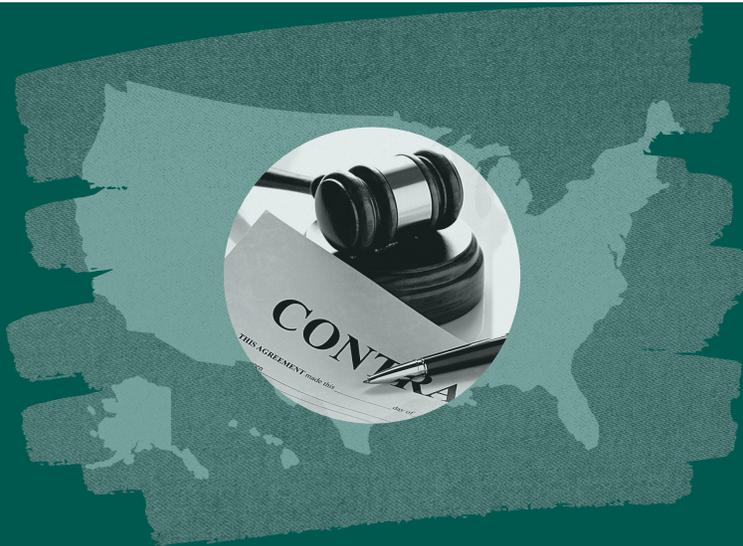




WAYNE STATE
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Legislative Oversight of State Government Contracts

April 2021



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This report is sponsored by the Levin Center at Wayne Law and
Wayne State University's Center for Urban Studies

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This report summarizes information gathered in the second of two investigations funded by the Levin Center at Wayne State University Law School examining oversight efforts by state legislatures. The first report, completed in 2019, delineated the oversight capabilities and activities in all 50 states.¹ It also identified legislative oversight of state-issued contracts as a particular weakness nationwide. This second report takes a closer look at that issue in six states where legislatures have taken steps in recent years to strengthen contract oversight. Both reports seek to strengthen oversight efforts by elected representatives serving in state legislatures.

¹ Checks and Balances in Action: Legislative Oversight Across the States, Wayne State University Center for Urban Studies (2019), <http://stateoversightmap.org/>.



1. Executive Summary

State governments pay private vendors substantial amounts of money to provide public services, a practice that increased dramatically beginning in the 1990s. This reliance on private for-profit and non-profit vendors to deliver public services typically involves contracting, which means that states continue to pay for public services using taxpayers' dollars, but private sector actors deliver the public services. The six states that we investigate in the work summarized here spent billions of dollars per year on state government contracts, often accounting for more than half of their state's general fund discretionary spending.

These contracts are typically entered into by the executive branch of the state government, and often oversight of these services is handled within the executive branch itself rather than through the checks and balances between branches of government. Moreover, to monitor these contracts, many state governments rely almost entirely on financial audits evaluating the amounts charged and paid, rather than on performance audits assessing the quality of the services delivered.

In the wake of the privatization surge, many states discovered how hard it is to ensure that private vendors fulfill their contractual obligations. We documented several instances of contracting scandals in our comprehensive study of legislative oversight in the 50 states—many with disastrous consequences for the public welfare and the public treasury. Sometimes states were sued and fined large sums of money; sometimes members of vulnerable populations died or were harmed; sometimes important activities and services, such as reporting student test scores or the state's ability to pay its bills, were disrupted.

If the services provided by these contracts were delivered by state agency employees, most state legislatures would have the authority, responsibility, and mechanisms they need to oversee the work performed. But as states “reinvented government,” state legislatures often lacked the authority or the resources needed to oversee contract execution. As a result, some legislators expressed frustration about their inability to monitor vendor performance in state agency contracts.

To examine the ways legislators might be able to oversee contractor performance, we selected six state legislatures that we found in our previous work had made efforts to improve their contract oversight. These states are Alabama, Hawaii, Idaho, Louisiana, Maryland, and Tennessee. We wanted to follow up to see where their efforts led and how the changes they made did or did not improve their legislatures' ability to oversee executive branch contracts.

We found that some catastrophic failure or scandal involving a state government contract appeared to open a window of opportunity for the state legislatures to reform their oversight of these contracts. In four of these six states the legislature passed laws that permitted state legislative oversight of contracts; some legislatures added state performance audit staff;

some legislatures worked with the state procurement office to improve their Requests for Proposals (RFPs) and train state agency contract monitors.

The state legislature that we consider the most successful was Idaho. After a high-profile scandal, Idaho's legislative audit staff produced a detailed performance audit of the contracting process itself. Based on this audit, Idaho embarked on a multi-year multi-pronged effort to change its state code, granting itself more power to oversee contracts, altering the procurement process, and ultimately funding two additional positions in the state procurement office. Those two new employees became responsible for contract management, training state agency staff in contract monitoring, ensuring that state agency staff perform their contract monitoring duties, and maintaining and updating procurement tools and resources (such as a contract monitoring manual and contract monitoring guidelines).

The Idaho legislature itself has a joint legislative oversight committee, and the changes to the state code extended its authority to oversee state contracts. This committee was bipartisan, with equal party membership regardless of the number of seats each party controlled in the two legislative chambers. This bipartisan approach ensured that concerns of the minority as well as the majority party were addressed. Legislative audit staff presented performance audits to this committee as well as to the budget committee and the committee with substantive jurisdiction over the agency with the contract. The budget committee, we were told, was very active in contract oversight. Legislative audit staff conducted performance audits of state agency contracts, as well as performance audits of state agency programs in general, presenting these to legislative committees.

Based on our investigation of Idaho and the five other states we examined, we make a series of recommendations to help state legislators oversee state agency contracts with private vendors. We also discuss some problems and impediments to effective legislative oversight of state contracts, including legal restrictions in some states. A brief description of contract oversight in these six states appears immediately after our discussion of recommendations and best practices. The remainder of the report delves more deeply into the details of how each state legislature managed and attempted to improve oversight of its state contracts, including case study examples of contract oversight performed by each of the six state legislatures.

a. Recommendations on Best Practices

First and foremost, we reiterate advice we provided in our larger 50-state study of legislative oversight. State legislatures should have a bipartisan committee (with equal membership for both major political parties) responsible for legislative oversight of the executive branch. In states that adopt this approach (13 nationally) we find, as we did in Idaho, that oversight becomes a good government, stewardship function rather than 'gotcha' politics. Moreover, we found in our earlier work that when one political party controls both the executive and legislative branches legislative oversight often declines. So, ensuring that the minority and

majority legislative parties have equal voice on oversight committees leads to more attention to contractor use of taxpayers' dollars, better service for citizens, and more oversight in general.

Second, **it is much more efficient and effective for oversight committees to be joint chamber committees**. These committees, which draw members from both legislative chambers in a state, listen to presentations by audit staff describing the performance of private vendors. If audit staff presents the same information to two different legislative committees, it takes time away from other audit investigations. It also consumes time and resources in two legislative settings instead of one, which is an inefficient use of scarce legislative resources. Moreover, it appears that in some states, Hawaii for example, the chambers may differ on their preferred approach, and legislative action initiated in one chamber may stall in the other. Joint chamber committees provide a forum for legislators to share their perspectives, knowledge, and expertise directly. The resulting shared understanding of a problem appears to facilitate action as we found in Idaho and Louisiana, both of which use joint chamber committees for oversight.

Third, **legislative oversight of executive branch contracts appears to work most effectively when it is based on collaboration** between legislators and state administrative procurement staff and between legislators, attorneys general, comptrollers, and state auditors. Delivering public services by paying private actors operates at the intersection of legislative oversight of the executive branch and executive branch oversight of itself. Inspectors general within the executive branch, procurement officers, legislative auditors and legislative budget committees are among those involved in ensuring that the public gets good value for its tax dollars and that citizens' needs are met. Idaho best illustrates the value of working collaboratively to hold private vendors accountable. In Idaho, state procurement staff train state agency staff to perform good contract monitoring. The legislature aids the state procurement staff by insisting in budget hearings that state agency staff meet the state's procurement standards. In addition, the legislature funds procurement positions whose primary responsibility is to ensure good contract performance. The legislature also relies on state and legislative auditors to back up state procurement personnel by conducting their own reviews of state agency and contractor performance.

Fourth, **contract monitoring requires good data from legislative auditors and well-written RFPs to ensure that private vendors provide state agencies with the data needed to monitor contracts**. States that perform good contract monitoring rely on performance audits that identify problems with specific contracts and with the overall contracting process. These broad performance audits led three state legislatures to pass laws revising their contract monitoring processes. (The three state legislatures that audited the overall contract monitoring process are Idaho, Louisiana, and Hawaii. Maryland recently completed a similar report on emergency procurement.) Legislators in these states fund audit staff that they can ask to audit or follow up on audits when problems arise with services provided by contractors. But the need for data does not end with performance audits, it includes provisions in RFPs that require vendors to provide data that state agency contract monitors can use to ensure that the vendor is performing well.

Procurement staff write RFPs to facilitate the collection and sharing of that data. States also need to provide public access to timely and usable contract performance data.

Fifth, **contract oversight improves when explicitly assigned to a legislative committee, when that committee sets priorities for contract reviews, and when that committee has the ability to do its work even when the full legislature is out of session.** All six states examined in this report had committees whose jurisdiction explicitly included contract oversight, and most saw more than one committee engage in contract review. In comparison, in states where the legislature has not assigned the duty to any particular body, contract oversight is minimal to non-existent. Idaho's legislature also took the step of working with state procurement officials to identify high priority contracts, eventually settling on a category of contracts spending at least \$5 million in taxpayer dollars. By placing a priority on those high-value contracts, the legislature was able to focus both the executive and legislative branch's contract oversight efforts where they would have the greatest impact. Also striking are legislative efforts in states like Louisiana and Alabama to establish contract review procedures that enable a chosen legislative committee to exercise routine contract oversight on a year-long basis, including when the full legislature is no longer in session.

Sixth, **involvement of state employees and the general public can facilitate contract monitoring.** Maryland, for example, uses fraud and waste tip lines to allow public employees and citizens to alert its government when problems occur. A few states, like Hawaii, provide detailed public information about the number and value of service contracts (especially high value services contracts) to heighten public awareness of contract activities and spending. Alabama's legislature, which currently has only limited power to oversee contracts, uses contract delays reported by the media to signal the public to express its views to the governor and other executive branch officials about problematic procurements or vendors. When the public and public employees are treated as partners in oversight, they can provide important information that helps both the legislature and state agencies to monitor contract performance.

Seventh, **legislatures should require the costs of directly monitoring a contract in the price tag.** Monitoring a contract requires time and effort from state agencies and procurement staff; it can be quite expensive, especially when legal costs are included. It also imposes costs on legislatures. Contract monitors, when possible, need to conduct site visits, engage with clients and citizens, and use direct methods to vigilantly check on contract execution. The Idaho Department of Corrections included, for example, the cost of sending its contract monitors on regular visits to an out-of-state correctional facility in its per prisoner price for out-of-state placement. Legislatures should require that these monitoring costs be included in contracts.

Eighth, **legislatures should fund separate executive branch positions to monitor and manage state contracts.** We were told by people involved in state procurement that writing RFPs can absorb all the time and energy of state agency procurement personnel. Creating a specific staff subunit within the procurement office devoted to contract monitoring and management ensures that these tasks attract sustained vigilance. This subunit should be

responsible for ensuring the quality of services delivered by vendors, not just their financial accountability.

Finally, **legislatures should focus their oversight efforts on contracts that offer substantial return on their efforts**—contracts that are large, risky, or that have historically been troublesome. Oversight is hard to do well; it requires substantial time and effort from legislators, auditors, and other legislative staff, it requires time and effort from state agency staff and executive branch procurement or general administration staff. Programs that are sometimes described as high value contracts should be given priority to ensure that there is maximum return on this investment. Idaho has adopted this approach.

b. Brief Overview of Contract Oversight in the Six States Examined

To develop the recommendations above, this report examined legislative efforts in six states to strengthen oversight of state-issued contracts. Summaries of what we found in each state follow; a more detailed discussion of each state appears later in this report.

In **Idaho**, the legislature asked its legislative audit staff to conduct a performance audit of the state's general contracting process and then acted on the findings, with input from the Attorney General and state procurement office, by developing new laws and rules governing contract oversight. All involved wanted to avoid further contract scandals and lawsuits, and to strengthen the performance of state contractors. In the words of government officials in Idaho, their approach was one of stewardship of the taxpayers' money and effective equitable provision of services to the citizens of the state. The legislature appeared to work in tandem with the state procurement office staff to insist that state agency staff monitor state contracts effectively. The legislature and the procurement office also collaborated to improve state agency RFPs so that contractors provided the data needed to monitor their performance. State agency contract monitors then relied on these data to ensure that services provided by private vendors met state performance standards. In the end, the process of writing a bid, selecting a contractor, and monitoring that contractor's performance were linked. After making these changes, the Idaho legislative and executive branches continued to work together to make improvements to the state's overall contracting process.

As an example of how seriously Idaho takes its contract monitoring responsibility, state agency contract monitors in the Department of Corrections went to extraordinary lengths to assess whether private vendors provided high quality care for Idaho's prisoners incarcerated outside the state. They traveled regularly to check on the care and services provided and made unannounced visits. The cost of these trips was included in the per prisoner cost of the contract. In hearings held by the Joint Legislative Committee on Oversight on the Idaho Department of Corrections contract, legislative auditors presented their reports, and state agency staff presented information and answered legislators' questions. Legislators asked about whether prisoners in the out-of-state facility received access to training that was comparable to training they would receive at a state-run facility and whether they had the opportunities to work for pay that

matched those available to prisoners in the state-run facilities. The emphasis was on the quality of the services delivered.

The State of Idaho illustrates the importance of collaboration among multiple actors in contract oversight, including the legislature, the procurement office, and the state agency staff. The attorney general also played a role in two ways: 1) determining whether proposed changes violated any state restrictions on the separation powers between the legislative and executive branches; and 2) facilitating the development of a system that avoided future legal problems between contractors and the state government or claims by citizens or others. Idaho is a small state (slightly fewer than 2 million people) with a correspondingly small state budget, so it focused its legislative oversight on high value services contracts, those with price tags in excess of \$5 million, entrusting the state procurement office with the task of overseeing contract monitoring and management of smaller contracts. Idaho's reform efforts are impressive, and participants in state government explained that the state continues to improve its contract monitoring and oversight.

Louisiana, under former Governor Jindal (2008-2016), experienced a surge in contracts that overwhelmed the state's ability to track the contracts and state funds. A 2015 audit report estimated that there were as many as 5,000 contracts that were not tracked by any part of state government. In collaboration with the next governor, the legislature passed a law requiring that the Office of State Procurement provide the Joint Legislative Committee on the Budget (JLCB) with a monthly report on contracts. The new law also mandated JLCB approval for all contracts over \$40,000. In July 2020, the Louisiana's legislature also created a new legislative oversight committee, the Contract Services Joint Legislative Task Force. Simultaneously, the state adopted a new computer information system, LaGov, that has an eProcurement component. To transfer all state contracts to this system, the Office of State Procurement worked diligently for months to unravel countless errors generated by state agencies. The LaGov system is especially valuable in ensuring that Louisiana knows what contracts it has and how much they cost.

Additionally, Louisiana improved the ability of both its legislative and executive branches to monitor contract performance. Requirements for legislative approval for small transfers of funds could, however, been an overreaction to the chaos the state discovered in 2015. We observed a committee hearing on hurricane clean up that delayed the vote for a week due to confusion among some legislators about interagency transfers. This delay suggests that Louisiana might have erred on the side of micro-management in its initial implementation of contract oversight. Hopefully, the delays and confusion will be resolved as everyone learns more about the new process. Going forward, the system can be fine-tuned and focused on vendor performance and service quality rather than solely on financial accountability.

Hawaii is yet another state in which a performance audit of the overall contracting process triggered the legislature to enact new laws to address contract monitoring. Completed in 2015, the audit recommended that the Office of State Procurement (OSP) needed to develop more systematic tools to help state agencies monitor contracts, such as worksheets and contract

timelines. Other recommendations included training state agency staff in contract monitoring and including stakeholders and service recipients in Capital Improvement Projects. In 2016, the legislature promptly passed new laws codifying the OSP recommendations.

A follow up audit in 2020 demonstrated inconsistent implementation of the new contract mandates and found that state agency compliance was rare. In response the Senate introduced two bills to provide funding for an OSP program officer to assist state agencies with implementation of the new contract monitoring tools. It also appropriated money to fund a ten-year program to develop innovative procurement methods that include training, development, and consulting. The Senate passed these bills the same year, but to date, the Hawaii House has not. This uneven result is consistent with other oversight actions in Hawaii; changes passed in one chamber often stall in the other. This pattern underscores the value of joint chamber committees in building a shared understanding of a problem, designing a response, and moving legislation forward, especially when legislative sessions are very short.

Maryland's legislature recently followed a different path to enhance its contract monitoring capacity, creating a new legislative staff subunit in 2019, the Office of Performance Evaluation and Government Accountability. The contracting problems in Maryland did not incapacitate state government in ways that affected the public, as was the case in Idaho and Louisiana. The only state-wide contracting scandal identified in a media search of the past decade involved paying state employees and contract employees different amounts for doing the same work. Yet prior to 2019, Maryland's legislators, despite an existing audit support staff, felt that they did not have the information they needed to oversee state contracts. This problem led them to create and fund an additional legislative staff subunit with the responsibility to issue performance reports on state contracts. In addition to creating this new subunit, Maryland's legislature made effective use of an employee hotline that facilitates whistleblowing by state employees whose fraud and abuse tips sometimes identified problems with outside non-profit and for-profit organizations that receive state funds. We did not find evidence of collaboration between the legislature and the executive branch in Maryland to try to develop system-wide reforms, but Maryland just finished an audit of its emergency procurement process that could lead in that direction.

Alabama's legislature faces challenges to its contract oversight authority due to the state constitution's strict separation of powers provisions as interpreted by Alabama courts. The state courts have determined, for example, that the legislature has no constitutional authority to terminate a state contract proposed by the governor. Moreover, both Alabama's executive and legislative branches conduct only financial audits of state-issued contracts; traditionally, neither has used its auditors to conduct performance reviews which, in turn, severely limits the information available for contract oversight. On top of that, the Alabama legislature has little history or experience acting as a check on the executive branch's contract authority.

Nevertheless, in 2018, the legislature enacted a new law reaffirming the authority of one of its committees, the Legislative Committee on Public Accounts, as well as its auditing arm, the

Department of Examiners of Public Accounts (DEPA), to conduct legislative oversight of state-issued contracts. Another committee, the Contract Review Permanent Legislative Oversight Committee, conducts monthly reviews of certain proposed state contracts. While it cannot prevent a contract from being signed by the governor, the committee can delay contract approval for up to 45 days. The committee has used its power to delay contract approval so rarely that it makes headlines when it does so. The delay then gives legislators, opponents, and the public an opportunity to press the governor for changes, though this tactic tends to be effective only for high profile contracts that have public salience. If Alabama's executive branch is not persuaded to change course, the contract in question can go forward after the 45-day delay whether the legislature likes it or not. In addition to delay tactics, both this committee and the Legislative Committee on Public Accounts can request audits by DEPA, investigate specific contracts, and hold public hearings. In March of 2021, the Alabama House passed legislation that would create a Joint Legislative Oversight Committee on Obligation Transparency that would have 45 days to review agreements entered into by any state agency or department valued at more than \$10 million of 5% of that state agency or department's general fund appropriation. The bill at the time of this writing has been read once in the Alabama Senate and assigned to the Senate Finance and Taxation General Fund Committee.²

The power of the purse gives the legislature's budget committees another way to influence state-issued contracts, both by calling hearings and rejecting or reducing requests for contract funds. Still another option for contract oversight is the legislature's Sunset Committee. Alabama has stringent sunset review requirements that its legislature can use to exert some influence over state contracts when those contracts require renewal, though the committee has rarely done so. The Alabama legislature has only limited authority and little history of exercising contract oversight, but as increasing amounts of taxpayer dollars are spent on vendors to perform services for the public, the legislature may have begun to assert itself.

Although **Tennessee** experienced scandals similar to those that triggered systemic changes in other states, we found no legislative plans for training state agency staff, altering the RFP process, or otherwise overhauling the state's contract monitoring system. Instead, in 2011, the Tennessee legislature eliminated 11 of its own oversight committees in order to save money on staff costs, an estimated reduction of about \$850,000 annually. The Office of the Comptroller of the Treasury (OCT)—a legislative appointee—supports reestablishing at least some of those committees, but repeated efforts within the legislature to do so have failed. Tennessee's lower legislative chamber supports restoring some oversight committees, but the state senate and the governor oppose it.

Despite these cuts, the Tennessee legislature's Joint Fiscal Review Committee (FRC) is authorized to review and approve any contract exceeding \$250,000 and lasting more than one year and can also oversee any fee-for-service contract. The legislature recently increased professional requirements for the FRC staff director to improve oversight. The Tennessee

² <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021RS/PrintFiles/HB392-int.pdf>

legislature also has a Joint Government Operations Committee (JGOC), which conducts periodic sunset reviews of all state entities, including state agencies, and is authorized to eliminate entire state agencies, but it is difficult to use that authority in the context of contracts. The legislature in the past, for example, considered eliminating the Tennessee Department of Corrections, because it was not adequately monitoring a contractor running state prisons, but using this power would have left the corrections facilities in the hands of the contractor whose poor work had not been properly sanctioned or controlled by the state agency. In the end, Tennessee’s legislature decided against terminating the DOC. Sunset reviews are a powerful but blunt instrument of oversight that appears to make them difficult to use when applied to state contracts.

c. Conclusions

We are encouraged to see some state legislatures adapting to the need to assert strong oversight of services provided through contracts in addition to overseeing services provided directly by state agencies. We are also encouraged to find several state legislatures collaborating with state oversight and procurement personnel to avoid scandals and major problems that arise from contractor failures. Because state legislative oversight of contracts challenges the separation of powers in some states, improving contract monitoring and oversight might require collaboration between branches of government rather than an adversarial orientation. State legislatures that are making the most progress have worked with the administrators in their state’s procurement office, the state attorney general, state auditor or others who can hold non-compliant vendors accountable. Legislative oversight committees can help procurement staff “encourage” state agency staff to monitor contracts effectively. Idaho provides an excellent template for this approach.

