change order because the contract (that combined multiple cases) still had funds available; and
- Invoices were approved and paid for work where the date and time of the work performed was contradicted in other documents.

This occurred due to the inadequate review of invoices for condemnation expert witness appraisal services and a lack of support documentation being provided by appraisal contractors.

Without adequate expenditure controls, errors or irregularities could occur and not be detected in a timely manner.

Recommendation

ODOT management should implement policies and procedures to ensure internal controls for expenditures related to the condemnation appraisal services are adequately supported for invoice content, require invoices to be submitted at set intervals (monthly or quarterly), and require contracts to specify hourly rates for all individuals working on the contract (by qualification or job title).

Views of Responsible Officials

The performance audit covered a total of 344 condemnation cases. The audit findings listed (4) deficiencies identified from the 21 invoices reviewed during the five-year period, of which two are described as one-time occurrences.

The Department has implemented internal controls, policies and procedures to monitor contract vendor work, review claims, and ensure contract compliance. Legal Division staff attorneys are tasked with reviewing expert witness and outside counsel performance in the cases they are assigned. ODOT has an existing policy that requires all billing invoices to be accurate and detailed. The contract vendor must include in each invoice: (1) the date each service was performed; (2) the identity of the vendor or vendor staff member who performed the task; (3) a description of the task performed; (4) and time spent on each task. Each billing invoice is also required to list the hourly rate of pay and to prorate the dollar figure for the time spent on each task. Additionally, all

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invoices are reviewed and approved by the Chief of the Litigation and Business Division before being sent to the Business Office for payment. The Business Office also checks the invoices for duplicity and other errors in the entries before payment. Any time a billing invoice is found to be incomplete, it is sent back to the vendor for correction.

The following specific changes have or are being implemented by the Department to address the findings and recommendations:

The current Chief of the Legal & Business Division is currently in the process of updating the Division's vendor contract forms and Policy and Procedures Manual to address the above noted deficiencies. These changes are anticipated to be completed by December 1, 2018.

1. Effective starting July 1, 2018 contract attorneys and expert witness vendors were informed that: (1) billing invoices must be more detailed and specific to be approved; (2) all change orders must be justified in writing and based only on the reasons allowed as set forth in the contract; (3) additional policy changes impacting billing and change orders will be made and enforced to address the audit findings.
2. The change order justification letters are now being maintained in the project legal file.
3. Legal Division Staff attorneys were provided training information during the June, July and September 2018 monthly staff meetings to closely review billing invoices and return any invoices that appear incomplete or lacking information. Staff attorneys were also advised to make monthly contact with each contract vendor they supervise to check on work/progress.
4. Effective September 1, 2018, the Division attorneys have been instructed to schedule the appraisers' site visit to coincide with the attorney's site visit whenever possible so that the initial inspection/appraisal work can be monitored by the Department's attorney(s) assigned to the case.
5. The standard vendor contract used by the Division is in the process of being modified to include a requirement that vendors submit invoices for payment within 90 days of the date services are rendered.
6. Effective in May 2018, all expert witness hires must be recommended by the staff attorney and approved by the Chief of the Legal Division before a contract is issued.
7. Effective August 1, 2018, the Business Office started running a monthly report for the Division Chief that shows the contract vendors total monthly billing and existing contract balances. This will allow

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better monitoring of contracts and prevent billing “gaps” and/or contract overages.

8. Effective in 2017, the Business Office developed a data sorting program that allows the accounting staff to cross reference dates and bills of appraisers across cases to prevent duplication of time and/or catch billing errors.
9. The Legal and Business Division has set up a training seminar to be held in December 2018 for its staff as well as all contract attorneys and expert witness vendors. This training seminar will cover all audit findings and include policy updates on billing, contracting, change orders, and litigation strategies.

**Non-Compliance
with ODOT
Condemnation
Policy Manual**

The ODOT Condemnation Policy Manual states that barring an emergency, “the expert should not start on the case until after receiving an approved copy of the proposal from Legal and Business Services Division.”

Both contract appraisers and contract attorneys are working and billing the agency without the existence of an approved copy of the contract. In 13 out of 21 cases, work was conducted 10 or more days prior to the existence of an approved contract; in one instance, work on the case began 26 months before the contract was approved.

This occurred due to the failure by the former Chief of Legal and Business Service Division and his staff to enforce division policies.

As a result, work was performed without existing contractual relationships and experts worked in an environment where they were virtually certain that they would be paid for whatever they invoiced.

Recommendation

We recommend that ODOT management review and update (if required) the Condemnation Policy Manual and provide staff training to ensure compliance.

Views of Responsible Officials

We concur that weakness existed for this specific area of the condemnation process during the audit period. Several staff changes have occurred, and internal controls have been established and implemented by the staff now in place. Additional information and specific actions taken to prevent these situations from recurring is provided below.