Given the gravity of some scandals involving private entities that deliver public services, it is alarming that many state legislatures lack the tools they need to oversee the performance of for-profit and non-profit vendors. Some of the contract scandals we described in our previous 50-state investigation involved the deaths of children or mismanagement of billions of taxpayer dollars. Performance audits, rather than solely financial audits, are a critical tool to prevent such scandals and tragedies. If more state legislators oversaw the performance of private contractors, it is possible that the better vendors would flourish while less conscientious contractors would see their business decline. But that outcome requires that more state legislatures adopt best practices in contract oversight.

2. State Legislative Oversight of State Government Contracts: Detailed Report

a. Motivation for the Research

State legislative oversight of the executive branch is a fundamental ingredient of the U.S. system of checks and balances. As we established in our 2019 report on *Checks and Balances in Action*³ state legislatures often lack the institutional structures, funding, and other resources needed to carry out this task. Nowhere was this more evident than in oversight of state agency contracts.

We documented several instances of contracting scandals in our comprehensive study of legislative oversight in the 50 states—many with disastrous consequences for the public welfare and the public treasury. Some of the most chilling instances of government failure we found in our previous work involved public services provided by private contractors. Sometimes states were sued and fined large sums on money; sometimes members of vulnerable populations died or were harmed; sometimes important activities and services were disrupted. These scandals include children killed while in foster care, deaths of two juveniles at a detention center managed by a private vendor, numerous problems in private prisons, state governments that could not pay bills when software programed by private vendors malfunctioned, educational test results from private vendors that were unavailable for months, and on and on.

In our prior work, we found that the problems state governments confront when using contractors are widespread. But more to the point for our work here, many state legislators complained in committee hearings that they lacked jurisdiction and institutional structures they needed to monitor these contracts and vendors. It was partly in response to those complaints that the six states studied here made changes to state laws, and their contracting processes to increase their legislature's ability to oversee contracts with private vendors.

b. The Rising Use of Contracts by State Governments

State governments' use of private contractors to deliver public services soared in the 1990s. An outgrowth of a movement popularized in the 1992 book by Osborne and Gaebler in *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*, this trend dovetails with devolution of federal policy to the states. States were increasingly responsible for implementing federal programs (Erikson 2016), sometimes with federal financial support, but also as unfunded mandates.

A Council of State Governments survey (Chi & Jasper 1998) documents the sharp increase in the use of contracts to provide public services, with 60% of state agencies reporting

³ https://law.wayne.edu/levin-center/pdfs/accessible_cus_full_report_07-08-19.pdf

that they expanded their use of these contracts between 1993 and 1998. This trend accelerated in more recent decades to staggering numbers of contracts. For example, in Louisiana under Governor Jindal, the total number of state contracts rose to 14,125 in July of 2016 (Crisp 2018). Many of these state contracts involve purchasing routine supplies (e.g., office supplies), but many others involve critical government services such as state-wide standardized student test scores, transportation for people needing medical care, or services for people who are incarcerated or wards of the state. The type and range of state government contracts is exceptionally diverse – some cost hundreds of dollars, while others cost millions of dollars.

These contracts are typically entered into by state agencies which are part of the state’s executive branch. Some states oversee these contracts through the executive branch itself rather than through the checks and balances imposed by the other branches of government—typically the state legislature, but occasionally the judicial branch. Procurement offices, which in an earlier era focused on the purchase of products, may rely on policies, procedures, staff, and resource levels from that earlier era. But with services previously provided by state employees increasingly provided through contracts with private vendors, the resources and procedures of many state procurement offices do not adequately support the effort needed to cope with the burgeoning number of services contracts.

When the services that are now provided by private contracts were delivered by state agency employees, nearly every state legislature had the authority, responsibility, and mechanisms to oversee the delivery of those public services. But as states “reinvented government” and increasingly hired private vendors to provide services, many state legislatures lacked the authority and or the institutional resources needed to oversee contract execution. As a result, we discovered in our earlier study that legislators often expressed frustration about their inability to monitor vendor performance in state agency contracts. This was particularly true when vulnerable people were harmed or when scandals roiled the state.

Traditionally contract monitoring used financial audits to oversee procurement by assessing whether the amounts billed and paid were appropriate for the products delivered. While clearly very important, financial audits do not encompass the quality of services delivered by private vendors. Many states discovered huge problems that surfaced when services provided by private vendors failed to meet the expectations of citizens and government actors. As privatized service delivery flourishes, states increasingly need performance monitoring to oversee the quality of services delivered.

In states that use performance audits to address service delivery by private vendors, the legislature relies on information provided by state auditors, comptrollers, legislative auditors or other legislative investigators. Ideally legislators work with audit staff to select contracts to examine closely. But, as we noted in our 2019 study, some states do not even have an auditor who responds to requests for information from legislators—a broader problem with legislative oversight in general. But this limitation is especially problematic when state financial audits fail

to probe the quality of services provided by private vendors. Not only is the procurement office operating in the dark when it comes to vendor performance, but so is the legislature.

This lack of information explains incidents revealed by our previous work in which legislators asked in committee hearings how they could directly confront contractors rather than chastising the state agency officials who entered into the contract. These legislators sought a way to directly assess whether service quality met state standards and to hold the vendors accountable. They felt that it was hard for them to determine whether private vendors were fulfilling their contractual obligations; they did not feel able to get a grasp on problems with poor vendor service by asking a state agency director about services delivered by those third-parties. As Girth (p.318, 2014) states, “Although well-written contracts with specified performance measures are critical first steps toward accountability, they are virtually worthless without vigilant execution.” State legislative oversight of the executive branch is an important mechanism to ensure “vigilant execution” of public services, but this power is diluted when legislators cannot directly confront vendors.

In our earlier work we discovered some states that were taking action to increase their capacity to oversee state contracts. To delve into the various ways legislators might be able to oversee contractor performance, we selected six states that we found in our previous work were making efforts to improve their contract oversight, Alabama, Hawaii, Idaho, Louisiana, Maryland, and Tennessee. At the time of our 2019 study, some of their efforts were just getting started. This report follows up to see where those efforts led and how the changes these states made did or did not improve the legislature’s ability to oversee executive branch contracts.

The facts indicate that some sort of catastrophic failure or scandal involving a state government contract appeared to open a window of opportunity for the state to reform its oversight of services contracts. In four of these six states the legislature passed laws that permitted increased state legislative oversight of executive contracts, including by adding performance audit staff, working with the state procurement office to improve Requests for Proposals (RFPs), or supporting increased training of state agency contract monitors.

The state that we consider the most successful was Idaho. After a high-profile scandal, Idaho’s legislative audit staff produced a detailed performance audit of the contracting process itself. Based on this audit, Idaho’s legislature embarked on a multi-year multi-pronged effort to change its state code granting itself more power to oversee contracts. It worked with the state procurement office, and ultimately funded two additional positions in that office. These new employees manage state contracts by training state agency staff in contract monitoring, ensuring that state agency staff perform their contract monitoring duties, and maintaining and updating procurement tools and resources such as a contract monitoring manual and contract monitoring guidelines. The legislature itself has a joint legislative oversight committee, and the changes to the state code extend its authority to oversee state contracts. This committee has equal party membership regardless of the number of seats each party controls in the two legislative chambers. This even-numbered bipartisan membership ensures that concerns of the minority as

well as the majority party are addressed. Legislative audit staff presents performance audits to this committee as well as to the budget committee and the committee with substantive jurisdiction over the agency with the contract. The budget committee, we were told, is very active in contract oversight. The legislative audit staff conducts performance audits of state agency contracts, as well as performance audits of state agency programs in general, presenting these to the legislative committees.

Based on our investigation of Idaho and the five other states we examined, we make a series of recommendations to help state legislators oversee state agency contracts with private vendors. We also discuss some problems and impediments to effective legislative oversight of state contracts. We acknowledge that some states, like Alabama, have constitutional and legal constraints that will force them to adapt our recommendations to their own state contexts. After the recommendations, we summarize the contract oversight highlights for each state. Following this overview of the research, a detailed description of the contract oversight process in each of the six states appears. These detailed descriptions include examples of contract oversight performed by each state's legislature.

c. Good Legislative Oversight in General

States that have good legislative oversight procedures in place are in a better position to expand their monitoring to include state contracts. The quality of oversight is difficult to measure impartially; hearings that score political points may seem like “good” oversight to members of the party scoring the points, but bad oversight to opponents. In our judgment, good oversight involves fact-based, bipartisan efforts to resolve public problems and to meet public needs. We strive to stay above these partisan characterizations of the quality of oversight by adopting principles that ensure both political parties are able to request investigations and that oversight is based on evidence. In our previous work we made several general recommendations about oversight. We reiterate two of these general recommendations here, because they are especially relevant to contract oversight: **1) including the concerns of the minority party in the oversight process and 2) evidence gathering by the legislature through performance audits.**

In our previous work we discovered that twelve states have at least one key oversight committees with equal party membership; one state has an auditor from each major political party, each of whom presents audit reports to the oversight committee. Although other committees in these states have party membership based on the proportion of seats each party controls in the chamber, the oversight committees (and a few other key committees) in these states do not award committee seats proportional to party control. This balanced party membership is an attempt to elevate legislative oversight above the partisan fray.

Evidence is the foundation of quality oversight. While most (albeit not all) states have some legislative staff or statewide unit that produces audit reports, some of these do not produce performance audits or program evaluations. State legislatures that conduct high quality oversight must have access to information about how state programs work, what their strengths and

weaknesses are, and what can be done to improve these programs. This takes money, time, and staff. But it also takes effort on the part of legislators to listen to auditors' reports, to legislate or change budgets based on auditors' recommendations, to negotiate with state agency officials, and take testimony and conduct hearings on these programs.

d. Additional Recommendations Specific to Contract Oversight

One of our findings from investigating these six states is that the more successful efforts to monitor contracts are built on collaboration between the legislature, audit staff, procurement staff, and the attorney general. As we described earlier in this discussion, contracts are often the domain of the state's procurement office, typically housed in some sort of general government services or government administration department within the executive branch. This is typically part of the governor's financial and administrative team. Often the changes a state needs to make to improve contract monitoring involve refocusing resources and priorities in the procurement office. Often needed changes occur when the legislature holds hearings on the procurement process. It might require appropriating money to add one or two staff to the procurement office. We observed this in Idaho. The legislature passed laws that changed the responsibilities of the procurement office to include training and supervising state agency staff in their contract monitoring duties. Although the legislature changed the state code to expand the responsibilities of the Procurement Office, that subunit could not perform these duties effectively until a couple of years later when the legislature funded two additional positions in the procurement office. **Therefore, we recommend that state legislatures work collaborative with their state's procurement office to improve contracting as well as contract monitoring and management.**

It appears that the combined pressure of procurement officers and legislators can increase the responsiveness of state agency staff to changes in the contract monitoring processes. In Idaho, the responsibility for day-to-day monitoring of contracts remains within the state agency's jurisdiction, but the procurement office is actively involved in managing the contract monitoring process and training the contract monitors. Moreover, the Idaho procurement office is involved in writing the Requests for Proposals (RFPs) or similar documents that control the contract bid process. The RFP requires that the contractors provide information that the state agency contract monitors need in order to keep tabs on the vendor's performance. When these measures are not incorporated into the bid, state agency contract monitors are often left without leverage over the vendor and the state legislators have no metrics with which to assess service provision. In other words, a good RFP provides evidence with which to evaluate service quality and performance.

The contract oversight process operates at the intersection of executive and legislative interaction. Therefore, a collaborative relationship between the legislature and the procurement office provides synergy that can be harnessed to gain compliance from state agency staff. On the other hand, competition between these actors can generate gridlock and inaction.

A second findings from the six states examined here is that joint chamber committees are much more efficient for conducting oversight of state contracts. **We recommend that legislatures schedule joint chamber sessions when dealing with contract oversight.** Audit staff are a valuable resource whose time is scarce. There almost always seem to be more requests for audits than staff can produce. Therefore, if this staff has to present the same, often lengthy reports, to two small committees in each chamber rather than to one combined, slightly larger committee, the time expended comes with an opportunity cost of foregone investigation time. But even more importantly, we found that in Hawaii, which has had experiences that are similar to those we found in Idaho, action in one chamber often stalled in the other chamber or was delayed so long that it was not finished in states with short legislative sessions. This occurred despite one-party control of both legislative chambers and the executive branch. Contract monitoring changes similar to those that Idaho adopted a few years ago remain mired in transit between the two chambers in Hawaii.

Our third finding about contract monitoring is that in some states' legislative oversight of state contracts is classified as a violation of the separation of powers. The power over contracts is classified by attorneys general in some states as the exclusive prerogative of the executive branch. In states like this, Alabama for example, the legislature can often express its concerns about contracts through the administrative rule review process or sunset reviews or the budget process. But these avenues for influencing contracts are often severely limited. In Alabama, the Contract Oversight Committee can delay approval of a contract for up to 45 days; it can refuse to renew a multi-year contract through the sunset review process, but it has no performance audits to keep itself fully informed. State legislatures need resources to monitor contracts if government is going to hold vendors accountable for the quality of services paid for with taxpayers' dollars. **We recommend that state provide staff resources to support contract oversight wherever that action is taking place.** This expands and clarifies our general recommendation for good oversight—information is crucial, and resources need to be devoted to producing and disseminating that information about contracts in addition to information about the executive branch in general.

Another finding about contract monitoring is that public opinion, media attention and citizen engagement are valuable resources that can facilitate legislative oversight of state contracts. When Alabama's legislature delays a contract, it is a rare event that attracts media attention; media attention often triggers a public outcry. The public's response sometimes motivates the executive branch to reconsider a contract. Maryland uses a hotline to facilitate whistleblowing by state employees. Those tips have uncovered problems with private for-profit and non-profit recipients of Maryland's state funds. Public outcry fueled by media attention to failed state contracts in Idaho, Hawaii, and Louisiana provided a window of opportunity for those state legislatures to rewrite their state laws to improve legislative oversight and state procurement rules for state contracts. Hawaii provides a uniquely accessible webpage that its citizens can use to find out how many state contracts there are, the categories of services these contract cover, and other valuable information about the use of their tax dollars. Maryland provides this information in a formal report from the state's Procurement Advisor the Board of

Public Works and the state's General Assembly. The report is available to the public online. We recommend that states emulate Hawaii and Maryland in providing more accessible contract information. These are posted and provided by executive branch actors, but state legislatures can encourage public access to this information by funding these reports and websites. The public cares about service quality even if state laws, separation of powers restrictions, lack of evidence, limited staff time and resource preclude vigorous monitoring of contracts. Hence, ballot initiative and constitutional amendments provide a tool that state legislatures can use to bolster their efforts to oversee state contracts.

By monitoring state contracts to the best of their ability and capacity, state legislators act as stewards of the public's resources by ensuring vendors deliver the services citizens are paying for. The proliferation of state contracts has outstripped the ability of state legislatures and procurement offices to ensure that vendors deliver quality services. The earlier focus on procuring supplies, equipment, and other products means that the capacity of states to monitor service contracts lags behind, even as service contracts consume an increasing percentage of the state budget and provide vital public services to citizens, including vulnerable populations ill equipped to command attention to the poor services they receive. This means that state procurement offices need additional staff to write high quality RFPs, to train state agency staff to monitor contractor performance, and to manage the contracts more generally. As we pointed out earlier, contract oversight occurs at the intersection between the legislative and executive branches. **We, therefore, recommend that legislatures help procurement staff acquire the resources they need to do a better job.** This could involve approving funds for additional positions in the procurement office as well as making changes to state laws and procedures and, as we mentioned above, funding more public access to information about the number of state contracts, the dollar value, and the types of contracts.

Additionally, we find that state governments need to consider contract monitoring as a cost of contracting for services. Idaho's Department of Corrections includes the cost of traveling to check on the treatment its prisoners receive at private out-of-state correctional facilities. This meant that when an inmate from Idaho died in a private prison in Texas that Idaho was able to overrule the Texas coroner who wanted to classify the death as due to natural causes. The Idaho state agency contract monitors had the information and resources needed to challenge that judgment—a factor that was important when the family pursued legal action over the death. **We recommend that states include monitoring costs in the cost of privatizing public services in state agency budgets** rather than allowing this cost to remain hidden.

Finally, we encourage state legislatures to focus their contract oversight efforts on contracts that are expensive, that serve vulnerable populations, or that for other reasons are highly consequential. The cost of a thorough performance audit is not a trivial expense. The opportunity cost of a foregone investigation of some other contract or program is a consideration because there are many other programs that could and should be investigated. So the choice of which programs to investigate is a serious consideration. Moreover, as stewards of taxpayer resources, legislators try to give their constituents good value for their tax dollars. And focusing

on the programs that are the most expensive provide the best opportunity to reduce waste, fraud, and mismanagement as well as routing out poor performance and bad service from private vendors.

Solutions to the problems entailed in monitoring these services contracts will often be unique to the state due to its state constitution, resources, and existing checks and balances. We hope that this investigation lays a stronger foundation for state legislators to share their experiences with this problem.

3. Legislative Oversight of State Contracts in Six States That Enacted Reforms

This section of the report provides a more detailed examination of the six state legislatures that took steps in recent years to strengthen contract oversight.

a. Contract Oversight in Idaho

i. Overview

Scope of Contracting in Idaho

In 2014, prior to the legislature's contract oversight reforms, the State of Idaho had 831 active contracts worth 3.2 billion dollars (OPE 2014). Forty-four percent of these active contracts procured products. The remaining 56% were service contracts. Of the total 831 active contracts, there were 25% for nonprofessional services, 14% for professional services, 14% for IT services, and 3% for other items. Idaho had several high value service contracts, defined as contracts worth at least \$5 million. These high value service contracts accounted for 81% of the \$3.2 billion Idaho spent on its state contracts in 2014.⁴ The legislature focuses its attention on high value contracts given the impact these expenditures have on the state's budget. To put the contract dollars into perspective, in 2014, Idaho's total state revenue from all sources (including federal funds) was approximately \$7.3 billion.⁵ So, state contracts accounted for almost 45% of the state's revenue.

Relevant Institutional Structures in Idaho

Although Idaho does not officially limit the length of its legislative session, the sessions tend to be short (about 2 to 3 months). Legislators are not highly paid (\$18,691 per year). Legislators also receive an expense allowance for days that the legislature is in regular session (\$139 per day for those who live more than 50 miles of the statehouse and, for legislators who live within 50 miles of the statehouse, a smaller allowance linked to the federal per diem rate for Boise, ID). Staff resources are not extensive (approximately 75 year-round staff and about 60 to 65 staff that assist as needed⁶). Consequently, Idaho is classified as a part-time or citizen legislature; Squire (2017) ranks Idaho as 35th in legislative professionalism.

Idaho's governor is relatively powerful, ranking 17th among the 50 states according to Ferguson (2015). This reflects his or her budget powers and ability to appoint heads of most state agencies. In addition to his or her authority to veto entire bills, Idaho's governor has line-item

⁴ Follow Up Report: Strengthening Contract Management in Idaho, Office of Program Evaluation, 2014. <https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1404f.pdf>

⁵ <https://legislature.idaho.gov/lso/bpa/highlights/>

⁶ Based on estimates from NCSL data on legislative staff from 1979 to 2015, <https://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx>

veto power on all bills, but only for dollar amounts (not the language of the bill) with a two-thirds majority vote of legislators needed to override (Beyle 2008).

Republicans control both of Idaho's legislative chambers. Just prior to the 2020 elections, there were 28 Republicans and 7 Democrats in the State Senate and 56 Republicans and 14 Democrats in the State House. Despite the overwhelming Republican majorities in both legislative chambers, Idaho's Joint Legislative Oversight Committee (JLOC) membership must consist of equal numbers of Republicans and Democrats. This is a best practice that we recommended to all states in our 2019 report.⁷ Other legislative committees in Idaho are not, however, subject to this rule.

Overview of the Contract Monitoring Process in Idaho

Idaho's legislature has two administrative staffs that assist with its executive branch oversight responsibilities: the Office of Performance Evaluation (OPE) and the Legislative Services Office (LSO), which has a subunit, the Legislative Audits Division (LAD). Both these analytic bureaucracies play a role in legislative oversight of state agency contracts. Each of these staffs works in tandem with a joint legislative committee; OPE supports the work of the Joint Legislative Oversight Committee (JLOC), and the LSO supports the efforts of the Joint Finance-Appropriations Committee (JFAC).

The LSO consists of a staff of approximately 70 professionals divided into the following four divisions: The Legislative Audit Division, the Budget & Policy Analysis Division, the Research and Legislation Division, and the Information Technology Division (LSO Website-Organizational Chart). The first two provide information used by the legislature to monitor state agency contracts. The OPE is much smaller, and, according to informed observers in the state, a non-partisan and independent analytic bureaucracy. OPE works closely with the bipartisan JLOC to determine which programs to evaluate and plays a central role in helping the JLOC oversee state agencies, including state agency contract monitoring. Any legislator can request an OPE evaluation, but JLOC votes on which evaluations to authorize and works with OPE to define the scope of the evaluation. OPE provides advance copies of its reports to JLOC and presents the reports to the committee. The committee votes on whether to release the reports, but informed observers do not recall any reports that have not been released.

Informed sources in Idaho say that the Joint Finance-Appropriations Committee (JFAC) is a crucial actor in contract oversight. During committee hearings legislators on that committee quiz agency officials about what "we're getting for our money." Other sources in Idaho report that agencies think about what they will be asked during these budget hearings, and this motivation improves contract monitoring within the agencies. Sources describe members of the JFAC as having "substance." Informed sources also say that budget staff deserve a lot of credit

⁷ https://law.wayne.edu/levin-center/pdfs/accessible_cus_full_report_07-08-19.pdf

for teasing the dollars apart because legislators lack time to delve into the details unless there's a problem (interview notes 2020).

In our 2019 report on oversight in the 50 states, *Checks and Balances in Action*, we reported that, in 2016, Idaho expanded its legislature's authority to oversee state contracts. The changes took effect in 2017, but it was too early to assess their effects in our report, which was based on the 2017-18 legislative session.

In the following discussion we examine the process through which Idaho's oversight of contracts evolved and expanded. The processes used to expand Idaho's contract oversight are in themselves an enlightening example of the way a state can improve its contract monitoring. In doing this Idaho models a best practice that other states that lack the power to oversee contracts may be able to emulate.

Specifically, the Idaho legislature followed advice from its program evaluation staff to change the Idaho Code to require more rigorous state agency monitoring of contracts. Based on that requirement, it used performance audits conducted by legislative staff units (analytic bureaucracies) to determine whether state agencies were effectively monitoring high value contracts. After making changes to the Idaho Code and approving new rules for the Department of Administration and Department of Purchasing (DOP), both the DOP and legislators had more power to ensure that contractors were monitored effectively by state agency staffs.

Legislative Oversight of Contracts in Idaho through the Appropriations Process

As noted above Idaho's legislature has a Legislative Service Office (LSO) with an audit division that conducts a small number of audit reports. In addition to these reports, the LSO Audit Division is responsible for reporting on the activities on all state entities that receive state funds on a regular three-year cycle. Entities with problems are revisited more often.

Brief (approximately 2 page) management reviews summarize LSO's review of all entities that receive a state appropriation. These reviews are available on the LSO website. The entities reviewed include executive branch departments, various executive branch elected officials' offices, and many boards, associations, and other institutions. There are 78 of these entities, including the State Board of Accountancy, the Lava Hot Springs Foundation, and the Outfitters Guides Licensing Board, as well as the Attorney General, the Lieutenant Governor, and the Secretary of State and all of the state agencies, such as the Department of Health and Welfare. Looking at these reports for the years 2016 through 2019 reveals that the LSO's Legislative Audit Division includes information about contract management in each of these reviews, noting contract management problems or lack thereof. During the four-year period 2016, 2017, 2018, and 2019, reveals only three reports that noted contract monitoring problems: one for the Idaho Department of Environmental Quality, one for the Idaho Division of Career Technical Education, and one for the Idaho Commission for the Blind and Visually Impaired.

The following excerpt from the Legislative Audits Division management review of the Idaho Department of Environmental Quality illustrates the systematic assessment of contract monitoring included in the management reviews. (Report MR24516 Date Issued: July 10, 2018) This report covers fiscal years 2014, 2015, and 2016.

Finding 1–The Department is not in compliance with internal contract monitoring and closeout policies.

Condition: We tested a sample of 18 contracts with a start date within our review period and 20 contracts with an end date during our review period. Our testing indicated several instances of non-compliance with the Department’s contracting policies and weaknesses in internal controls.

Project managers do not seem to understand the importance of completing these reports and do not consider them a priority. The new procedures have not been adequately monitored, and appropriate action has not been taken to ensure compliance. There has also been some turnover in the Department’s contract staff. In addition, two different databases store contract data; one for contract management and one for contract monitoring. Currently, there is not sufficient data sharing between the two databases.

A search of the minutes for JFAC Committee Meetings during the years 2016, 2017, and 2019 reveals the JFAC addressed the contract monitoring problems with each of these three entities during committee meetings. The format of JFAC’s involvement was similar for all three entities. The LSO analyst presented the audit findings, the executive officer representing the entity told the committee members what had been done to address the audit findings, and then the LSO analyst told the committee what the governor’s budget recommendation was for the entity. In some instances, the committee members voted on “Language of Legislative Intent” requiring the state entity to report back to the committee or empowering the LSO to conduct further investigation of the entity. These statements of intent were pass by unanimous consent. There was no discussion recorded in the minutes. So, although there is a pattern of legislative oversight, it is, at least publicly, a pro forma treatment of the issue with heavy reliance on LSO.

Legislative Oversight of Contracts in Idaho through the Joint Legislative Oversight Committee

The Joint Legislative Oversight Committee (JLOC) works closely with its staff in the Office of Program Evaluation (OPE) to monitor state agency performance and service delivery. During oversight activities OPE and JLOC discovered problems with state contracts that failed to deliver quality products and services.

For example, in the early 2000s, the Idaho State Department of Education contracted with Pearson Education Inc for a state-wide instructional management system (IMS) called Schoolnet that was supposed to allow teachers to individualize students learning based on real-time data about each student. The intent, strongly supported by then State Superintendent of Education, Tom Luna, was to reform teaching so that students mastered skills before advancing

to the next level. So rather than a grade to grade progression students would master skills and then move on in specific skill areas. The price tag for the Schoolnet IMS was \$19.4 million. This cost was paid for primarily with Idaho State dollars. In 2006, OPE released a report, *Idaho Student Information Management System (ISIMS) – Lessons for Future Technology Projects*, documenting the failure of the system and the millions of dollars spent on it.⁸ A few years later, in 2011, another OPE report, *Delays in Medicaid Claims Processing*, described problems that resulted from contract management issues in the Department of Health and Welfare. Moreover, the state was embroiled in a lawsuit about an illegally awarded broadband contract from 2009 that eventually cost the State of Idaho millions of dollars.⁹

Sensing a systemic problem with contract management, on March 12, 2012, JLOC instructed OPE to undertake an evaluation of the general process of contract management with a goal of identifying best contracting practices rather than investigating specific contracting failures. The JLOC hoped that “[a] better understanding of the current roles and responsibilities among vendors, the contracting agency, and the Division of Purchasing (within the Department of Administration) will shed light on how, or whether, Idaho needs to make improvements to its contracting process.”¹⁰

In its 2013 report, OPE found that the state had appropriate procedures in place for the “development and award of contracts,” but that the state needed to improve procedures for monitoring services, performance, and results provided through state contracts. Specifically, OPE noted that, as of 2013, the Idaho Code and Administrative Code said nothing about contract monitoring. Moreover, the 2013 report stated that guidelines for contract monitoring from the Division of Purchasing (DOP) were limited. (DOP is a subunit of the Department of Administration, the executive branch agency responsible for contracts.) OPE reported that employees within state agencies that relied on contracts to provide public services were not adequately trained to monitor the contracts and had limited knowledge, skills, and abilities to perform contract monitoring. Additionally, the 2013 OPE report noted that not all state agencies were legally required to consider contracting best practices. Consequently, OPE recommended, with support from the Attorney General, that the Idaho Code be updated to ensure contract monitoring, that DOP train state agency staff in contract management, and that DOP monitor agencies’ performance in managing their contracts.

In response to the 2013 report, the Idaho legislature worked for several years to improve the state’s contract monitoring processes. It changed the state code and appropriated money to pay two full-time state procurement employees to train and work with state agencies to improve

⁸ The Schoolnet system was later described as a fiasco. Richert, Kevin, “After the \$61 million Schoolnet fiasco, a scramble begins”, *Idaho Statesman*, May 3, 2015

⁹ Richert, K. (2014). Judge Tosses State Broadband Contract. Idaho EdNews. Retrieved from https://www.idahoednews.org/news/judge-tosses-state-broadband-contract/#.VNvlpFw_100

¹⁰ Appendix A, Project Scope, May 2012 p. 35 of the resulting report, *Strengthening Contract Management in Idaho* (released on January 15, 2013), <https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1302.pdf>

their contract monitoring. Idaho later created a new DOP website, activated in January 2021, highlighting contract management tools. Contract monitoring became a collaborative effort that both the executive branch civil servants and the legislature worked to improve.

ii. Three Idaho Case Studies

To deepen understanding of the Idaho legislature's contract oversight efforts, three recent case studies follow. In the first, the Idaho legislature responded to an overall performance audit by OPE to improve the state's contracting monitoring. In the second, the legislature used OPE findings to encourage the Idaho Department of Health and Welfare to improve an RFP for statewide Non-Emergency Medical Transportation services. In the third, OPE and Idaho's Joint Legislative Committee on Oversight assessed the performance of the Department of Corrections with respect to placement of prisoners in private out-of-state correctional facilities.

Case Study 1: Reforms to Improve Contract Monitoring in Idaho

In 2014, OPE issued a follow-up report on the state's contracting activities. In that report, OPE described the progress made in response to its 2013 findings and recommendations by three government actors: the legislature, the Department of Administration and the Division of Purchasing, and the state Attorney General. Examples of actions taken by these actors to address contract management follow.

First, the DOP refocused contract management on high value contracts, those described above as consuming 81% of the state funds (\$3.2 billion total in 2014) spent on contracts. The 2013 Office of Program Evaluation (OPE) report had initially recommended that management focus on contracts described as high-risk because "failure would cause significant physical, emotional, or political harm to the state and its citizens." (p 8). The Division of Purchasing recommended a different definition focused on high cost contracts, because it viewed risk assessment as a subjective criterion that could lead to disputes between the agency and the DOP about which contracts were subject to the new guidelines. In its 2014 report, OPE accepted this as a valid criterion, noting that even a high threshold of \$5,000,000 would require extensive management of 45 contracts with a dollar value of \$2.6 billion.

Second, the Office of the Attorney General supported clarifying the information about contracting in the Idaho Code and Administrative Code to resolve some of the problems identified by OPE. Responding to OPE and the Attorney General's recommendations, in 2013, the Idaho House passed a concurrent resolution that required the Department of Administration (of which the Division of Purchasing is a subunit) to develop a plan to address the 2013 OPE Report.

In the JLOC hearings on OPE's 2013 report, the Department of Administration stated that it would need at least one and possibly two new positions to train state agency staff in contract management and to monitor contract management conducted by staff of state agencies in Idaho. An appropriation for 2 FTEs for contract administration personnel appears in the JFAC minutes for March 6, 2019. Minutes for 2015, 2016, and 2017 do not indicate that there was additional staff funded for this work, but it is possible that there is some other source of funding that the

DOP was able to use to support the work involved in creating new contract management materials and train agency staff.

In 2014, the Idaho legislature, through an appropriations bill, instructed the Department of Administration “to develop best practices for contract management, develop a statewide contract monitoring system, and notify the Legislature prior to” extending or renewing any contracts. (p 6, Follow up Report: Strengthening Contract Management, 2014, OPE). In 2015, the legislature followed up on its oversight by requiring the Department of Administration to keep it apprised of contract renewals or extensions in excess of \$1,000,000. There is section in the JFAC committee minutes for March 12, 2015 called “Legislative Intent Language for the Department of Administration” that specifies details of the contract renewal and extension process. Similar language appears in the JFAC Committee minutes for March 8, 2016.

It appears that the Department of Administration (the parent of DOP) used the rule review process to work with the legislature to develop specific requirements for contract monitoring. Changes proposed by DOP were submitted to the legislature in the form of an administrative rule in October 2016 (Docket No. 38-0501-1601 Rules of the Division of Purchasing Proposed Rulemaking). The administrative rule, submitted to the legislature in October of 2016 as part of the rule review process, established a threshold of \$1,500,000 for extensive contract management. Contracts above this threshold were defined in the rule as high value contracts. The changes to the rule also included extensive definitions of contract management and contract administration. Some state agencies in Idaho can directly enter into contracts on their own; others lack that authority and rely on DOP as their statutory agent to enter into contracts. According to the new rule, in the former instance the state agency is responsible for contract administration and contract management. For the latter category of state agencies, the DOP is responsible for contract administration while state agency staff are responsible for contract management, meaning the day-to-day monitoring of the delivery of and quality of services. The rule specified that any agency with one or more contracts must designate a contract manager who is “the single point of contact for each agency contract.” (Section 113.02a). In Section 113.02d, the rule specified that this state agency contract manager must “develop and implement internal contract monitoring tools . . . based on the dollar value and/or potential risk associated with contract failure.” In other words, more extensive contract monitoring tools are required for large contracts and contracts in which failure could cause harm or jeopardize people or the State of Idaho.

To train state agency staff to monitor contracts (as recommended by OPE), the Division of Purchasing (DOP) published a Contract Administration and Management Guide (CAMG) that described the specific responsibilities of the agency (day-to-day contract management) and the DOP (contract administration and oversight). Agency staff are responsible for monitoring the work of the contractor to ensure that it complies with the terms of the contract and for letting the DOP know if there were “serious issues and unresolved disputes.” The DOP is responsible for enforcing contract compliance, and assisting the state agency with enforcing remedies. DOP was also responsible for helping the agency develop evaluation documents to manage the contract. In

addition to developing this guide, the DOP revised its forms and created best practices checklists for contract managers based on the standards of three national professional associations, the Institute for Public Procurement (NIGP), the National Contract Management Association, and the National State Auditors Association. These checklists are included in the Contract Administration and Management Guide. DOP also issued a Desk Manual to accompany the Contract Administration and Management Guide (CAMG).

The CAMG includes a highly detailed flowchart of activities for agencies to follow beginning with the agency establishing a contract management team whose members include a contract manager, project manager, and subject matter experts. The initial meeting of this team is required to establish a timeline and ensure “clarity on what will be accomplished when.” This timeline is also required to include milestones for deliverables or performance. The agency is required to maintain a file copy of the discussions that occur in this initial meeting and to correspond with the “Contractor confirming understanding/next steps.” (Appendix 1, CAGM, January 2014).

The CAMG further defines contract monitoring to include “observation of and documenting the Contractor’s performance.” This activity may include a review of the Contractor’s files and reports. The guide also specifies that contract management evaluation documents need to be considered and included in the solicitation of bids (i.e., when drafting a request for services). In the section of the guide that discusses “Determining What to Monitor” (section 6.4.3 p. 9) the first question is “How will the Agency know it is receiving what it paid for?” Subsequent discussions of what to monitor point out that site visits “to the locations where services are performed . . . can be used to verify actual performance.” (p. 11 CAMG) The CAMG advises the contract manager to take a random sample of contractor files and that “[t]he Contractor should never be allowed to select the samples for review.” The CAMG also specifies that site visit documentation should be sent to the contractor, the contract manager, and “other state of Idaho designees.” The importance of careful recordkeeping is stressed throughout the guide. Contract managers are advised to work through the DOP if a contract needs to be terminated. The details included in this guide provide an excellent template for high quality contract monitoring by state agency staff.

Although Idaho has made great strides in increasing oversight of contracts, there are still problems that arise. Recently the Idaho Education Department made headlines over its use of sole source contracts—87 contracts valued at \$29.7 million issued in the 18 months between January 2019 and June 2020. Current law exempts “constitutional officers” from bid requirements. This exemption means that the State Superintendent of Public Instruction has latitude to award no-bid contracts. Her office argues that continuity is needed for contract extensions related to software platforms and educational testing. Moreover, some of these contracts were initially awarded through a bidding process. But it appears that other contracts do not meet this criterion. In an effort to control this practice, Idaho’s legislators included a requirement in the Department of Education 2021 budget for a report on all contracts exceeding

\$25,000, with an explanation of the rationale for any sole source or no-bid contracts.¹¹ This new legal requirement demonstrates that Idaho’s legislature continues to be proactive in its oversight of executive branch contracts even with one-party control of government. It appears that this commitment to non-partisan oversight is an essential component of the state’s system of checks and balances. The willingness of Idaho’s legislators to use the budget process appears to increase state agencies’ compliance with contract monitoring standards.

Additionally, the Department of Purchasing continues to improve the contract monitoring process. In January 2021, DOP unveiled a one-stop shop for contract monitoring and management resources on its website. Informed sources say that most people who attend DOP training on contracting are involved in procurement. To increase attention to contract monitoring DOP is creating two separate subunits: one for procurement and one for contracting. The rationale is that it is hard to maintain attention to contract monitoring when attention is focused on issuing a new RFP. As a result, DOP worries that contract monitoring is taking a back seat to new procurements. This attention to contract monitoring, not just RFPs, reflects the attitude conveyed by Idaho’s legislators, who appear to view themselves as stewards of the public’s money. Legislators want agencies to explain to them in committee hearings, “what are we getting for our money?”¹²

Case Study 2: Contracting for Non-Emergency Medical Transport (NEMT)

The State of Idaho uses a contract to pay for transporting the state’s Medicaid recipients to non-emergency medical appointments. In 2010, federal changes to the Medicaid program made all Medicaid recipients entitled to transportation to receive medical care even if the care was not an emergency. Transportation to receive care is an extremely important and valuable feature of Medicaid for people who lack transportation or who cannot drive. Prior to 2010, transportation to medical care was based on a fee for service model. After 2010, states were allowed to use several different methods to provide Non-Emergency Medical Transportation (NEMT).

The approaches taken by states were summarized in a 2018 national study of this aspect of Medicaid.¹³ Many states provided transportation using an “in house” management model with the state Medicaid program contracting with transportation providers on a fee-for-service basis. Others use a managed care organization that delivered medical care but also provided transportation to receive these medical services. Still others used statewide brokers or regional brokers that arranged for transportation through a variety of mechanisms such as taxi companies, ride-hailing services, and other transit options that are not associated with medical services or providers. These brokers were typically for-profit entities that acted as a call center linking Medicaid recipients with transportation providers.

¹¹ <https://www.idahostatesman.com/news/politics-government/state-politics/article248186340.html>

¹² Interview notes, 2020.

¹³ http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rpt_202_companion.pdf

According to the 2018 report, Idaho’s Medicaid program used managed care plans to deliver medical services, but these managed care plans did not provide transportation, which meant that other providers were needed for transportation. Idaho used the statewide “broker” model, contracting for this service through its Department of Health and Welfare (DHW). From 2010 to 2016, the state’s DHW contracted with Access2Care. From July 2016 to March 2018, Veyo, which relies on ride-hailing services, was the statewide broker. Although the contract was supposed to last for 3 years, in March 2018, Idaho transferred the contract to a private company, MTM, that has national experience providing NEMT. MTM took over Veyo’s contract through June 2019. In May of 2019, the Joint Legislative Oversight Committee (JLOC) asked OPE to conduct a performance evaluation of the state’s NEMT system.

In June 2019, OPE was asked to expedite its report because DHW needed to write an RFP for a new contract, and the JLOC and the Department of Administration wanted to include OPE recommendations in the new RFP. Consequently, OPE did not have time to produce a full evaluation; instead it produced a contract management letter. On July 26, 2020, the JLOC held a hearing on the recommendations and findings conveyed in the contract management letter. The committee hearing included a presentation from OPE. Minutes of that hearing are publicly available.¹⁴

The original scope of the evaluation that JLOC asked OPE to produce included a comparison of the broker model with other mechanisms for delivering NEMT services. The OPE analyst reported in the committee hearing that the problems that the state encountered flowed from poor contract management rather than any fundamental flaw with the broker model. OPE described DHW’s contract management as “inappropriately passive” and thus unable “to ensure that it protected participants.” Moreover, OPE determined that the Division of Medicaid (within DHW) was unable to understand and use performance and cost data provided by its contractor. Furthermore, OPE revealed that DHW had failed to conduct a cost analysis that could be used to determine a reasonable cost for the service. OPE recommended that DHW utilize “regular and systematic methods to verify broker data and to independently audit the broker’s data.”

Following the presentation by OPE, the committee listened to responses from the DHW Deputy Director, whose purview included the Division of Medicaid. Responding to the OPE recommendation about cost assessment, he reported that the department was working with an accountant to audit the broker’s data and had commissioned a study of the NEMT program from the University of Illinois Chicago. The deputy director also reported that contractor data appeared accurate but acknowledged that the lowest cost bid was not necessarily the best bid if the service was bad. Consequently, DHW planned to add quality and usage metrics, as well as cost, to the next RFP. The DHW also commissioned a study from an outside contractor to determine if other states were using successful rate models for broker provided NEMT services.

¹⁴ <https://legislature.idaho.gov/wp-content/uploads/OPE/JLOCMinutes/min200220.pdf>

With respect to DHW's overly passive contract management, the deputy director said that they had made "strategic leadership changes to improve accountability, ownership, oversight and quality." He also acknowledged that DHW had not provided OPE with information needed for the audit in a timely manner. As part of the new contract management approach, the department developed a web-based complaint form so that stakeholders, including Medicaid recipients, drivers, and service providers, could report problems directly to Idaho's Medicaid Division. In the past these stakeholders lodged complaints with the broker but going forward the Medicaid Division would do its own complaint follow up. The external report from the University of Illinois Chicago convinced the DHW that it was important to include program goals in the RFP so that service contractors understood the expectations and knew the consequences for poor performance. Consequently, DHW reported that the RFP would clearly specify the program goal of no missed trips, and the RFP would include penalties if serious concerns surfaced in the complaints. Also, the report provided by the University of Illinois Chicago included a survey of people using NEMT services and interviews with other stakeholders. As noted below, the Medicaid Division expressed interest in hearing more from people using the transportation service and is expanding the opportunities for stakeholder input.

During the hearing the Idaho senators listened attentively. While only one senator asked a question and made comments during the hearing, knowledgeable sources in Idaho described extensive behind the scenes work that had already resolved concerns and questions of several legislators. Moreover, legislators had discussed problems in the rural parts of the state in previous committee hearings, and these concerns led to the OPE audit. Sen. Troy, after summarizing the problems in rural parts of the state, asked the Deputy Director of Medicaid how the division would ensure that the NEMT system worked in rural areas, not just in Boise. She said that her email box had been overflowing with complaints about the program. She said that her number one goal was to end the flood of complaints. Additionally, she asked for more information about the stakeholder involvement that the Medicaid Division was planning to launch.

In response to Sen. Troy's queries and comments, the deputy director explained that, in addition to a couple of Boise-centered efforts, the Medicaid Division had a transportation advisory committee that citizens can attend. Also, he explained that the division has Dial Us and Transportation Providers—two other avenues for input. Then he described Community Now, an effort that the DHW started a couple of years ago. In conjunction with that program, the department travels to different parts of the state and provides an opportunity for people who use department services to talk about their experiences with the services. Also, he indicated that DHW planned to meet with transportation providers in different parts of the state to gain a better understanding about running a business "out there"—meaning rural areas.