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Funding is set aside and encumbered for all Right of Way acquisition activities, including potential condemnation proceedings, on every project prior to any acquisitions or contract work being initiated. While there were some cases noted where a gap occurred between the date an expert appraisal started work and the date their contract was signed, the Department had sufficient overall encumbrances set aside with either federal or state funding. All expert appraiser contracts were standardized below the market rate for appraisal services during the five-year audit period.

The following changes have or are being implemented by the Department to address the findings and recommendations:

1. Effective in May 2018, settlement agreements have been used to pay for services provided during lapsed contract periods rather than change orders being initiated.
2. Effective in September 2018, staff attorneys and vendors were informed in writing that no work should begin on a case file until a fully executed and signed contract is in place.
3. Effective September 2018, the Division began efforts to implement an electronic signature process that will allow for more efficient contract administration.
4. The standard vendor contract used by the Division is being modified to clearly state that the vendor should not bill without a valid signed contract and that any work performed or incurred outside of valid contract is not a valid debt against the State.
5. As recommended the Legal and Business Division has set up a contracting rules and regulations training to be held in December 2018 for its staff as well as all contract attorneys and expert witness vendors.

**Non-Compliance
with ODOT
Contract and
Change Order
Requirements**

The ODOT expert witness appraiser contract language specifies that **“Service Provider shall be required and agrees to complete this case regardless of the number of hours required. If unforeseen events occur, extensive research or motions are required, or a mistrial or new trial or an appeal is granted, and insufficient funds remain on this contract, a written extension letter shall be required.”** ODOT change order language specifies that **“By your signature below and upon return of the executed document, you agree to complete all work in this contract as agreed, regardless of the amount of time it takes to do such work, for an amount not to exceed this revised maximum fee.”**

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We reviewed 20 cases where 27 change orders were requested. Of the 27 change orders requested, detailed documentation could only be provided for seven of the orders. The detailed documentation for the other 20 change orders had been properly destroyed as per records disposition schedule. Based on a review of these seven change order requests submitted by condemnation appraisers, none were for an allowable reason per the original contract under which the appraiser agreed to provide services. In five separate instances, the same appraiser requested multiple change orders for the same case. Change orders were requested after the contract limits had already been exceeded and were often in excess of 200% of the original amount allotted for the case.

In addition, multiple condemnation cases were lumped into one contract. Although each case was provided an allotment of \$9,000, the total contract amount was the basis for how much could be invoiced without a change order. In one instance, the total contract amount of \$54,000 consisted of six separate condemnation cases with an allocation of \$9,000 for each case. It was noted that when invoices for one case exceeded the \$9,000 allotment, the additional cost was absorbed by another case in the contract where funds were still available. Change orders were not requested when individual cases exceeded their authorized dollar limit if funds were still available in the overall contract.

This occurred due to the failure of the former Chief of Legal and Business Service Division to enforce contractual and change order requirements.

As a result, additional case work was performed prior to being authorized by change orders and an environment was created where appraisers expected all change order requests to be approved.

Recommendation

We recommend that ODOT management review Contract and Change Order language for currency, provide staff training for compliance, and limit the number of cases per contract to one.

Views of Responsible Officials

During the Audit period, there were a total of 122 contracts, of which 56 were single case contracts and 66 multi-case contracts. All together there were 122 master contracts covering 327 cases in which experts were hired. Supplemental contracts (also known as change orders) were made in 20 cases and needed in another 44 cases. So, for the five-year audit period a total of 64 supplemental contracts were either made and/or required out of the 327 cases in which experts were hired. Statistically that means that

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in 80% of the cases, the cost for expert witness appraisers either came in at or below the original contract amount.

The Department concurs with the findings and recommendations regarding appraiser contract change orders. The following changes have or are being implemented by the Department to address the auditor's findings:

1. Legal and Business staff will conduct an internal study to determine what the standard minimum contract rate needs to be set at to avoid the necessity for change orders.
2. Change orders will only be approved if written justification documentation demonstrate that the contract vendor has met the contract criteria for a change order.
3. The written justification for the change order will be provided by vendors in letter format and scanned into the litigation file and kept as a part of the litigation file along with any responses made by the Division Chief to the requests for change orders.
4. Effective in August 2018, the Business Office began running monthly reports showing the contract vendors monthly billing and current contract balance. This will allow better monitoring of contracts before funding runs out and should help prevent billing "gaps" between contracts and/or contract overages.
5. As recommended the Legal and Business Division has set up training to be held in December 2018 for its staff as well as all contract attorneys and expert witness vendors. This training will cover all policy updates on billing, contracting, change orders and litigation strategies.
6. Effective July 1, 2018, there is to only be one contract per vendor per case; (i.e. no more multiple case contracts for one vendor). This will eliminate funds being moved from one case to another.



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