The Idaho legislature's oversight of the NEMT contract produced positive results. The hearing indicated that DHW was taking the recommendations of the committee, the auditors, and DOP seriously. Moreover, the facts indicated that DOP was more involved in the new NEMT RFP and helped DHW improve its contract monitoring processes going forward.

Case Study 3: Contract Monitoring of Out-of-State Prisoners

This third case study describes oversight of a state contract to house Idaho prisoners in an out-of-state facility due to in-state prison overcrowding. It involves oversight actions by the legislative oversight committee and the appropriations committee.

On January 27, 2020, OPE submitted a report, *Managing Correctional Capacity*, to the Joint Legislative Oversight Committee (JLOC). This report followed up on two earlier reports, one in 2010 and another in 2012, examining the operational efficiencies in Idaho's prison system. A March 11, 2019 letter from the Idaho House Minority Leader to the JLOC triggered the 2020 OPE report. The minority leader's letter asked for information on actions taken in response to the 2010 and 2012 OPE audit report findings about the corrections department. The full report¹⁵ on managing correction capacity addresses several facets of the Idaho correctional facilities, but of interest is here is the attention directed toward a contract to house prisoners out-of-state to avoid prison overcrowding.

The Idaho Department of Corrections manages most of its state correctional facilities using state employees rather than contracting with outside vendors for prison management. However, in September of 2018, the Idaho Department of Corrections responded to an "urgent need for additional beds"¹⁶ by entering into an emergency contract to house inmates out-of-state at a private prison, the Eagle Pass Correctional Facility in Texas. This facility was run by the GEO Group, a real estate investment trust, whose home office is in Boca Raton, Florida. Almost all of its 125 private prisons and mental health facilities, some of which serve as immigrant detention centers, are located in the United States; five are located outside of U.S. borders, in South Africa, Australia, and the United Kingdom. Eagle Pass was originally constructed as a detention center and is located on the border of Texas and Mexico. GEO is publicly traded and pays dividends to its shareholders.

According to media reports, in January of 2020, 651 Idaho inmates were held in the Eagle Pass Correctional Facility. This is almost 7% of Idaho's prison population or 9,426 people. The shortage of beds within the state correctional facilities also led to 834 inmates, or nearly 9% of the total, being housed in county jails.

The 2019 request for a legislative inquiry led to OPE's 2020 report to the JLOC. The day after the report's release, the full committee spent an hour and 30 minutes in a public hearing in which OPE presented its findings and recommendations. In addition to committee members and OPE's director and analysts, three other legislators, a gubernatorial policy advisor, the director of the Idaho Department of Corrections, and a Division of Financial Management analyst attended the hearing. The JLOC agreed that OPE should revisit the topic of this report again in a year.

¹⁵ <https://legislature.idaho.gov/ope/reports/r2002/>

¹⁶ <https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r2002.pdf> , p42

During the JLOC hearing, approximately five minutes before the end, Senator Johnson asked about the limited cognitive and behavioral programs available to Idaho prisoners placed out-of-state and in county jails. He asked about potential delays in the release of those prisoners if they must rotate back through Idaho prisons to receive some mandatory training and services. Department of Corrections (DOC) Director Tewalt responded that this was the reason why the Board of Corrections took a more “thoughtful approach” to the current contract compared to the prior emergency contract with the GEO Group. The newly negotiated contract includes some services the out-of-state Idaho prisoners would receive if they were housed in the state of Idaho. The IDOC Director stated that under a new CoreCivic contract 75% of Idaho’s prisoners would be able to work for pay while serving their time. This would be a substantial increase over the 20% of Idaho’s prisoners who were able to work for pay while serving time at Eagle Pass.

OPE also presented its report to the Judiciary Committee the next day, January 29, 2020. There is no video available for that meeting, but detailed meeting minutes do not specify any questions from committee members directed toward OPE about the contract to house prisoners out-of-state. Two committee members asked for more information about how costs were calculated. OPE promised to send them the information. The OPE report includes the cost of contract monitoring in the daily cost per prisoner for out-of-state placement. As discussed below, the contract monitoring costs included regular weekly site visits by Idaho Department of Corrections (IDOC) staff to the out-of-state facility.

The prison capacity issue also came up during the 2020 appropriations hearings held by JFAC. Despite recommendations by the Office of Program Evaluation (OPE)¹⁷ that the state build a new correctional facility, the legislature did not appropriate funds for this in the 2020 budget nor did the governor request the funding.¹⁸ In its 2020 report, *Managing Correctional Capacity*, OPE estimated that it cost the state of Idaho per prisoner \$95 per day to house a prisoner in county jail, \$82 per day to house a prisoner at Eagle Pass (the same amount as it costs to house them in current state prisons), but would cost only \$78 per day to house a prisoner at a new prison. Therefore, OPE recommended that the state fund and build a new prison. Instead, in the wake of a death and serious incident report concerning one Idaho man housed at Eagle Pass, the Idaho Department of Corrections sought a new private contractor and the governor’s 2020 budget request focused on reducing the prisoner population housed at county jails in order to reduce corrections costs rather than building a new facility.¹⁹

During the JFAC hearing on January 14, 2020, on the Correction Department budget, a Department of Financial Management Administrator, Alex Adams, reported that the Governor wanted to expand reentry centers and intervention programs rather than spend money on building

¹⁷ <https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r2002.pdf> p 9

¹⁸ Brown, Nathan, January 7, 2020, *New private prison contract would move Idaho inmates from Texas lockup*, Boise: Post Register. https://www.postregister.com/news/crime_courts/new-private-prison-contract-would-move-idaho-inmates-from-texas-lockup/article_b02e89c6-cecb-5941-87f8-bbf7d584da5.html

¹⁹ Brown, Nathan, January 7, 2020, *New private prison contract would move Idaho inmates from Texas lockup*, Boise: Post Register. https://www.postregister.com/news/crime_courts/new-private-prison-contract-would-move-idaho-inmates-from-texas-lockup/article_b02e89c6-cecb-5941-87f8-bbf7d584da5.html

a new prison. There was no apparent discussion of this issue in the JFAC minutes. The appropriations bill did not include funds to build a new prison as OPE recommended.

Based on weekly visits to Eagle Pass and an investigation following the death of an Idaho inmate, the IDOC contract managers found that GEO Group's medical care for prisoners did not meet expectations. Moreover, GEO Group was not able to provide consistent training programs for Idaho's prisoners at Eagle Pass. As mentioned above, only a small percentage of prisoners at Eagle Pass were able to work for pay. All these factors were considered in awarding the new contract.

The state's contract with GEO Group ended in September 2020. The State of Idaho negotiated a new contract with another provider, CoreCivic. The new contract provided that up to 1,200 Idaho prisoners would be housed at the Saguro Correctional Center in Arizona²⁰ (which also houses prisoners from Hawaii, Kansas, and Nevada)²¹ under management by CoreCivic. Idaho initiated this new private prison contract in August of 2020 with CoreCivic, despite this company having a history of failed prison management in Idaho in 2014, when CoreCivic's name was the Corrections Corporation of America. At that time the state discovered that the Corrections Corporation of America did not meet contract obligations and, moreover, that it falsified reports.²² Consequently, the state took over management of that prison, located south of Boise, due to the high levels of violence that prevailed when it was managed by the Corrections Corporation of America. The State of Idaho still operates that facility as part of the state corrections system.

The decision to award the contract to CoreCivic was due in part to contract management information critical of the Eagle Pass facility. OPE reported that the IDOC sent contract monitors weekly to the Eagle Pass Facility to assess GEO Group performance in housing Idaho's prisoners. The IDOC had a contract person in its oversight unit that is headed by a deputy warden. This unit went to Texas weekly to visit Eagle Pass and completed monthly and annual checklists that documented the performance of the Eagle Pass facility on three sets of criteria: safety, security, and health. When contract monitors identified problems, GEO Group was given 10 days to submit an action plan and 30 days to correct the problem. If GEO Group failed to meet this standard, IDOC could impose sanctions. This is standard practice for IDOC contract monitoring.

²⁰ Scholl, Jacob, August 19, 2020, Idaho soon will send inmates to private prison in Arizona rather than Texas facility, Idaho Statesman.

²¹ Idaho Press Staff, August 17, 2020, *IDOC deal with CoreCivic for private Arizona prisons to take effect this week*. The Idaho Press. https://www.idahopress.com/news/local/idoc-deal-with-corecivic-for-private-arizona-prisons-to-take-effect-this-week/article_9d959df6-e561-5cdc-bc1c-0e296329ce86.html; Simmons, Tommy July 20, 2020 *IDOC now considers private prison deal in Arizona*, The Idaho Press. https://www.idahopress.com/news/local/idoc-now-considers-private-prison-deal-in-arizona/article_230c8c42-abfe-5a1d-b3c8-661b3775752c.html.

²² Boone, Rebecca, Associated Press, January 29, 2020, *Report: Idaho could save money by building state prison*. Post Register. https://www.postregister.com/news/local/report-idaho-could-save-money-by-building-state-prison/article_80dcd677-d144-5bb6-a190-ed653e916884.html

OPE reported that IDOC contract monitors used thumbprint records to check facility staffing levels, used video surveillance, and made unscheduled night and weekend visits to monitor the facility. The checklists used by IDOC were described by OPE as specific. The physical presence of contract monitors at the facility on a frequent and regular basis appears to be a best practice in contract monitoring. It does not, however, prevent serious problems from occurring, as the following synopsis indicates.

Despite its generally positive assessment of IDOC's contract monitoring, OPE stated that working with a private contractor meant that the state ceded substantial control over the treatment and costs associated with its prison population. For example, out-of-state medical care can be expensive, and safety and security responsibilities are delegated to local law enforcement at the location of the facility. Private correctional facilities also do not provide the same level of training and educational programming that the Idaho Department of Corrections provides in state-run facilities. Finally, OPE pointed out that family visitation was curtailed when prisoners were housed out-of-state.

As part of their inspections of the Eagle Pass facility, IDOC contract monitors reported on four "group disturbances," two of which required intervention by Eagle Pass corrections staff in "full tactical gear." In other words, two of the four incidents were extremely serious. Moreover, an Idaho prisoner died in January of 2019 while at Eagle Pass. Audits of Eagle Pass gave the facility a failing grade in a series of health care functions. After the 2019 death of the Idaho inmate, an incident report from the Maverick County Texas Sheriff's Office claimed that the Idaho inmate had died of natural causes, and the Eagle Pass Warden did not order an autopsy. This is an example of the loss of control for IDOC that the OPE refers to in its assessment of the pros and cons of using out-of-state prison facilities. Even more revealing, a Serious Incident Report (SIR), created by Idaho investigators who traveled to Eagle Pass, concluded that the medical response at that the facility was inadequate given the symptoms the inmate presented—pale, incoherent, dizzy, unable to stand, sore throat, and a temperature of 101.3 degrees. Two Eagle Pass health professionals were fired.

The SIR triggered Idaho to send to Texas an audit team consisting of management representatives from the IDOC, and a representative from the IDOC medical provider to conduct a full review of health care at Eagle Pass. The audit team conducted two audits, one in January of 2019 and the other in February of 2019. Auditors focused on four categories of health care services, finding that Eagle Pass failed to meet expectations for any of the categories. However, the Director of the IDOC asserted that the use of private, out-of-state prisons would continue, since "[o]ut-of-state placement is the best of our worst alternatives." The IDOC Director continued: "When you try to balance Idaho's need for beds versus the need for good outcomes, you're really trying to do as little harm as you can[.] With our lack of space, and the potential harm of overcrowding, we look out of state."

The family of the dead inmate hired a lawyer in connection with the death. The lawyer's judgment of the performance of the IDOC was positive as reflected in the following statement: "I

actually commend IDOC for promptly investing this, and the generating [of the] SIR in relatively short order.”²³ This lawyer’s assessment is consistent with the information we found, which demonstrated extensive efforts by IDOC to oversee the state’s contract with GEO Group at the Eagle Pass facility.

The Idaho Board of Corrections, which oversees the work of the Department of Corrections on behalf of the Governor, negotiated the new contract with CoreCivic to place prisoners out-of-state in Saguro, Arizona. OPE continues to advocate that the state should build a new prison and maintain its prisoners within its own state-run system. OPE contends that it is cheaper and that the services (employment opportunities and retraining) are higher quality at the state-run facilities. While unsuccessful in producing that outcome, the OPE report did lead to the new contract including more services for Idaho prisoners. OPE’s daily rate per prisoner for the out-of-state facility included the cost of weekly site visits by IDOC contract managers, and the contract provides for data gathering and other in-depth contract monitoring activities. We assume this means that IDOC will continue its vigorous oversight of this contract.

OPE thoroughly assessed the performance of IDOC in monitoring the contract with GEO Group, including the services available to prisoners sent to Eagle Pass, and the cost of sending prisoners to Eagle Pass. In brief, OPE reported extensive contract monitoring actions by IDOC. IDOC documented the lower levels of service to prisoners compared to Idaho State Prisons. OPE demonstrated higher costs per prisoner out-of-state compared to Idaho prisons. The contract for out-of-state prisoner placement also received careful and thorough attention in OPE’s 2020 report to the legislature.

The JLOC demonstrated sustained attention on this issue by holding a hearing and asking OPE for an update in one year. Legislators serving on the JLOC asked several questions about the report. Moreover, as noted above, one member of the JLOC, Senator Johnson, asked questions about the difference between services available to prisoners in-state versus out-of-state. This question demonstrates, that JLOC members were attentive to the problems out-of-state placement of prisoners created with respect to service delivery and access to education, training, and work opportunities. Both OPE and this legislator also expressed concern about the impediment to family visits posed by out-of-state placements.

IDOC appears to take its contract monitoring duties seriously. The training manuals produced by DOP that we described in Case 1 appeared to have had a positive impact on state agency contract monitoring. IDOC conducted its contract monitoring in a way that is consistent with the standards set in these training manuals and reflected the checklists and standards of professional societies included in the OPE report that triggered changes in Idaho’s State Code. These include extensive site visits, unannounced visits, and data collection that is controlled by the state agency contract managers. Moreover, IDOC appears to have included its goals in the

²³ Prentice, George Boise Weekly, May 7, 2019, *Private prison death fallout: Failed audits, firings, and a vow for Gov. Brad Little*. Post Register. https://www.postregister.com/news/local/private-prison-death-fallout-failed-audits-firings-and-a-vow-from-gov-brad-little/article_9c09ce11-5f38-56ba-a085-675a9f03f08f.html

contracting process—the practice that OPE instructed the Department of Health and Welfare to adopt in its bid process for NEMT (Case 2). Finally, when a serious incident occurred involving the death of an Idaho prisoner, IDOC was not content to let the Texas coroner pass the death off to natural causes. It sent its own investigators to the facility, disputed the coroner’s assessment, and launched two audits of the Eagle Pass facility. IDOC was rigorous enough in its pursuit of contract monitoring that it won praise from the attorney hired by the family.

iii. Conclusions

The Idaho legislature actively enforces contract monitoring standards and insists on improvement when problems occur. OPE provides valuable information to the legislature through its performance audits. DOP also works hard to ensure that state agencies monitor contracts. The executive and legislative branches appear to collaborate, acting as stewards of the public’s money and public welfare. It took several years of sustained effort to make these changes and some bad experiences with contracting to trigger the legislature and state’s response. Many states have bad experiences with contracting for services, but it appears that Idaho learned from its “bad decisions” (interview notes 2020) and set up a system to try to avoid future problems. The collaboration between the Department of Administration, the Attorney General, and the legislature and its staff paid off and produced very detailed mechanisms to facilitate state contract oversight in Idaho.

The best practices demonstrated by Idaho include paying for DOP staff whose responsibilities include contract monitoring and contract management, training state agency staff to monitor contracts, setting guidelines about the size and nature of contracts most needing monitoring, dedicating legislative staff resources to investigating contract monitoring, and finally, ensuring that legislative oversight committees hold public hearings on any contracting problems discovered by OPE, LSO, or DOP and use the power of the purse to motivate state agencies to improve.

The commitment of the legislature was instrumental in changing the state code to mandate contract monitoring, in motivating DOP to produce detailed guides and training materials on contract monitoring, and in funding positions in DOP dedicated to training state agency staff to perform high quality contract monitoring. It is also important to note the support of the Attorney General in changing the state code. OPE has continued to use its authority to audit state agencies and investigate contract monitoring, and the JLOC meets regularly and has demonstrated an ongoing commitment to overseeing all aspects of executive agency performance, including contracts.

OPE reports and JLOC hearings appear to have motivated state agency officials to respond to concerns that legislators hear from constituents. Moreover, the new contract bid process and contract monitoring guidelines established and implemented in the last few years by DOP appear to be changing the bid process to anticipate the need for contract management and monitoring. The RFPs require service providers to produce data needed to monitor contracts. Some contracts include the cost of state agency officials’ onsite visits to monitor first-hand the quality of contract services being delivered.

JLOC demonstrates Idaho's commitment to bipartisan oversight. The chamber's minority party leader requested the performance evaluation of the state's correctional capacity through the JLOC. In legislatures without a balanced partisan membership on the oversight committee, minority party concerns are often ignored. JLOC also demonstrates its commitment to pursue oversight by holding public hearings of OPE reports. For example, there was a public hearing in the JLOC immediately after OPE completed the report about the correctional facilities. As soon as JLOC voted to release the report, OPE presented the report to other legislative committees with substantive jurisdiction over the issue, including the Judiciary Committee.

Legislators used both the oversight and appropriations processes to motivate state entities to monitor their contractors. The legislative power of the purse appears to provide motivation for state entities to take LSO reviews and OPE audit findings seriously. OPE reports receive public hearings in legislative committees. LSO staff report publicly at appropriations committee meetings on contract monitoring problems, with the committee using the power of the purse to reinforce corrective measures that are recommended in staff reports and audits.

The crucial ingredients of this system appear to be:

- funding OPE audit staff to examine state entities receiving state funds,
- including a section on contract monitoring in OPE audit reports on agencies,
- holding public hearings on audit reports,
- including concerns of the legislature's minority party by balancing membership on the oversight committee, and
- including information about contract monitoring problems in appropriations committee hearings on the budget requests for the state entity.

If more states adopted the practices Idaho uses to monitor private contractors, it is possible that the better companies would flourish while less conscientious contractors would see their business decline. But that is likely to require that a lot more states adopt some of the best practices that Idaho has developed over years of sustained effort to improve its contract monitoring. These practices reflect Idaho's governing philosophy of public stewardship.

b. Contract Oversight in Louisiana

i. Overview

Scope of Contracting in Louisiana

As of 2017-18, Louisiana had 3,043 services contracts in seven areas: professional (688 valued at \$190 million), personal (122 valued at \$8 million), consulting (681 valued at \$1.7 billion), social services (535 valued at \$455 million), interagency (246 valued at \$110 million), and cooperative endeavor agreements (336 valued at \$457 million). Those totals do not include 3,163 additional contracts valued at \$389 million entered into by state agencies through the delegation of authority from Office of State Procurement (OSP). The total combined value of these contracts was \$3.68 billion. As we discover below, this is a steep decline in the number and dollar value of contracts from prior years.

To put these figures into perspective, Louisiana's total state budget in 2018 was \$35.4 billion. So, the services contracts in these areas accounted for a little more than 10% of the state's total budget.

To understand contract management in Louisiana, it is also important to understand that the number state contracts grew substantially during the tenure of Gov. Bobby Jindal from 2008 through 2016. When the next governor took office in January 2016, it was reported that no one really knew how many contracts agencies had, and agencies were not required to report all of them. A 2015 auditor's report estimated that there were 5,000 contracts that were not tracked by any state agency. In response, the legislature enacted reform measures in 2015, and the state began to keep careful records related to its state-issued contracts.

Relevant Institutional Structures in Louisiana

On paper, Louisiana has a relatively weak legislature and weak governor. Informally, however, the weak political parties, exceptionally strong interest groups such as the oil and gas industries, and a history of political titans serving as governors of the state mean that Louisiana's governors exert outsized influence on state politics. One measure of this informal power is the infrequency (only twice since 1812²⁴) with which the Louisiana legislature has overridden gubernatorial vetoes. At the same time, the formal powers of the governor are constrained by the separate election of many of Louisiana's executive branch officials.

The legislature is described by NCSL as a hybrid chamber, which means that the job takes about two-thirds of a full-time job and the limited pay generally means that legislators hold some other paid position. Squire ranks Louisiana's legislature as 29th most professional based on the low pay (approximately \$30,000 when per diem and expense allowances are included), short regular sessions (45 days in odd years and 60 days in even years), but sizeable staff (more than

²⁴ https://www.theadvocate.com/baton_rouge/news/coronavirusarticle_b1d50652-9cfb-11ea-8837-0b18cb36c8ee.html

900, with approximately 750 holding permanent positions). The formal rules governing the types of legislative sessions and session length are exceptionally complex.

Overview of the State Contract Monitoring Process in Louisiana

The Louisiana Division of Administration is the home of the (OSP). This subunit, which is part of the state executive branch, is responsible for the “procurement, management, control and disposition of all professional, persona, consulting, and social services contracts (‘PPCS Contracts’) utilized by state agencies.” Laws governing OSP’s performance were updated in 2015, as discuss below. Essentially, it is OSP that acts on behalf of the executive branch to issue and monitor state contracts in Louisiana.

The Louisiana legislative branch has an auditor and two committees that play key roles in overseeing contracts issued by the executive branch. The Louisiana Legislative Auditor (LLA), with a staff of more than 250, heads a large, well-funded analytic bureaucracy that supports the Louisiana legislature. Specialized subunits within the LLA’s staff, including Actuarial Services, Advisory Services, Financial Audit Services, Investigative Audit Services, Legal Services, Local Government Services, Performance Audit Services, and Recovery Assistance Services, perform contract-related audit work. As we reported in our 2019 study, the LLA is appointed by a majority vote of each legislative chamber and may be removed only by a two-thirds vote in each chamber (NASACT, 2015).

The LLA works closely with the Legislative Audit Advisory Council (LAAC), a joint committee of the Louisiana legislature comprised of five representatives and five senators. LLA staff provides the LAAC and others with audit services. Although some audits are required by law, practitioners say that the LLA may also initiate audits on its own or provide audits that it thinks legislators would be interested in.

Legislative Oversight of Contracts in Louisiana

The LAAC, which supervises the LLA, receives all LLA audit reports. These audits can and do cover contract performance and payments to vendors. For example, an LLA audit of state Medicaid contracts found the state health department had paid 41 million claims “totaling \$2.4 billion from October 2015 through December 2017 that didn’t have valid provider identification numbers,”²⁵ yet the agency had paid these claims to private managed care facilities. The LAA also presented this audit to the Joint Legislative Committee on the Budget (JLCB). Ultimately legislators introduced a bill that criminalized government benefits fraud and which facilitated legal actions by the state’s attorney general.

The Louisiana legislature also exercises contract oversight through the Joint Legislative Committee on the Budget (JLCB). In 2015, the legislature passed Act 87, which requires the Office of State Procurement (OSP) to provide the JLCB a monthly report of certain contracts and

²⁵ https://www.theadvocate.com/baton_rouge/news/article_07685364-796b-11e8-b831-232ef0cc7d82.html, accessed 12/1/18.

mandates JLCB approval for contracts of \$40,000 or more. JLCB reviews those Act 87 contracts during monthly JLCB hearings. In addition, RS 39, §1615, requires contracts regarding “professional, personal, consulting, or social services” and which are entered into for a period of more than three years but not more than five years to be approved by the JLCB. For those reasons, the JLCB has become an important actor in legislative oversight of state-issued contracts in Louisiana.

ii. Three Louisiana Case Studies

To deepen understanding of the Louisiana legislature’s contract oversight efforts, three recent case studies follow. In the first, the legislature used a 2014 LLA audit exposing the state’s inability to track its contracts to enact a 2015 law establishing a new state contract database and a host of other contract reforms. In the second, the legislature used a 2018 LLA audit to investigate how the New Orleans Sewerage and Water Board used federal funds on 25 contracts to strengthen the city’s drainage systems and other protections against flooding. In the third, the legislature used a series of LLA audits to monitor and improve actions by an environmental state agency to collect fees from vendors who generated vehicle tire waste.

Case Study 1: Creation of Contract Monitoring System, LaGov eProcurement

In November of 2014, the LLA issued an audit report²⁶ finding that the state of Louisiana had “at least 14,693 contracts” (p. 1) with an estimated worth of \$21.3 billion. The report also noted that, at that time, Louisiana law required approval for only seven types of contracts, and contracts not requiring central approval comprised 55% of all state contracts and were valued at \$6.2 billion. The report noted further that state law did not require entry of contract information into the state’s Central Financial Management System (CFMS), and that, therefore, the Office of Contractual Review (OCR) did not require agencies or other government entities to enter contract information into the CFMS.

This lax recordkeeping led the LLA to conclude in its 2014 report that it was impossible to determine exactly how many Louisiana state contracts existed or precisely what their value was. Although currently most state agencies use the Integrated Statewide Information System (ISIS), which includes CFMS, most state boards, commission, universities, and other similar entities still do not use the ISIS, and their contract data is still not centrally available in Louisiana.

The LLA report found that state law in 2014 (R.S. 39:4190) required OCR to “adopt rules and regulations for the procurement, management, control, and disposition” of only “professional, persona, consulting, and social services contracts required by state agencies” (p. 2). Moreover, OCR could delegate approval authority to state agencies for contracts of \$20,000 or less and “grant special delegated authority to any state agency for routine contracts as the director deems appropriate for any amount” (p. 4). The LLA found that, during 2014, OCR had granted this authority to 18 entities which approved 1,312 contracts worth \$247.5 million. OCR

²⁶ <https://tomaswell.files.wordpress.com/2015/09/state-contracts-audit-report.pdf>

required the entities to which it delegated contract authority to enter contract information into CFMS, but it lacked staff to ensure compliance. Starting in 2014, the LLA reported that OCR had begun transitioning Executive Branch agency contracts into a new database system, LaGov.

In January 2015, in response to the 2014 LLA report, the Louisiana legislature enacted a series of changes to state laws governing contracts (RS 39:1554 through R.S. 39:1758). These new laws specified that the state's chief procurement officer -- the OSP director -- produce an annual report with complete information about all state-issued contracts to be submitted to the Joint Legislative Committee on the Budget (JLCB). Beginning in July of 2018, the chief procurement officer was to report state contracts on a monthly basis to the JLCB.

In addition, among other changes the legislature made, it reduced the value of contracts that OCR, now merged with the OSP, could delegate to another office to a maximum value of \$2,000 rather than \$20,000. The legislature continued, however, to permit OSP/OCR to delegate authority to specific agencies for routine contracts for any amount. The legal changes also centralized reporting requirements for state agencies and other government entities. They were henceforth required to report contract information to the OSP, superseding other reporting requirements. OSP was granted "all rights, powers, duties and authority relating to the procurement of supplies, services, and major repairs now vested in or exercised by any state governmental body" (R.S. 39:1571). This strongly worded statement was then followed, however, by a list in R.S. 39:1572 of exemptions.

Beginning in July of 2020, the law also established the Contract Services Joint Legislative Task Force. This task force now appears on the Louisiana State Legislature website.²⁷ It shows that its membership consists of 8 legislators: four senators and four representatives. These legislators are appointed by the leader of their respective chambers. The website also shows two vacancies—both representatives to be appointed by the House Speaker. No other information is available about the task force on the website.

Beginning in the 2015-16 fiscal year the Office of State Procurement-began to implement a new computer information system, LaGov eProcurement. As Executive Branch agencies converted their contract information to this system, OSP discovered multiple agency errors and incomplete and inaccurate information from legacy contracts. After "OSP analysts worked countless hours to correct data and re-classify any contracts which were previously entered into LaGov inaccurately,"²⁸ the OSP reported in 2017 that the problems were resolved, and data should be accurate going forward.

This case study shows how a 2014 legislative audit report led to 2015 legislative enactment of significant contract management reforms, including establishment of a new contract database, the cleanup of incomplete and error-riddled contract data, and the entry of the

²⁷ <https://www.legis.la.gov/legis/BoardMembers.aspx?boardId=1018>

²⁸ <https://www.doa.la.gov/Pages/osp/PC/agencies/AnnualReports.aspx>

revised data into the new LaGov eProcurement system. The new law also required a new state procurement office, OSP, to report contract information on a regular basis to a joint chamber legislative committee. The overall result was a much-improved system of legislative oversight of state-issued contracts.

Case Study 2: Contract Failures by New Orleans Sewerage & Water Board

On August 5, 2017, nine inches of rain fell on New Orleans producing severe flooding. That flooding triggered 200 “life-threatening” emergency calls and raised a series of questions about the performance of the Sewerage and Water Board of New Orleans (S&WB). Citizens reported that pumps failed to work despite assurances from S&WB’s executive director that the pumps were operating fully. Later reports revealed that some of the city pumps had not been operating at all during the storm. In fact, evidence indicated that some pumps had shifted into reverse and pumped water back onto the streets.²⁹ Moreover, many of the city’s drains and canals had become clogged with debris rendering them ineffective.³⁰ These problems occurred despite a \$15 billion infusion of U.S. taxpayer money since 2005 to protect New Orleans from flooding. In particular, from 2005 through 2017, the S&WB had received \$557 million from the Federal Emergency Management Agency (FEMA) of which \$67 million was to fund drainage projects.

The New Orleans Sewerage and Water Board (S&WB) dates back to the turn of the last century. It was created by the Louisiana legislature through Act 6 of 1899 to manage water distribution and a sanitary sewer system for New Orleans. In 1903, the legislature merged the Drainage Commission with S&WB. Over decades, the S&WB grew into a 1,500-person organization with far-reaching responsibilities and authority. In 2011, for example, the Louisiana legislature enacted a statute (R.S. 33:4071) conferring on S&WB responsibility for construction, control, maintenance, and operation of the public water, sewerage, and drainage systems in Orleans Parish and parts of Jefferson Parish and designated membership on the board to include the Mayor of New Orleans, three city council members, and seven citizens, as well as other city officials. In 2013, the legislature amended the law to alter membership of the S&WB and to mandate that the board provide a quarterly report to the New Orleans City Council on all its contracts. Despite these legislative attempts to improve the operation of S&WB, problems persisted.

At the time of the 2017 flooding, the LLA was conducting a routine audit of S&WB. In response to public outcry about the flooding, the legislature passed a resolution (HR 92I) on April 18, 2018, that broadened the scope of the auditor’s investigation “to include ‘an audit of the contracts of the New Orleans Sewerage and Water Board’ entered into by the board since

²⁹ Times-Picayune Editorial Board, “A year after Aug. 5 flood, trusting S&WB remains a challenge,” August 8, 2018. https://www.nola.com/opinions/article_3e5654ed-588f-5486-89b3-f7ce9bf64863.html

³⁰ Craig, Tim (2017). It wasn’t even a hurricane, but heavy rains flooded New Orleans as pumps faltered.” The Washington Post, August 9, 2017. https://www.washingtonpost.com/national/it-wasnt-even-a-hurricane-but-heavy-rains-flooded-new-orleans-as-pumps-faltered/2017/08/09/b3b7506a-7d37-11e7-9d08-b79f191668ed_story.html

January 2013. The resulting LLA report³¹ investigated S&WB's contract monitoring in addition to its drainage operations. The LLA requested documentation for 25 contracts and related documents, although it ultimately received partial documentation for only 11 contracts. The LLA also review other S&WB documents and interviewed staff. In the course of its investigation, LLA explored best practices and legal research on contract management.

The 2018 LAA report found that S&WB contracted with numerous vendors and companies for construction, goods, and professional services. It relied on its own employees to perform specific contract oversight duties: monitoring, approving changes or amendments, invoice approval, and closing out contracts. LLA found that S&WB lacked a centralized list of all of its contracts, and there were no written procedures for recordkeeping or management. LLA's overall assessment was as follows:

“that the S&WB did not have adequate written contract policies and procedures over (1) recordkeeping and reporting, (2) procurement, (3) monitoring, (4) change orders and amendments, and (5) payments. Contract recordkeeping is not centralized, nor is there centralized management review and oversight of all contracts” (p. 2).

Despite waiting seven weeks, the LLA reported that the S&WB did not provide complete documentation for any requested contracts. Based on partial documentation of 11 contracts,³² the LLA identified conflicts of interest, lack of appropriate approvals, control and compliance problems, and potential legal violations, including possible constitutional violations.

According to LLA, the lack of consistent centralized contract management inhibited S&WB's ability to anticipate costs and manage its budget. LLA's audit also revealed that contracts were not closed out when projects were completed, meaning that cost overruns on other projects could be paid for from these open contracts. LLA found that S&WB's procurement practices failed to meet Louisiana's legal requirements. LLA also found that some contract changes involved millions of dollars of additional spending that did not receive adequate review within S&WB or by the Director of Procurement or the legislature's Finance Committee. In response to an earlier LLA audit, in June of 2017, S&WB had drafted contract monitoring policies to comply with relevant statutory requirements, but when LLA followed up in June 2018, these policies had neither been approved nor implemented.

The 2018 LLA report made many recommendations to improve the performance of S&WB generally as well as improve its contract monitoring. One was relevant to the Louisiana legislature: amending applicable legislation to require board appointees have more experience in the utilities industry.

³¹ Louisiana Legislative Auditor, (2018) Sewerage and Water Board of New Orleans Louisiana House of Representatives Resolution 92 and Drainage Operations. Report ID No. 70180014, November 7, 2018.
[http://app.lla.state.la.us/PublicReports.nsf/0/819E2407C262F90A8625833E006BF9E5/\\$FILE/0001AB9E.pdf](http://app.lla.state.la.us/PublicReports.nsf/0/819E2407C262F90A8625833E006BF9E5/$FILE/0001AB9E.pdf)

³² (LLA originally requested for documentation of 25 contracts, but after waiting for months proceeded with the limited documentation S&WB provided)

The S&WB responded to the audit report in a letter dated November 1, 2018, from the Executive Director of the Board, Ghassan Korban. Although his response to the LLA audit cited the environmental stresses that produced the recent flooding and drainage problems, he accepted all of the LLA recommendations to improve the Board's contract management policies and procedures. He also reported progress toward many of those recommendations.

For example, in response to the LLA recommendation that the Executive Director position require utility industry work experience, Mr. Korban noted that he had that experience. Director Korban, who was hired following the resignation of top leadership at S&WB following the 2017 flooding incident, had previously worked for decades in the City of Milwaukee Department of Public Works. He ended his career there as a Department of Public Works Commissioner. The executive director position was hardly the only top S&WB management change. At least nine other top management employees resigned or retired in 2017.

The Louisiana legislature played a key role in the LLA investigation of S&WB by expanding the scope of the LLA audit. Additionally, the legislature seemed to step in frequently to adjust the structure of S&WB, changing its reporting requirements and the qualifications of its employees and altering the board membership. In March of 2020, the Louisiana legislature debated two competing bills to alter the S&WB reporting requirements. One would have required the S&WB to seek budget approval from the city council; the other would have expanded the authority of the board to approve its own budget.

During an April 2, 2019 LAAC meeting, the committee devoted most of its time to the LLA presentation of its November 2018 audit of S&WB. The discussion among committee members was extensive and rigorous taking up 15 of the 25 pages of single-spaced meeting minutes. Legislators asked about the types of S&WB contracts that LLA had reviewed: five were for professional services, three each were for construction and to purchase goods and services, and one was an emergency services contract. Five of these contracts were closed and six were active. Rep. Connick commented about how a contractor was getting paid, yet S&WB could not produce the contract. How, he mused, "do you know that what is being paid is according to the contract if you cannot find the contract?" (Minutes Legislative Audit Advisory Council, April 2, 2019 p. 7).³³ Representative Connick also asked if this disarray in contract management was typical. The LLA auditor, Mr. Cryer, said that in his 23 years of experience he had not found another government entity with problems comparable to those LLA found at S&WB. He did, however, acknowledge that S&WB is an exceptionally large organization that is highly decentralized. He expressed hope that a centralized structure could be implemented soon with oversight from upper management, because S&WB's departments were working separately with their own people maintaining and monitoring contracts. He commented later that typically auditors can walk into a central file room and pull the information on contracts. Therefore, he viewed it as unusual to have such a decentralized system for contract monitoring. In response to

³³ https://www.la.gov/documents/laac-minutes/2019/LAAC_Minutes_April_2_2019_Approved_9-12-19.pdf

questions from Representative Hilferty, the LLA auditor explained that contract billing and payments were centralized, but contract monitoring and supporting documentation was lodged in separate S&WB subunits.

Representative Hilferty asked about the financial audit of S&WB and problems with customer billing. The LLA auditor explained that those issues were beyond the scope of this audit, but the 2018 financial audit was due in LLA's office soon. Representative Hilferty noted that for the past two years S&WB billing was incorrect, reporting that some people received outrageous bills, while others received no bill at all.

At this point, S&WB's new executive director attempted to answer the committee's questions about a wide array of problems with the entity, its billing, and the contract with a Canadian company that seemed to be implicated in the billing problems. It seems clear from the questions posed by committee members that many legislators were hearing from constituents angry about S&WB bills. Other legislators described S&WB employees as sleeping in their trucks at repair sites.

Legislators asked S&WB's new director, Mr. Korban, whether he would be willing to include S&WB in a new state database, Louisiana Checkbook, modeled on Ohio's online database that shows all contracts, expenditures, and income for state agencies. He said he would be "happy to discuss that." During the discussion, it became apparent that S&WB not only used a contractor for billing but used another contractor to collect delinquent payments.

In 2019, federal authorities were also investigating S&WB. A report, from the Office of the Inspector General on the FEMA Public Assistance Program, had not yet been released, but was mentioned during the April 2, 2019 LAAC meeting. So, it is possible that some of the legislative interest in scrutinizing S&WB contract monitoring arose from federal attention to the flooding given the large amount of U.S. taxpayer money devoted toward flood mitigation in New Orleans.

Despite management changes at the top and assurances from the new executive director that contract monitoring policies and procedures would be revised, we find no evidence that there is a state-level effort to create standard contract monitoring guidelines for all government contracts nor do we find evidence that the state has undertaken massive training efforts to ensure that contract monitors within agencies, boards, and commissions are trained to follow contract monitoring guidelines. The approach taken in the S&WB matter reflects action and interest from the legislature, but these actions are specific to the actors involved rather than proactively training specific individuals to monitor contracts within any state agencies and other government or quasi-government entities that hand public funds.

The creation of the Louisiana Checkbook sounds like a promising systemic reform. But it is not clear whether the Department of Administration is undertaking an extensive training program to teach people within various government entities how to monitor contracts. Nor does

it appear that there are specific guidelines and checklists that are to be required from contract monitors. In other words, the shared responsibility for contract monitoring and management that Idaho developed in the past several years is not yet apparent in the entity-specific approach being taken in Louisiana.

Case Study 3: Fee Collection in the Waste Tire Management Program

The Louisiana Department of Environmental Quality (LDEQ) runs a Waste Tire Management Program (WTMP) by working with private vendors who generate tire waste. According to an LLA performance audit of this program, “[t]he goal of the WTMP is to reduce or eliminate illegal tire dumps by providing subsidies to waste tire processors that receive the process eligible waste tires for use in recycling projects approved by LDEQ, such as using tire materials for alternative fuel or engineering projects.” (p. 1)³⁴

In its 2014 initial audit of the WTMP, LLA identified serious problems with this program. LDEQ, according to the 2014 report, lacked a system to track waste tire generators that failed to submit mandatory fees and reports related to waste tires. These generators were businesses that generated waste tires as part of their business, such as Sears, Firestone, or Walmart. These generators were required to collect fees from customers for tires sold to cover the cost of tire cleanup and recycling. Then these generators were required to submit a report and the fees collected to the LDEQ on a monthly basis. These fees covered the LDEQ’s costs to process the waste tires. The fees were \$2.25 per tire for passenger vehicles and light trucks, \$5 per medium truck tire, and \$10 per off-road tire. The Waste Tire Management Program Task Force was created in 2013 by the Louisiana legislature to ensure that the state received “complete, accurate, and timely waste tire fees.” But when the LLA audited the program in 2014, this task force had not met at all.

In 2018, the Louisiana legislature passed Act 530 requiring the LLA to conduct a performance audit of the program at least every four years. This meant that the LLA would revisit the Waste Tire Management Program after 2018. In its 2019 follow up report, LLA found that LDEQ had made progress to correct several of the problems identified in its 2014 audit. For example, the Waste Tire Program Task Force had met 19 times between 2015 and 2019. Additionally, LDEQ had increased the fees it collected from waste generators, collecting \$57.2 million in waste tire fees from 2014-18. These fees covered processing the tires plus 10% to reimburse LDEQ for the administrative and staff costs for the program. Moreover, it paid \$49.9 million to four waste tire processors to operate five waste tire processing facilities, all licensed by LDEQ. One of the reasons that LDEQ’s collections improved was that it implemented modules of the statewide LaGov that allowed it to keep track of the waste time generators, what they had paid, and when they paid it.

³⁴ [https://www.lla.la.gov/PublicReports.nsf/95F0B50446693FE786258433004F12CF/\\$FILE/0001D33C.pdf](https://www.lla.la.gov/PublicReports.nsf/95F0B50446693FE786258433004F12CF/$FILE/0001D33C.pdf)

Despite these improvements, the 2019 LLA report still found that some problems persisted. First, LDEQ lacked a complete and accurate list of generators. Hence it could not be certain that it was identifying all noncompliant generators. Even with an automated system like LaGov, the LDEQ still needed to identify all the generators. LLA also found over \$8,600 in late fees that LDEQ failed to collect due to this limitation. Moreover, LLA determined that LDEQ might not be collecting all the waste tire fees to which the state was entitled. LDEQ claimed that it did not have enough staff to do this work due to staff reductions within the agency. But it did collect over \$202,000 in late fees. LLA reported that this increase in collections was in part the result of the legislature passing Act 633 in 2016. This Act allowed LDEQ to use an automated system to mail invoices for late fees directly to delinquent generators. Coding errors in the automated system resulted in the uncollected late fees, however. Again, LDEQ needed to improve its ability to identify the waste tire generators.

This case study shows that through a combination of new legislation, the creation of a task force, and regular audits of LDEQ, the Louisiana legislature and the LLA improved LDEQ's performance with respect to these private vendors. Part of the solution was a better centralized state financial system that helped LDEQ centralize information about the vendors, who they are, what they owe, and when and what they have paid the agency. But regular audits and pressure from the legislature appear to have provided the motivation the agency needed to improve its monitoring of the private sector generators.

iii. Conclusions

The Louisiana legislature, after learning from its audit agency that the state's contracts were an impenetrable maze, made major changes to state laws and to the procurement process. It implemented a comprehensive government accounting and tracking system, LaGov. It reorganized parts of the Office of State Procurement (OSP), and it required that the OSP send an annual report on contracts to the legislature. Finally, it created a new committee within the legislature with responsibility for monitoring state contracts. It is too early to assess the performance of this new legislative committee, but early data indicates that it is active.

In making these changes, the legislature appears to have worked collaboratively with the OSP. Indeed, OSP spent innumerable hours trying to untangle the contracting morass in the state. Part of the motivation for the contract reforms appears to have been the result of a change in governors as well as information the legislature received from its audit agency. This collaboration between the legislative and executive branches to clean up a contracting "mess" or scandal is one of the best practices that we have observed in several states. We also see the far-reaching improvements of a good automated system to track contracts in all three of the case studies in Louisiana. Whether it a major set of contracts that includes federal funds (the S&WB) or a program that involves keeping tabs on numerous small private vendors (the Waste Tire Program), having accurate, centralized records is essential for adequate contract management.

Second, legislative contract oversight in Louisiana improved procurement practices. The data collected facilitate contract monitoring by the legislature and state agencies, and contract management by the state as well as the state's RFPs and the financial side of the contracting process. A contract oversight best practice is attention to these performance

orientated aspects of contracting. Good data and good management systems are essential for improved contract monitoring and management.

Finally, the legislature was extensively involved in the S&WB matter in response to citizen concerns and the harm done by a major environmental disaster that was exacerbated by poorly managed contracts. The legislature even went so far as to change the job requirements for another quasi-governmental entity to improve the ability of its director to monitor contracts effectively. This is a best practice that we found in some other states—pressure applied to other parts of government in response to constituents’ needs and concerns.

c. Contract Oversight in Hawaii

i. Overview

Scope of Contracting in Hawaii

According to the Hawaii Awards and Notices Data System (HANDS), in 2019, Hawaii awarded 3,644 external contracts for a total of \$2.97 billion. Of the contracts awarded in 2019, a little over 62% were categorized as “Health and Human Services” for a total of \$1.85 billion in spending. The next highest spending category was “Goods and Services” for a total of \$406 million (13.7% of total contract awards), followed by “Construction” which had \$364 million in awarded contracts (12.2% of total contract awards).

Of these contracts 63 were classified as high-value service contracts, defined as contracts with a value of more than \$5 million. These 63 contracts totaled \$2.11 billion or about 71% of Hawaii’s overall spending on external contracts. Within these high-value services contracts \$1.56 billion was awarded by the Department of Education (DOE), which went to 13 individual contractors at \$120 million per contract for “Applied Behavioral Analysis (ABA) Services” in June of 2019. This expenditure was a little over half of the total awarded contracts (\$2.97 billion) in 2019.³⁵ This figure demonstrates the significance of specific categories of service contracts in Hawaii.

To provide context for the \$2.97 billion spent on contracts, in 2020, Hawaii’s government expenditures totaled \$18.1 billion, which includes federal funds and bonds. That means more than 16 percent of Hawaii’s state budget was spent through state agency contracts. And over 11 percent of the state’s budget was consumed by the 63 high-value contracts, many of which involved the DOE.

The State of Hawaii’s HANDS website provides contracting information in a highly accessible format. We did not find any other state that approaches the same level of public information about contracts. Interested citizens and others can see how many contracts the state has, the dollar value of these contracts, and the contracts are subdivided into categories, such as services contracts, purchasing, and so on. Other states provide information by individual bids or individual contracts, but the information is not aggregated and presented in bar charts and other formats to provide a overview of contracts by type or to calculate total amounts spent on specific categories of contracts.

Relevant Institutional Structures in Hawaii

Hawaii’s legislature is ranked as the 7th most professional in the U.S. (Squire 2017), yet earns only a classification of “professional lite” from the National Conference of State Legislatures. This NCSL classification means that the job of legislator is judged to require 80% of a full-time job. The legislative session length is limited to 60 days annually, but there are options for the governor to call special sessions or the chambers to do so with a two-thirds vote.

³⁵ <https://hands.ehawaii.gov/hands/>, accessed 9/18/20

These extensions can total an additional 60 days, which means that the annual session days could reach 120 annually. This is longer than many legislatures without restrictions on session length actually meet. Hawaii has no term limits, and the staff size is reasonably large for a small state. The chambers themselves are small—76 members in House and 25 in the Senate.

The Democratic Party holds large majorities in each house of the legislature, with only one Republican Senator (out of 25 seats) and five Republican Representatives (out of 51 seats) currently serving. Despite the small numbers of Republicans present in each house, there is one Republican seated on each oversight committee. At the same time, effectively one political party controls the state government.

Hawaii's governor is rated 23rd most powerful among the states (Ferguson 2015). The governor and legislature share budget authority, although the governor does have a line item veto on all bills, including the budget. The Governor appoints 20 department heads. Only the lieutenant governor is elected separately; no other top executive positions are separately elected in Hawaii. The lieutenant governor's duties include those performed by a secretary of state in most other states.

Overview of the Contract Monitoring Process in Hawaii

Although the executive branch has sole authority to monitor contracts in Hawaii, the legislature uses audit reports and the budget process to insert itself into the contracting system. The legislature's Office of the Auditor (OA) is a crucial actor in contract oversight. In addition, two committees within the Hawaii legislature play a large role in conducting oversight of executive branch contracts: the Senate's Committee on Government Operations and the House's Committee on Legislative Management. Each is comprised of five legislators. We were also told that, in the House, the Finance Committee plays an increasingly important role in contract oversight (interview 2021).

The Office of the Auditor (OA) is a legislative agency that is constitutionally mandated to conduct regular audits of the transactions, accounts, and performance of any executive branch department or agency in Hawaii. The OA was established during Hawaii's first Constitutional Convention in 1950, and saw its responsibilities expanded during the Constitutional Convention in 1978. The OA is given broad authority to request or review any documents or records from state departments and agencies pertaining to their audits. It is also granted the power to conduct interviews with state officials under oath. Several types of audits fall under the purview of the OA. It conducts performance, financial, and procurement audits regularly as well as perform analyses of existing and proposed special, revolving, or trust funds. It also conducts special studies when requested by the legislature.

The Office of the Auditor is comprised of the Auditor, a deputy auditor, six managers, 15 analysts, and four information technology and office services staff. The Auditor serves an eight-year term and is appointed by a simple majority vote in both houses of the legislature. The Auditor can be removed at any time by a two-thirds majority vote. While a large portion of its

financial audits are contracted out to persons with “specialized expertise,” the OA website asserts that it publishes its reports largely in-house.³⁶

Legislative Oversight of the Contract Monitoring in Hawaii

As mentioned above, the legislature has two committees with jurisdiction over contracts: the Senate’s Committee on Government Operations (GVO) and the House’s Committee on Legislative Management (LMG). Each is comprised of five legislators. Despite the small numbers of Republicans present in each house, there is one Republican seated on each oversight committee, as noted above.

The GVO meets frequently throughout the legislative session, most often in tandem with another Senate committee. In the 60-day legislative session starting in mid-January of 2020, the GVO held 20 public committee hearings, 16 of which were held jointly with another Senate committee. In 2019, during the 60-day legislative session, GVO met a total of 48 times with all but nine meetings held with another committee present. All GVO hearings are available for public viewing through the local broadcast network, Olelo, and are archived on the legislature’s website.

In contrast, the LMG met on only one day (2/7/20) during the 2020 legislative sessions, perhaps due to the COVID pandemic. In 2019, it held 18 committee hearings, 10 of which were held jointly with another committee. Unfortunately, none of the LMG meetings are available for public viewing through Olelo, and only the agendas and committee reports from their hearings are archived. Both the House Majority and Minority Leaders hold seats on this oversight committee.

The Role of Analytic Bureaucracies in Legislative Oversight of Contracts

The Office of the Auditor (OA) assists the legislature in oversight by conducting several different kinds of audits and providing consistent follow-up reports on recommendations to address problems identified in those audits. Follow-up reports and audits are legally mandated in Section 23-7.5 of the Hawaii Revised Statutes. One year after an audit with recommendations is published, the OA sends a questionnaire to the department of interest to check on the status of implementation of the OA’s recommendations and to report to the legislature on the progress that has or has not been made.³⁷ Two to three years after the initial audit, the OA performs another “active” audit in which the OA independently assesses the agency’s or department’s progress. During the 2 or 3-year follow-up audit, the OA will interview department officials, collect evidentiary documents, and issue another full report to the legislature to keep them up to date on the progress and, if warranted, recommend new avenues for change.³⁸

During 2020, the OA released 40 reports and published each on its website for public access. The vast majority of these reports concerned financial performance (29 financial audits

³⁶ <https://auditor.hawaii.gov/history-of-the-hawai%ca%bbi-office-of-the-auditor/>, accessed 9/18/20

³⁷ For an example of a 1-year follow-up audit, see <https://files.hawaii.gov/auditor/Reports/2019/19-15.pdf>

³⁸ For an example of a 2-3 year follow-up audit, see <https://files.hawaii.gov/auditor/Reports/2020/20-12.pdf>

and five fund reviews). There were, however, three performance audits (one full performance audit and two follow up audits). The performance audit of the Department of Accounting and General Services is examined in Case Study 1 below. There were other miscellaneous reports, such as a peer review conducted on the OA itself and an annual report. The financial audits covered a wide range of a dozen state departments and agencies. Some were given more attention than others. Out of the 29 financial audits that occurred, seven were Department of Transportation audits; two were audits of the Department of Human Services; and three audits each were of the Department of Health, the Department of Accounting and General Services, and the Department of Business, Economic Development, and Tourism.

Financial audits conducted by the OA frequently turned up minor accounting errors that then needed to be adjusted and reconciled by the Department under audit. An example is a May 2019 financial audit performed by Baker Tilly of the Honolulu Authority for Rapid Transportation (HART). The audit found that HART had overpaid two of their contractors, one for an overage of \$21,300 and the other for an overage of \$5,000. The report stated that both of these overages should have been found in HART's review of their invoices per departmental standard operating procedure. Nevertheless, the OA's findings allowed HART to reach out to each of the contractors to be reimbursed for the amount they overpaid.³⁹ This action shows how OA audits can save Hawaii's government money.

Financial audits conducted by the OA occasionally turned up performance issues within the departments or agencies. An example is an April 2020 OA contract hiring an independent auditor, KMH LLP, to conduct a financial and compliance audit of the Department of Human Services (DHS). KMH assessed DHS's contract management procedures and found that the Department had failed to conduct on-site inspections of Medicare providers and sub-recipients of funding for nutritional programs, despite being mandated by federal law to do so.⁴⁰ Furthermore, this was a repeat finding from an audit conducted by the OA in 2018. In the "Corrective Action Plans for Findings and Recommendations" section of the report, a DHS project manager responded to the finding with the department's plan to become compliant with the law. Although the project manager stated explicitly that a lack of resources and staffing were the reasons the department was not compliant, they estimated full compliance by July 1, 2020, with the addition of a technological upgrade to their Medicare provider enrollment system. This action shows how OA audits can improve agency contract management.

Despite an active and persistent auditor's office in Hawaii, the overall system for legislative oversight of external contracts often lacks a key component: attention and action from the legislature to hold executive departments accountable for failing to implement OA recommendations. For example, the OA has audited the Deposit Beverage Container (DBC) program every other year since 2006, and has consistently identified problems and potentially fraudulent activity with the self-reported data from third-party distributors and redemption

³⁹ <https://files.hawaii.gov/auditor/Reports/2019/2019HARTCompliance.pdf>, accessed 7/24/20

⁴⁰ https://files.hawaii.gov/auditor/Reports/2019_Audit/DHS2019.pdf, accessed 8/5/20

centers.⁴¹ Year after year, the OA warned the implementing agency, the Department of Health (DOH), of significant pitfalls in the DBC program and how its reliance on self-reported data was causing the state to incur large monetary losses. In one fiscal year, the auditor reported the state paid \$2.6 million in deposit refunds for approximately 3.5 million pounds of recycled material that was unaccounted for. In every audit conducted over the last 14 years, the OA has recommended systems of verification and regular inspections of distributors and redemption centers from the DOH. But the DOH appears to be wholly uninterested in fixing the problem. It responded to the OA's audits on the program by complaining about the formatting of the report,⁴² instead of responding with an actionable plan to recover the money or account for it and to avoid future financial errors.

The DBC program audits were contracted to an independent auditor, which exercised direct oversight of the state contracts with the beverage container distributors and the redemption centers. The auditor requested information directly from the contractors and, in some instances, physically went to the location to verify records. The OA even issued a separate report, outside of the mandated 2-year follow-up reports, that reviewed the contracts' procurement process. The OA report found that DOH proceeded with the procurement despite numerous irregularities.⁴³ The OA also found that modifications to the contract drastically increased its amount, extended the deliverables deadline, and reduced the scope of work required.⁴⁴ Still, the DOH has taken little action, and it would appear the legislature depends solely on the OA to continue to follow-up with DOH on its lack of adequate controls to monitor the accuracy and thoroughness of the self-reported information it is receiving.

The facts indicate that the Hawaii legislature has not paid sufficient attention to the DBC problem or taken steps to rectify the situation. Without a legislature that is willing to give the audits the attention warranted and impose consequences on DOH for its inaction, contractors that are part of the DBC program will continue to profit from the state's inability to monitor them. The Hawaii legislature, and the state as a whole, would benefit by listening to the alarms the OA is ringing and taking legislative action. One option the OA is currently considering⁴⁵ is to establish a process in which audits relevant to a legislative committee's jurisdiction receive a committee hearing shortly after publication. OA and agency staff could be invited to answer legislators' questions. If the legislature dedicated time to publicly hear the OA recommendations and ask the implementing agency (and the external contractors, when applicable) follow-up questions, it would increase the opportunities to correct waste, fraud, and abuse of taxpayer money.

⁴¹ For the most recent examples, see <https://files.hawaii.gov/auditor/Reports/2015/15-02.pdf>; <https://files.hawaii.gov/auditor/Reports/2017/17-02.pdf>; <https://files.hawaii.gov/auditor/Reports/2019/19-08.pdf>

⁴² Pg. 45, <https://files.hawaii.gov/auditor/Reports/2015/15-02.pdf>

⁴³ <https://files.hawaii.gov/auditor/Reports/2015/15-09.pdf>

⁴⁴ Interview notes

⁴⁵ Interview notes

In addition to the OA, the Hawaii legislature works with the administrative office of the Department of Accounting and General Services (DAGS) to oversee state agency contracts. DAGS is headed by the State Comptroller, who is appointed by the Governor and requires Senate confirmation. This executive branch department is responsible for managing and supervising a wide range of state activities and contracts. DAGS audits various executive branch departments, archives information and records, handles accounting processes and procedures for several executive branch departments, and recommends best accounting and efficiency practices to both the executive and legislative branches. DAGS is a relatively large department with eight divisions, three main offices, three district offices, and 13 attached agencies, boards, and commissions.⁴⁶ It focuses more heavily on accounting than the OA does.

One of the attached agencies to DAGS is the State Procurement Office (SPO). The SPO is headed by the Chief Procurement Officer, who is also appointed by the Governor with advice and consent from the Senate. The SPO monitors, tracks, and records all state departments' spending and procurement of services and goods from external contractors. It also provides training in efficient procurement and compliance training for state officials. In addition, it provides training for vendors and contractors on how to bid on open contracting opportunities with the state and helps them work through compliance obligations in order to receive a state contract award.⁴⁷ Importantly, SPO also manages HANDS, Hawaii's "one-stop shop" for vendors and contractors to see what bidding opportunities are currently available and to track their compliance status, completely free of charge. The HANDS website also permits the public to search for contracts that have been awarded previously by the state and displays all contract data in a user-friendly format that breaks down awards by category, department, date, or dollar amount spent.⁴⁸

Another important subsidiary of DAGS for the oversight and management of external state contracts is the Procurement Policy Board (PPB). The PPB has the authority and the responsibility to adopt rules and govern the procurement of all goods and services obtained by the state. It is a seven-member board that must, by law, fill its seats with the State Comptroller, a county employee with procurement experience, and five outside members who have expertise in procurement practices. Of these five outside members, one must be a certified professional in the field of procurement, one must have experience with federal procurement, and two must have significant experience in the field of health and human services. On average, the PPB meets three to five times a year, (although there was only one meeting held in 2020). All meeting agendas and minutes are posted to the PPB website for public access and live stream access for meetings can be requested and viewed.⁴⁹

ii. Three Hawaii Case Studies

⁴⁶ <https://ags.hawaii.gov/>, accessed 9/18/20

⁴⁷ <http://spo.hawaii.gov/>, accessed 9/18/20

⁴⁸ <https://hands.ehawaii.gov/hands/>, accessed 9/18/20

⁴⁹ <http://spo.hawaii.gov/procurement-policy-board/>, accessed 9/18/20

To deepen understanding of the Hawaii legislature’s contract oversight efforts, three recent case studies follow. In the first, the legislature used two OA legislative performance audits to design and enact improved contract management procedures and then to compel compliance with them. In the second, a newly formed Senate Special Committee on COVID-19 used oversight hearings and site visits to press two state departments to account for how they were using federal funds on contracts for goods and services needed to combat the pandemic. In the third, a newly formed House Select Committee on COVID-19 Economic and Financial Preparedness, with a unique committee structure, used members drawn from both the legislature and Hawaii’s economic sectors to review pandemic-related contracts and increase COVID-related contract transparency.

Case Study 1 – Using OA Audits to Improve Contract Management

Audits conducted by the OA can sometimes lead the executive branch to improve its contract management efforts. An example is a performance audit conducted by the OA in 2019 and published in January of 2020.⁵⁰ This report, titled “Report on Compliance with Statutory Requirements Based on Report No. 15-13, *Study of State Departmental Engineering Sections That Manage Capital Improvement Projects*,” had been requested by House Concurrent Resolution No. 193, Senate Draft 1 (2019 Regular Session) and was a follow-up report to another OA audit in 2015.⁵¹

The 2015 audit sought to better understand the contracting and procurement processes involved with Hawaii’s Capital Improvement Program (CIP) and to recommend to the legislature whether or not the management of all CIP projects should be consolidated under DAGS. The 2015 audit report found that total consolidation under DAGS was unreasonable and untenable, but that CIP programs would benefit from better alignment of best practices by adopting uniform procedures for contract management throughout the state.

The 2015 OA recommendations for better statewide contract and project management were as follows:

1. Departments should use timelines that include a comprehensive list of activities required on a project.
2. Departments should use a contract administration worksheet to track payments and deliverables.⁵²
3. Departments should identify and include stakeholders in the CIP process and seek assurance of end-user satisfaction.
4. The Comptroller (director of DAGS) should conduct annual training on contract management and procurement practices for engineering personnel in all departments and require the departments to provide orientation training for any employees hired between annual trainings.⁵³

⁵⁰ <https://files.hawaii.gov/auditor/Reports/2020/20-02.pdf>, accessed 9/25/20

⁵¹ <https://files.hawaii.gov/auditor/Reports/2015/15-13.pdf>, accessed 9/25/20

⁵² For an example of a contract administration worksheet, see <https://spo.hawaii.gov/for-state-county-personnel/programs/procurement/contract-administration/>, accessed 9/25/20

⁵³ Training materials available at <https://pwd.hawaii.gov/act241/>

The legislature found these OA recommendations to be insightful and important and, in 2016, codified them into law not long after the report was published. The above recommendations are now mandated by statute in Act 241, Session Laws of Hawaii, Section 103-12, Hawaii Revised Statutes. Act 241 essentially required all state agencies, with a few exceptions, to strengthen their contract management procedures.

The 2020 OA audit was requested by the legislature to ensure compliance with Act 241. The OA used a different methodology for the 2020 audit compared to the audit in 2015. For the 2015 audit, the OA had simply asked the departments to respond to a questionnaire and relied solely on self-reported information from the departments. For the 2020 audit, the OA conducted an independent review of evidentiary documents in addition to multiple surveys that were sent out to over 20 executive branch departments and agencies.

The results of the 2020 audit were not flattering to the departments assessed. The OA found that not a single department or agency complied with all of the recommendations required by statute in Act 241. Out of 21 departments investigated only one used a comprehensive timeline, only one demonstrated they were including stakeholders in the CIP process to the extent mandated, and only three departments met the requirement for annual training. There were relatively positive findings regarding the contract administration worksheets, however. Twelve departments were found to be utilizing the template of the contract administration worksheet or a similar, alternative option for tracking the progress of external contracts.

The Auditor concluded, “Our review of the implementation of these statutory requirements shows a low level of compliance to date by the various departments that manage their own CIP. It is difficult to pinpoint whether the lack of compliance is because departments are unclear about the requirements, are unaware of requirements, or if there are other causes or factors. We encourage DAGS and affected departments and agencies to discuss both requirements and strategies to effectuate compliance in this area.”⁵⁴ The OA allows for departments under audit to submit a response to be included in the final audit report. The Comptroller responded on behalf of DAGS and committed to convening a statewide working group to address the report findings and strategize about ways for improvement.

Since the release of the performance audit report in January 2020, the GVO committee in the Senate appears to have reacted to the findings by drafting and considering two bills: SB3015⁵⁵ and SB3143.⁵⁶ In SB3015, the bill makes an appropriation of \$550,000 to DAGS to fund contract-related training, development, and consulting services for innovative project delivery. SB3143 requires the SPO and the Public Works Division of the DAGS to develop a ten-year pilot program to enable innovative methods of procurement. It also establishes and makes an appropriation of \$85,000 for an exempt innovative project delivery officer position

⁵⁴ <https://files.hawaii.gov/auditor/Reports/2020/20-02.pdf>, pg. 38; accessed 9/25/20

⁵⁵ https://www.capitol.hawaii.gov/session2020/Bills/SB3015_.pdf, accessed 9/25/20

⁵⁶ https://www.capitol.hawaii.gov/session2020/Bills/SB3143_.pdf, accessed 9/25/20

within the Public Works Division and requires DAGS to submit biennial follow-up reports to the legislature.

Both bills were discussed in a GVO committee hearing on February 4, 2020.⁵⁷ Neither bill had oral testimony presented at the hearing, and there was no deliberation after the Chair read through the list of affected parties opposed and in favor of the legislation. The committee did receive written testimony in favor of both bills from DAGS and SPO, however. In addition, after a referral to the Senate Ways and Means committee, both bills were approved by the full Senate and passed to the House where they await further consideration from the House Finance Committee.

This case study shows how OA audits led to the enactment of significant contract management reforms and to a review of the extent to which state agencies actually implemented those reforms. In both cases, the legislative audit office and a legislative committee drove the improvements in state contract management.

Case Study 2 – Contract Oversight by the Senate Special Committee on COVID-19

On March 18, 2020, the Hawaii Senate Special Committee on COVID-19 (SCOVID) was established by the Senate President. The committee is comprised of six Senators, including five Democrats and the one sitting Republican Senator. SCOVID has met frequently since its conception in March, totaling 28 committee hearings over the course of five and a half months. The committee’s mission statement is as follows:

“The Senate Special Committee on COVID-19 will assess and advise the Senate regarding the State of Hawaii’s COVID-19 plans and procedures to include, but not be limited to: (1) Confirm the development of the state departmental plans and procedures; (2) Review and assess current state departmental plans and procedures; (3) Review and assess whether state departmental plans and procedures are properly and timely implemented to safeguard public health and safety; and (4) To communicate and disseminate information obtained therefrom.”⁵⁸

It is evident from listening to several SCOVID hearings that the Senators took this mission seriously and were adamant about holding the executive branch accountable for their plans and actions during this time of crisis. In particular, the committee hearing that occurred on August 8, 2020,⁵⁹ demonstrates how persistent questioning of state officials regarding the money the Senate had allocated to be spent on external contracts is a good practice for legislative oversight of the executive branch.

Before the hearing on August 8th, the legislature passed a bill, signed into law at the end of July, that allocated CARES Act funds provided by the federal government to state

⁵⁷ http://olelo.granicus.com/player/clip/75559?view_id=13&redirect=true, accessed 9/25/20

⁵⁸ <https://www.capitol.hawaii.gov/specialcommittee.aspx?comm=scovid&year=2020>, accessed 10/1/20

⁵⁹ http://olelo.granicus.com/player/clip/77831?view_id=13&redirect=true, accessed 10/1/20

departments for spending on the state’s response to the COVID-19 pandemic.⁶⁰ Part of that allocation process gave the Department of Transportation (DOT) Airports Division \$70 million for various needs including thermal cameras to be installed in the airports, COVID-19 testing for passengers arriving in Hawaii, and increases in airport labor costs to implement the new testing procedures.

The SCOVID hearing on August 8th began with an intense interrogation of the director of the DOT Airports Division by the Committee chair and Senator Kim. For 20 minutes, the two Senators repeatedly pressed the director for a full breakdown of where the \$70 million was spent. The DOT director told the committee that the department had already contracted out and installed 36 thermal cameras. When the cameras appeared to be the only items the director was prepared to discuss with the committee, the Chair responded, “Ok... what about the rest of the \$70 million?” The director appeared flustered and stumbled in his response, referring back to the cameras and the \$25 million price tag that went with them. The Chair, growing frustrated, insisted on a breakdown of the rest of the money. When the director indicated that he did not have a breakdown of the remaining \$45 million, there was an audible interruption from Senator Kim of “Why not?” Senator Kim then questioned the DOT official about the additional labor costs incurred by the Airports Division. The official responded that \$20 million had been allocated through the end of the year to cover the extra cost of labor to which Senator Kim responded, “That seems like too much... we only have 4 months left.” She asked the official again for a breakdown of labor costs to which the official responded he did not have that available at the time.

The questioning from the Senators continued, despite the apparent unpreparedness of the DOT official. They did not let up. They continued to ask him to be more specific and give more information regarding the testing occurring at the airports. The Senators criticized the DOT’s inability to test quickly and efficiently, inquiring why the state had not contracted testing to local, privately held labs instead of waiting on the overrun state labs. When it became obvious to the Senators that they would not receive the information they required from the DOT official, they requested the breakdown be delivered to them in writing and put a 4-day deadline on the requested information.⁶¹

While the questioning of the DOT director may have been intense and aggressive, it paled in comparison to what was in store for the Department of Health (DOH) official who testified next. For about two hours, SCOVID grilled the state’s Chief Epidemiologist and Director of the Disease Outbreak Control Division. Earlier in the year, DOH was allocated \$2.5 million from the CARES Act to contract with the University of Hawaii for the training of contact

⁶⁰ https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=126&year=2020, accessed 10/1/20

⁶¹ A copy of the letter sent to DOT can be found at: [https://www.capitol.hawaii.gov/committeefiles/special/SCOVID/DEPARTMENT%20OF%20TRANSPORTATION_/2020-08-06%20LETTER%20to%20DOT-Airports%20\(CARES%20Budget\).pdf](https://www.capitol.hawaii.gov/committeefiles/special/SCOVID/DEPARTMENT%20OF%20TRANSPORTATION_/2020-08-06%20LETTER%20to%20DOT-Airports%20(CARES%20Budget).pdf), accessed 10/1/20

tracers to help mitigate and control the spread of COVID-19.⁶² The training plan was criticized in an OA audit for its cost and long timeline of six weeks for completion. This contract was compared to New York’s partnership with John Hopkins University, which came at no cost to the state. The Johns Hopkins training took approximately seven hours for a contact tracer trainee to complete.

The DOH director began her testimony with a presentation of DOH’s progress and its plans going forward. In this presentation, the director claimed they had trained 198 contact tracers, of which 105 were currently active. However, when the Chair started questioning the director about who the contract tracers are, where they are working from, and, overall, trying to understand more about the training process, Dr. Park started to equivocate and became very ambiguous in her answers. Her answers clearly frustrated the Chair and the other Senators present, as they continued to press her:

Senator Kim: “The other thing that is concerning to me is the numbers. We keep getting different numbers and... ya know, the message keeps changing because I have notes back from March when you folks kept saying [now reading from her notes] that ‘we need to have contact tracing... successful contract tracing... department continues to focus on contact tracing as a preventive measure to determine community spread. We need to continue aggressive testing, contact tracing’ – this was in April. I can go on and on with these numbers. And as late as July 29th [holds up a document], in writing, in writing, we have asked you current number of contract tracers available and you said, [reading from the document] 77 active contact tracers. This number includes 8 from the University of Hawaii, that have been volunteering. And then on the next page, we ask you how many contact tracers will be on board, full-time by August 1, 2020? And this is July 29th now you wrote this, and you said at least 100 contact tracers will be working full-time by August 1, 2020. These numbers don’t add up with the numbers you just gave us.”

DOH Official: “The times are changing...”

Sen. Kim: “Excuse me [puts hand up], this is July 29th. [talking over DOH official] You wrote us this July 29th, when we were already surging, you gave us these answers [holds up the document again]. And so, to tell us that you are going to have 100 full-time working by August 1, not maybe, not anything... this is what you tell us and then the numbers are very misleading. You seem to be misleading the public and us.”

The line of questioning about contact tracers continued with each Senator taking a turn to inquire about the progress of training and how many people are working as full-time contact tracers. They each tried in earnest to get straightforward answers from the DOH official and, at times, the discussion became contentious. For example, a Senator commented he was barely able to get his questions out because his blood pressure was so high at the moment.

After the questioning about contact tracers concluded, the Senators continued to persist. The Chair started questioning the DOH official about what Memoranda of Agreement (MOAs)

⁶² Pg. 17 of this report: <https://files.hawaii.gov/auditor/Reports/2020/20-10.pdf>, accessed 10/1/20

the department currently had in place with local community centers during this time of crisis. When the answer from the DOH official was that there are no written MOAs and that they are partnering with local community centers with a “virtual handshake,” the Chair shook his head in frustration and stated the department would need to send the Senate a universal, written MOA that the department will use going forward. The Senators also spent a significant amount of time inquiring about the functionality of the state’s unemployment insurance software, Maven, that is managed by a third-party, Conduent. The Senators asserted they have been receiving numerous complaints about the system to which the DOH official responded that the department was seeking to upgrade the system to handle the increased traffic.

Two days after the hearing, three Senators from the committee made an unannounced visit to the office of the DOH official who testified.⁶³ The Senators personally questioned the state employees working there to reveal an overrun operation in desperate need of more resources and support. The contact tracers were overloaded with cases, and there was little evidence that the office was being managed effectively. The Senators’ visit and the subsequent media storm that ensued led the Lieutenant Governor to call for changes in the leadership at DOH a day later.

The Senators’ questioning during the two oversight hearings demonstrated the importance of persistent follow-up and inquiry from legislators in holding state agencies accountable. The committee members’ continued oversight efforts outside of any hearing setting demonstrated their commitment to increasing state agency accountability.

The approach taken by Hawaii’s Senators melded oversight of the state agency in general with oversight of the specific contracts the state agency should be monitoring. The state agencies appeared to be poorly prepared to answer Senators’ questions both with respect to in-house activities and to contract performance. The DOH leaders did not appear to manage the contracts well, and also appeared generally to perform poorly. The willingness of the state Senators to show up and determine what was happening at DOH demonstrated a serious commitment to oversight. Furthermore, their efforts appear to have had an effect, given the prompt executive branch reaction and the potential change in agency leadership.

Case Study 3 –Contract Oversight by the House Select Committee on COVID-19 Economic and Financial Preparedness

In early March 2020, the House Select Committee on COVID-19 Economic and Financial Preparedness⁶⁴ (COV) was established by House Resolution 54.⁶⁵ The COV has a uniquely open structure as it not only includes five Representatives from the House, but also 32 members of the public representing various sectors of Hawaii’s economy. The committee has two co-chairs--the Speaker of the House and the President of the Bank of Hawaii. The House

⁶³ <https://www.hawaiinewsnow.com/2020/08/08/during-unannounced-visit-senators-find-health-department-overwhelmed-by-covid-surge/>

⁶⁴ <https://www.capitol.hawaii.gov/specialcommittee.aspx?comm=cov&year=2020>, accessed 10/1/20

⁶⁵ https://www.capitol.hawaii.gov/session2020/bills/HR54_.PDF

Majority and Minority leaders both served on this committee alongside members from the community such as the President of Hawaiian Airlines, the Presidents of Maui's and Hawaii's Chamber of Commerce, the Executive Director of Hawaii Alliance of Nonprofit Organizations, and the Executive Director of the Hawaii Food Industry Association. The COV has held 17 public hearings since its first meeting on March 17, 2020 and has spawned five subcommittees comprised of additional community members and state officials.

The unique compilation of both Representatives from the legislature and prominent leaders in each sector of the Hawaiian economy created an open and transparent environment for oversight of the executive branch during the COVID-19 pandemic. Usually, oversight by the legislature of external contracts involves legislators asking questions of state department officials who are expected to have done the initial oversight and management of the contract themselves. In this situation, however, the oversight is occurring directly between the legislator and the private contractor or a representative of a private contractor through the COV hearings. These public hearings consist of both the major leaders of industry and the top state officials and representatives working together to hold one another accountable to the plan to get Hawaii through the crisis. All entities that are impacted have a seat at the table, and the work is performed out in the open for all to critique and oversee.

The COV website is especially useful when seeking information about the state's response to the COVID-19 crisis. On this site, one can find a list of all the committee members and their associations, committee and subcommittee reports, documents, presentations, updates on major issues such as fishing and shipping, videos, and agendas of all the hearings, and subcommittee and task force updates and notes. The COV has also partnered with a non-profit organization called Hawaii Data Collaborative that tracks all the spending of COVID-19 relief funds coming from the federal government.⁶⁶

An example of how this open structure and a commitment to transparency in the COV provided the legislature with useful oversight of an external contract occurred during a COV hearing on April 20, 2020. During this hearing, the Executive Director of the Hawaii Farm Bureau was invited to give a presentation and an update on how local farmers were faring during the first couple of months of the COVID-19 crisis. The Hawaii Farm Bureau (HFB) is a non-profit advocacy group that represents about 2,000 local farmer families in Hawaii and organizes the county farm bureaus under one unified voice.⁶⁷ The HFB has been the recipient of significant state contracts in the past, awarded by the Department of Agriculture, totaling \$1.26 million in contracts since 2016. Prior to the meeting on April 20th, the Department of Agriculture had awarded \$86,000 to various local farmers and associations for "COVID-19 Emergency Farmer Relief," \$10,000 of which was received by HFB. During the Executive Director's presentation and testimony, he asked to be seated on the COV going forward and also strongly encouraged the state, specifically the Department of Health and the Department of Education, to enter into

⁶⁶ <https://www.hawaiidata.org/hawaii-covid-federal-funding>, accessed 10/1/20

⁶⁷ <https://hfbf.org/about/>, accessed 10/1/20

long-term contracts with local farmers immediately to ensure there would be no food waste during the COVID-19 crisis. He bluntly stated, “Quite honestly, if we can grow it, they should be buying it.”

That the HFB Executive Director’s comments were well received is evident in the House Majority Leader and the Speaker of the House’s responses:

Majority Leader: “Brian, to accelerate contracts with state government who can we contact or who can we connect you within the Dept of Ed, in the Public Safety department, as well as our hospitals to make sure those local contracts are being accelerated so that we know what you folks need to grow for our state government facilities when they come back up and as they come back up to full operation?”

Speaker of the House: (first asks Co-Chair for consent to add a seat on COV for HFB and then says,) “Brian, for next time, can you just give us an idea, this is a follow up to Peter’s question, I think we just need an idea of what... basically of what is unsold at this point in time. Like what kind of commodities are unsold? Ok? So, we have an idea of what’s out there? Della [House Majority Leader], can you work with Brian on the government contracts, and especially on the Snap Program, I think there’s a Snap expansion issue that needs some... you need some help with? And Rep. Onishi, can you work with Brian on the federal DOE grant to see what the status is about?”

The HFB Executive Director received immediate action and partnership from the COV regarding the issuance of new state contracts to the local farmers he represented. Just a couple weeks after the hearing, on May 5th, another \$16,000 was awarded to various local farmers to buy up any food they were unable to sell, and about a month later on May 15th, \$150,000 was awarded to HFB. It also appears that the partnership that the Speaker requested between the House Majority Leader and HFB concerning the Snap Program was making progress as well since a “Snap-Ed Needs Assessment” was contracted to the University of Hawaii shortly after the hearing in April. All of this contract information is easily accessible through the HANDS website⁶⁸ on SPO’s homepage.

The best practices illustrated in this case study are two-fold: transparency in the awarding of contracts and collaboration between community contractors and legislators. First, it appears that these contractors are local, in-state business leaders or business associations. Therefore, all the parties (the legislators and the businesses) have a shared interest in the welfare of the state of Hawaii. In the specific example of farm production, Hawaii, as an island, could have difficulty with the food supply chain if global shipping were heavily affected the by pandemic. No one on the island wanted to see a food shortage; there was a shared interest in food production for local consumption. This shared interest led to a collaborative problem-solving approach.

⁶⁸ <https://hands.ehawaii.gov/hands/awards>, accessed 10/1/20

This approach stands in sharp contrast to the tenor of the discussion in Case Study 2 in which executive branch actors were not seen as collaborators, but rather laggards thwarting the effort to contain the virus. This difference highlights an underlying theme that runs through all three case studies for Hawaii; the Senate and the House did not seem to be on the same page. Actions taken by the Senate languished in the House and the collaborative committee in the House, featured in this Case Study 3, did not include involvement by the state Senate. A best practice that we recommended in our 2019 report, *Checks and Balances in Action*, using joint chamber committees for oversight, might facilitate better oversight by the Hawaiian legislature of both state agencies and state contracts.

iii. Conclusions

These case studies illustrate three best practices for contract oversight in Hawaii: a powerful legislative auditor, legislator dedication to public service, and contract transparency with the public. The case studies also suggest one way in which Hawaii could improve its contract oversight: using joint chamber oversight hearings so that action proposed in one chamber does not die in the other. We describe Hawaii's strengths in more detail below.

Powers and Independence of the Legislative Auditor

The state of Hawaii has an active Office of the Auditor (OA) that is accountable to the legislature and not part of the executive branch. As mentioned previously in this report, the position of the Auditor is filled by a majority vote in the legislature and, while the regular practice is for the OA to share its reporting and audits with both the legislature and the Governor's Office, the Auditor may be removed from office only by the legislature. True accountability for the OA comes from the state's constitution, as the bulk of its audits are automatically triggered when there is a significant change in funding legislation.⁶⁹ The OA mission statement is as follows and appears on the first page of most of its published reports:

“The *primary* mission is to conduct post audits of the transactions, accounts, programs, and performance of public agencies. A *supplemental* mission is to conduct such other investigations and prepare such additional reports as may be directed by the Legislature.” [emphasis added; see an example at <https://files.hawaii.gov/auditor/Reports/2015/15-13.pdf>]

The independence of the OA from the executive branch allows intense scrutiny of executive branch agencies to infuse its auditing process when necessary. The ability to criticize the executive branch is particularly important in a state so heavily dominated by one political party (Democrats). An example of this no-holds-barred approach can be found in the first few pages of two reports released by the OA in August 2020, concerning the state Department of Education (DOE) and the Department of Health's (DOH) handling of the rising cases of COVID-19 in Hawaii.⁷⁰ Both of these reports are prefaced with a comment by the Auditor titled,

⁶⁹ <https://lrb.hawaii.gov/constitution#articlevii>, see Article VII, Section 10, accessed 9/25/20

⁷⁰ For the DOH report, see <https://files.hawaii.gov/auditor/Reports/2020/20-10.pdf>, accessed 9/25/20. For the DOE report, see <https://files.hawaii.gov/auditor/Reports/2020/20-11.pdf>, accessed 9/25/20.

“Transparency and Accountability – Now More Than Ever,” and both bluntly describe DOE and DOH as being wholly uncooperative in providing answers to the OA’s questions and the documents that were requested. Following the comments are scathing rebukes of the departments’ lack of a plan and urgency, and the executive branch’s incompetence in appropriately managing the COVID-19 crisis. These reports that identify wrongdoing from many top Democratic officials can only be products of an Auditor with a relatively high level of independence from a political party affiliation. An independent auditor is an essential ingredient of oversight.

Legislator Commitment, Expertise, and Preparation

Legislative oversight of contracts issued by the State of Hawaii occurs periodically due to certain legislators being particularly persistent in their questioning of state officials during committee hearings. It is evident in these moments of intense interrogation that these legislators were well prepared for the hearing, paid close attention to what the official had asserted in the past, and continued to press the official until they get straightforward answers to their questions. These legislators hold executive department officials accountable for their plans and actions and often ask for written documentation from the department in question after they are through their line of questioning. This conduct suggests these legislators were actively applying oversight pressure to department officials that testified before them and used procedures to ensure the department followed through with what they presented to the legislature.

An example is a 2018 GVO committee hearing⁷¹ in which Senator Donna Mercado Kim aggressively questioned an official from the Department of Taxation over a \$60,000,000 contract given to a technology firm, Advantek, to modernize Hawaii’s tax system. In 2017, the Department of Taxation had received a significant amount of negative press concerning the project, and the head of the department had resigned amidst allegations that the department had interfered with and manipulated an OA audit of the Advantek contract.⁷² In the 2018 GVO hearing, Senator Kim asked a department official about concerns she had raised *two years prior* about the Advantek contract. Referring to her notes, she reminded the official what had been promised to the legislature regarding this project and would not take new excuses from the official as sufficient answers to her follow-ups. Senator Kim requested several pieces of written documentation from the Department of Taxation and introduced a 2018 bill⁷³ that would instruct the OA and SPO to conduct a performance and financial audit of the Advantek contract. She also demanded that no further contracts with Advantek be entered into until the audit reports were reviewed by the legislature. Personal commitment, expertise, and preparation for committee hearings by key legislators enhances the legislature’s ability to oversee contracts and to hold vendors to account.

⁷¹ https://olelo.granicus.com/player/clip/65927?view_id=13, accessed 10/2/20

⁷² <https://statescoop.com/hawaii-tax-director-abruptly-resigns-amid-struggling-60-million-system-modernization/>, accessed 10/6/20

⁷³ https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=SCR&billnumber=62&year=2018, accessed 10/1/20

Transparency and Public Engagement

Lastly, the state of Hawaii demonstrates a good practice for legislative oversight through the legislature's dedication to transparency and public access to information regarding state-issued contracts. The Hawaii state legislature's website has easy and open access to videos and agendas of the committee hearings (with a few exceptions) and, within the agenda of each meeting, one can find access to dedicated pages for each bill discussed. Within the webpage for each bill, one can see where the bill is in the legislative process, the committee reports that have been produced concerning the bill, any written testimony that has been submitted either in favor or opposed to the bill, all written versions of the bill, the sponsors of the bill, and links to agendas and video recordings of all the hearings in which the bill was considered.⁷⁴ The set up makes for easy navigation of all the information concerning a particular bill or committee hearing.

The State Procurement Office's (SPO) website⁷⁵ also provides the public and legislature with a transparent view of the contracting activities occurring within the state government. On this site, there is access to the training materials used by contractors to obtain contracts according to state rules and regulations,⁷⁶ the training materials utilized by state and county employees to procure contracts in an efficient and legally mandated manner,⁷⁷ and a price list for items that the state procures by bulk regularly.⁷⁸ As mentioned previously in this report, the SPO also manages a site called HANDS⁷⁹ that provides a searchable spreadsheet of all awarded state contracts,⁸⁰ a searchable database for all open bidding opportunities,⁸¹ and breakdowns of spending on external contracts by category and department. Another useful tool for oversight is the OA's website which provides access to over 1,200 audit reports dating back to 1965.⁸² Focused attention on high-value contracts could yield major financial savings through contract oversight given the sizeable price tags on some DOE contracts and contracts with other state agencies.

Of the six states reviewed in this report, Hawaii had the best public databases tracking legislative activities and state contracts?? Databases that provide useful data to the public not only enable better contract oversight, but also fosters greater public confidence in the legislature acting as a reasonable check on state agencies issuing contracts funded with taxpayer dollars.

⁷⁴ See, for example:

https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=2590&year=2020, accessed 10/1/20

⁷⁵ <https://spo.hawaii.gov/>, accessed 10/1/20

⁷⁶ <https://hands.ehawaii.gov/hands/compliance>, accessed 10/1/20

⁷⁷ <http://spo.hawaii.gov/for-state-county-personnel/training/>, accessed 10/1/20

⁷⁸ <http://spo.hawaii.gov/for-vendors/contract-awards/price-vendor-lists/>, accessed 10/1/20

⁷⁹ <https://hands.ehawaii.gov/hands/>, accessed 10/1/20

⁸⁰ <https://hands.ehawaii.gov/hands/awards>, accessed 10/1/20

⁸¹ <https://hands.ehawaii.gov/hands/opportunities>, accessed 10/1/20

⁸² <https://auditor.hawaii.gov/reports/>, accessed 10/1/20

d. Contract Oversight in Maryland

i. Overview

Scope of Contracting in Maryland

The Procurement Advisor's Report of Maryland's Board of Public Works for Fiscal Years 2017 and 2018, published on February 11, 2020, describes the number and value of state contracts. The report lists all categories of goods and services purchased. This report is available online. Interested citizens can find detailed information about contracting in this annual report,.

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The total value for 2018 for all categories of state contracts was \$8.35 billion. Of this amount \$4.05 billion was spent on two service categories: general services and a category named Human, Cultural, Social and Educational Services. So roughly half the amount spent on all contract purchases of goods and services from outside sources was devoted to those two broad areas. The report also indicated that the total number of services contracts approved by the State of Maryland in 2018 was 718 plus 171 approved contract modifications. To place those figures in context, the overall Maryland state budget in 2018 was approximately \$43.5 billion, including nearly \$13 billion in federal funds. Therefore, spending on state contracts appears to account for about 19% of total state revenue or nearly a fifth of state spending.

Relevant Institutional Structures in Maryland

Although Maryland's legislature is limited to a short (three month) session, it makes good use of its limited time, meeting for around 70 days per session. Squire (2017) reports that few legislatures with unlimited session days meet for more than this. The Maryland legislature further leverages its time using interim committees to pursue specific investigations, such as legislative oversight. The Legislative Policy Committee (LPC) makes decisions about the use of interim committees throughout the year. This joint committee, consisting of 14 senators and 14 delegates, can also hold hearings, subpoena witnesses, and prepare legislation throughout the year. The Maryland legislature benefits from an extensive staff of nearly 800, the majority of whom (around 650) are permanent, year-round employees. Thus, even with the limits on session length, Maryland's legislature is ranked by Squire (2017) as the 10th most professional chamber in the U.S.

Maryland's governor is ranked among the top five most powerful governors in the US based in large part on the exceptionally powerful budget authority of this office. The governor proposes a budget to which the legislature may make cuts only. The legislature may not transfer money between state agencies or increase funding for any state agency. The governor also has line-item veto authority that the legislature may override with a three-fifths vote in both chambers.

⁸³ <https://bpw.maryland.gov/Publications/FY2017-2018%20FINAL%20PROCUREMENT%20ADVISORS%20REPORT.pdf>

Overview of the Contracting Process in Maryland

In February 2016, Maryland Governor Larry Hogan established a Commission to Modernize State Procurement. In December 2016, the Commission published a lengthy report with a total of 57 recommendations.⁸⁴ The oversight section of the report presented 17 recommendations on a wide variety of technical matters to improve contract oversight in the state. The Commission report has since sparked multiple contract reforms.

In 2017, the Maryland General Assembly passed HB 1021 (effective 2019), which transferred the state's procurement authority to the Department of General Services (DGS) and created a Chief Procurement Officer to lead the DGS Office of State Procurement. The CPO was given the authority to issue rules governing state agency contracting authority. For example, in 2020, the CPO recommended to the DGS Secretary that the maximum emergency procurement threshold be raised to \$100,000 from \$50,000.

In 2019, Maryland established the eMaryland Marketplace Advantage (eMMA), an automated centralized information system that is now used by most state agencies and many county and municipal governments to automate the contract approval process.⁸⁵ eMMA is managed jointly by DGS OSP and the Maryland Department of Information Technology (DoIT).

Despite the 2017 creation of the DGS CPO, the Maryland Board of Public Works (BPW), a constitutional entity dating back to 1825, continues to exercise substantial authority over state contracts.⁸⁶ Among other activities, it controls state procurement policy and regulations, debars problematic vendors, and approves most state contracts exceeding \$200,000. The board consists of the Governor, State Treasurer, and State Comptroller. It is advised by a larger, 12-member, Procurement Improvement Council that consists of various executive department heads (including DGS), and representatives from the public and local government (Maryland.gov 2020).

The BPW meets every two weeks to consider procurement contracts, capital projects, and the acquisition and transfer of the state's assets. State agencies can make small purchases (under \$50,000) and emergency purchases without BPW approval but must otherwise obtain BPW assent to proposed contracts. It appears that BPW has superseding authority over the DGS CPO, giving the Governor, Treasurer, and Comptroller final authority on state procurement decisions and procurement policy. For example, in 2001, the BPW issued an advisory rule requiring state agency heads to designate one or more Procurement Review Groups within their agencies to "maximize opportunities for Minority Business Enterprises to participate in State procurement contracts."⁸⁷ This action indicates that BPW has procurement policy authority that extends across the executive branch.

⁸⁴ <https://governor.maryland.gov/ltgovernor/wp-content/uploads/sites/2/2016/12/Commission-to-Modernize-State-Procurement-Final-Report.pdf>

⁸⁵ <http://dls.maryland.gov/pubs/prod/ProgEval/EvaluationofEmergencyProcurement.pdf>

⁸⁶ <https://bpw.maryland.gov/Pages/about-bpw.aspx>

⁸⁷ <https://bpw.maryland.gov/Pages/adv-2001-2.aspx>

Legislative Oversight of Contracts in Maryland

Numerous legislative committees conduct oversight of contracts and procurement in Maryland. The House Appropriations Committee conducts hearings on issues concerning the awarding of state grants to for-profit and nonprofit organizations. The Joint Committee on Audit and Evaluation (JCAE) focuses on financial audits. The JCAE is composed of 20 legislators, including a Senate Chair, a House Chair, six Democratic senators, three Republican senators, six Democratic representatives, two Republican representatives, and presently one vacancy.

These committees consider audits, reports, and other information produced by several analytic support staff subunits within the legislature's Department of Legislative Services (DLS). DLS handles a wide range of analytic functions for the legislature, including policy analysis, auditing, and program evaluation.⁸⁸ One DLS subunit, the Office of Policy Analysis (OPA), supports the legislature's committees by providing policy, budget, and legal analysis, including with respect to procurement issues. Another, the Office of Legislative Audits (OLA), focuses on financial accountability, conducting fiscal and compliance audits of state offices.⁸⁹ While OLA normally confines its work to fiscal matters, upon request from the DLS Executive Director or from the legislature directly, OLA has also conducted performance evaluations and produced other special reports. In addition, in 2019, the legislature established a third DLS subunit specifically dedicated to performance evaluation, called the Office of Performance Evaluation and Government Accountability (OPEGA). This new office is intended to strengthen the legislature's ability to conduct oversight of state programs and contracts. An OPEGA evaluation must be requested by either the JCAE or the DLS Executive Director.

The legislature created the Office of Program Evaluation and Government Accountability (OPEGA) in July 2019. Its first director was hired in November 2019, shortly before the COVID crisis led to lockdowns and legislative personnel working from home. OPEGA currently has a staff of three people, but that is expected to grow to 12 or 15 in the coming years as the office continues to develop.

According to one DLS staff member, OPEGA's mission is to conduct deep dives into issues to help the legislature monitor the activities of the governor's administration, especially activities that have been outsourced to contractors. The DLS staffer explained that OPEGA's work differs from other DLS offices that conduct evaluations, because it looks at broader issues than the financial transactions scrutinized in a typical DLS audit. Those issues could include the quality of contractor performance and how contractor performance relates to the bigger picture on effective public policy. Additionally, the staffer explained that when legislators appropriate funding for projects or initiatives, they often want to verify that the desired results were achieved. OPEGA is intended to assist with that objective. Moreover, prior to OPEGA, legislators had no easy way to determine the return on investment from funds appropriated. Instead, in prior years, Maryland's legislature typically commissioned sunset evaluations of

⁸⁸ <https://msa.maryland.gov/msa/mdmanual/07leg/legser/html/legserf.html>

⁸⁹ https://www.ola.state.md.us/top_pgs/Publications/pubs_performance%20and%20specials.html

particular programs and agencies every ten years. The legislature expects OPEGA to conduct those types of evaluations moving forward.

OPEGA is also tasked with more existential questions regarding the operation of various programs and agencies and questions surrounding what constitutes an ‘emergency procurement’— issues that should help the legislature, specifically the Committee on Audit and Evaluation, evaluate the state’s progress towards the goal of good government, explained by one Maryland Legislative staffer as achieving the three ‘E’s:’ efficiency, effectiveness, and economy. In October 2020, OPEGA completed its first report, which evaluated best practices surrounding parole and probation in Maryland. In January 2021, OPEGA explored issues involved in emergency procurements, reflecting issues related to the COVID-19 pandemic.

The facts indicate that the Department of Legislative Services plays a key role in supporting the Maryland legislation. More specifically, it appears to contribute to legislative contract oversight efforts in three primary ways: (1) contract policy analysis and recommendations provided by the DLS Office of Policy Analysis; (2) financial audits, performance evaluations, or special reports provided by the DLS Office of Legislative Audit; and (3) performance evaluations and recommendations provided by the DLS’s newest office, OPEGA, when requested by either the DLS Executive Director or the JCAE.

ii. Three Maryland Case Studies

To deepen understanding of the Maryland legislature’s contract oversight efforts, three recent case studies follow. In the first, the legislature used an OLA audit to expose poor contract management by a state agency. In the second the legislature used a questionable COVID-related contract to launch an extensive investigation of the state’s emergency contracting practices. In the third, the legislature investigates tips from an employee whistleblower hotline revealed that a state agency lacked rules and procedures to evaluate the grants and awards it made.

Case Study 1: DDA’s management of CCS contractors

Over a period of years, the Office of Legislative Audits (OLA) has published numerous documents relating to the performance and financial practices of the Developmental Disabilities Administration (DDA), an agency located within the Maryland Department of Health and Mental Hygiene. In January 2019, it published a performance evaluation on the DDA’s monitoring of the delivery of services to consumers by the Coordination of Community Services (CCS). The DDA outsources its activities to seventeen organizations, called CCS agencies, composed of twelve local health departments throughout the state and five private companies. The audit showed that consumers of DDA services were adequately receiving services, such as housing, employment, medical, and mental health services, but revealed other problems related to how the DDA was managing the CCS agencies.

A subsequent OLA financial audit, conducted in July 2019, described eleven additional findings, four of which documented problems with the DDA’s oversight of CCS contractors. One of those findings revealed that the DDA made regular overpayments to the contractors. A

second disclosed that the DDA did not audit the CCS service providers to make sure that the payments made by the state to the private contractors were consistent with the actual services being provided. Another finding revealed that the DDA did not monitor the vendors to verify that services were provided to consumers. The final finding revealed that the “DDA could not adequately justify a \$2.7 million contract award to an incumbent vendor to continue assisting in the financial restructuring of DDA operations” (Maryland Office of Legislative Audits 2019).

A July 2020 follow-up OLA evaluation reported that that DDA had agreed to implement recommendations to resolve the eleven findings in the financial audit. OLA also reported that, although the DDA reported that it had resolved five of the eleven findings and made progress on the remaining findings, the OLA follow-up report verified resolution of only two of the findings and progress on the rest. (Maryland Department of Legislative Audits 2020).

Problems in the Developmental Disabilities Administration were not new. The OLA had been conducting audits, publishing special reports, and reporting DDA financial mismanagement to the legislature as far back as 2011. A 2012 audit had found, for example, that the DDA had total expenditures of \$806 million, and that 95% of that had been spent on contractors. \$31 million was specifically paid to contractors who planned, coordinated, and monitored other contractors. Additional findings indicated that the contractors were overpaid and there was insufficient documentation to verify that contractors were providing adequate levels of services to the disabled (Lazarick 2013). In 2013, the Maryland legislature restricted the release of \$1,000,000 from the DDA’s budget until the Maryland Department of Health and Mental Hygiene submitted a report that verified the DDA had implemented changes to its financial system (Report on the Fiscal 2014 State Operating Budget and the State Capital Budget and Related Recommendations 2013). This action was an example of the legislature exercising its power of the purse to ensure compliance.

Nevertheless, a September 2014 Daily Record article revealed that OLA auditors had found no evidence that the DDA had corrected its contract monitoring deficiencies. (Frager 2014).

This case study illustrates two best practices of legislative oversight, a persistent legislature that is willing to follow up on investigations, authorizing audit after audit to ensure audit recommendations are implemented. The legislature also demonstrated its willingness to restrict an agency’s budget in order to enforce compliance. It also demonstrates, however, the difficulty involved in forcing an executive branch agency to improve its contracting practices.

Case Study 2: Emergency procurement involving Blue Flame Medical LLC

On April 1, 2020, Maryland awarded a \$12.5 million contract on an emergency, sole-source basis to a company called Blue Flame Medical LLC for 1.5 million N95 respirator masks and 110 ventilators. At the time of the contract, these supplies were difficult to find and in great demand due to the outbreak of the coronavirus throughout the United States. Previously,

Maryland Governor Hogan had arranged for a major purchase of medical supplies from South Korea.

According to media reports, Blue Flame Medical was a company that had been founded only weeks earlier by two Republican Party consultants with connections to officials in the governor's office. The company submitted a bid via email and received assistance from an aide in the governor's office in order to obtain the contract award (P. Wood 2020).

When the equipment was not delivered as promised, criticisms of the contract increased. In May 2020, State Senator Jill Carter was quoted in the press warning, "The process has no oversight with everything being funneled through the Maryland Emergency Management Agency. We should create a non-political emergency Covid-19 Contracting Oversight, Equity, Accountability, and Transparency Board to ensure efficient use and distribution of available resources, as well as inclusion" (L. B. Wood 2020). Around the same time, the Maryland legislature asked OPEGA to investigate, evaluate state practices, and develop standards to determine when an emergency procurement should bypass normal procurement procedures. Further, House Speaker Adrienne Jones asked the House Appropriations Committee to review the matter.

Blue Flame eventually delivered 27 of the 110 promised ventilators, but the state canceled the remainder of the contract. Blue Flame sent a letter to the Maryland House Energy and Commerce Committee explaining that it had only been able to fulfill portions of the order (Mullins 2020). Evidence also emerged that Blue Flame had made deals to deliver similar products to California, Alabama, and Tennessee, all of which also collapsed (Mullins 2020). In the case of California, the state ended up rescinding a wire transfer of over \$450 million after the recipient bank flagged the Blue Flame account as suspicious (Pulliam 2020). Alabama had placed orders for 700,000 N-95 masks, 200,000 gowns, and 50,000 gloves and provided a cash deposit of \$1.8 million, which Blue Flame eventually refunded when it could not acquire the items at the promised price.

Maryland Delegate Kirill Reznik sent a letter to the state's Chief Procurement Officer about the matter, specifically inquiring how a firm like Blue Flame, with no background or experience in sourcing medical equipment, was awarded a contract for \$12.5 million. "Do we not have checks and controls on these kinds of payments?" he asked the House Appropriations Committee on May 21, 2020.⁹⁰

In January 2021, OPEGA released the requested performance evaluation report on Maryland's emergency procurement rules and practices.⁹¹ The report provided data on over 550 emergency procurements from 2013 to 2020, and determined that Maryland spent, on average, \$50 million per year using emergency procurements. The report offered multiple

⁹¹ <http://dls.maryland.gov/pubs/prod/ProgEval/EvaluationofEmergencyProcurement.pdf>

recommendations to improve emergency contracting in the state, including recommending that the Maryland General Assembly enact legislation to require: (1) the state's Chief Procurement Officer (CPO) to submit to the legislature an annual report on all state emergency contract awards; (2) CPO pre-approval of every emergency procurement; (3) faster disclosure of emergency contracts to BPW and the eMMA database; (3) development and use of emergency procurement performance metrics; and (5) development of alternative procurement methods to deal with emergency situations.

The report also includes several draft bills that are ready for introduction by members of the General Assembly. In addition, an appendix provides possible emergency contract performance measures that could be added to the state's existing Managing for Results program. These draft measures to implement many of the OPEGA recommendations provide opportunities for prompt legislative and executive branch actions.

This case study demonstrates several best practices in legislative contract oversight, including the legislature's insistence that a troubling state contract be examined, its use of that contract to trigger a deeper exploration of an important procurement issue, its use of a legislative support organization to initiate a performance audit of a specific set of contracting practices, and a resulting legislative audit report that not only provides original and useful state contract data, but also practical reforms to address the problems uncovered.

Case 3: Evaluation of Opioid Command Center Grant Program

The Maryland House of Delegate's Appropriations Committee scrutinized the Opioid Operations Command Center's (OOCC) grant program in a hearing on February 14, 2020. In 2018 and 2019, the OOCC annually disbursed \$10 million worth of grants to combat opioid addiction and overdoses (Maryland House of Delegates 2020). A tip left on the state's Fraud Hotline, a mechanism by which state employees can anonymously report fraud, waste, and abuse, and concerned raised by a local health department triggered investigations into the grant awards. Concerns of this local health department initiated an internal investigation by the Department of Health's Inspector General. This was followed by an audit by the Office of Legislative Services, responding to the allegations reported to the fraud hotline. The Inspector General of the Department of Health referred the matter to the Attorney General for criminal investigation, while the legislature simultaneously conducted its audit (Gaines 2020).

A tip from the fraud hotline reported that an opioid grant was awarded to a nonprofit organization called Farming 4 Hunger in the amount of \$750,000. The grant proposal stated that the organization would purchase and rehabilitate a former nine-hole golf course into a facility that combined drug treatment with teaching agricultural skills. The property would include a farm, a restaurant, and a new nine-hole golf course (Maryland House of Delegates 2020). The audit revealed that the OOCC did not have comprehensive procedures and controls in place to evaluate grant applications and determine the awards for grant recipients. "OOCC was found to not have written policies and procedures for the selection of grantees, determination of the amounts awarded, and the monitoring of grantees (Office of Legislative Audits 2020)." The

OCCC did not sufficiently notify the public about the availability of grant funds, there was no way to verify any of the information submitted by applicants, and there was no way to ensure that the grants were spent in accordance with the proposed activities. Additional findings revealed that the OCCC was not able to justify its \$750,000 grant to Farming 4 Hunger. There was no documentation that supported that the center evaluated the application. The \$750,000 grant, though awarded, was never actually disbursed to Farming 4 Hunger. At a house appropriations committee hearing on February 14, 2020, questions were raised by the OLA regarding the proposed location of the Farming 4 Hunger project. Caroline County experienced some of the lowest instances of opioid abuse and overdose, yet it was chosen as the location for the project. When given the opportunity to testify at the same hearing, the Director of the OCCC responded that the intention of Farming 4 Hunger was to serve the entire Eastern Shore Region, not just Caroline County. Legislators further pressed the director at the hearing, inquiring about the activities of the OCCC's nine-person staff. Given that grant oversight was found to be insufficient, legislators inquired how OCCC staff was spending their time at the expense of taxpayers. Delegate Henson inquired, "the OCCC was not doing compliance reviews, no internal controls, not advertising grants sufficiently, not doing independent verification, not doing all of the things that an agency that (provides) grants does, then what are they doing with the state's money?" (Maryland House of Delegates 2020).

The OCCC was found to have potentially mismanaged other grants in the program as well. An out-of-state nonprofit called Life Changing Experience, was awarded \$100,000, a majority of which was transferred to a private for-profit company owned by individuals who sat on the board of directors of the nonprofit. In addition to being a suspicious move, it also raised questions about the legality of the nonprofit's activities, considering that charitable nonprofits cannot be organized around the benefit of a for-profit entity (Office of Legislative Audits 2020).

Additionally, a \$40,959 grant made to an organization named Brook's House, was used for expenses that did not correspond to its proposal for the funds. The funds were claimed to be for staffing needs of the organization in the grant proposal, but were instead used for numerous other items, including a truck, a lawn mower and a grill, according to the subsequent grant agreement (Office of Legislative Audits 2020).

The OLA's proposed recommendations to resolve the findings included that the OCCC develop written policies and procedures for evaluation and review processes and for the OCCC to verify that funds are used in accordance with the grant proposals and agreements. Additionally, the center ought to refrain from awarding grants to nonprofits that transfer their funds to third parties.

iii. Conclusions

The Maryland legislature possesses a number of useful contract oversight mechanisms that can be identified as 'best practices.' They include utilizing three legislative analytical bodies, OPA, OLA, and OPEGA, to monitor and investigate activities related to a wide range of recipients of state money. Other best practices in Maryland include maintaining a fraud hotline

that allows state employees to report anonymous instances of waste, fraud or abuse; publishing a regular legislative audit bulletin that summarizes the audit activity and findings that allows members of legislature to stay informed; having an organizational culture of persistence demonstrated by conducting follow-up audits and holding hearings on the implementation of audit recommendations; restricting funds from agency budgets until better contract compliance is achieved; and using subpoenas to obtain nonpublic information. The Maryland legislature has performed all of these activities in accordance with its contract oversight role.

Maryland's new legislative audit office, the DLS Office of Program Evaluation and Government Accountability, has already produced two program evaluation reports that could support legislative actions to strengthen Maryland contracting practices. The report on state emergency procurement practices is particularly noteworthy for its compilation of original contract data, extensive recommendations for contract reforms, and draft bills and contract performance measures. These novel features of the report can facilitate prompt legislative and executive branch implementation of its recommendations is a best practice that advances legislative contract oversight.

e. Contract Oversight in Alabama

i. Overview

The Scope of Contracting in Alabama

For the state of Alabama, for several reasons, this report was unable to calculate the total number of services contracts issued by the state per year.⁹² When using the Alabama STAARS procurement system, it is hard to separate contracts for services from purchases of routine supplies. It is possible, however, to estimate the volume of state contracts for professional services by looking at the agenda for the monthly meetings of the Contract Review Committee (CRC)⁹³ (described in detail below). Even that agenda only yields an estimate of the scope of state contracts because the contracts are listed by agency or substantive area with a combined number of federal, state, and local contracts. State funds are, however, listed in a separate column. Additionally, legal services contracts are listed on a separate agenda. Based on the committee agendas for the monthly meetings during 2020 it appears that there were approximately 475 contracts considered. Of these 130 were contracts for legal services. The total cost to the State of Alabama for these contracts was approximately \$415 million. Of this amount, nearly \$26 million was for legal services.

These figures cover, however, only the contracts subject to review by the CRC during one year. They do not include ongoing multi-year contracts. Given that Alabama's state budget, including funds from the federal government, is approximately \$32 billion for 2019, it likely that the \$415 million in contracts reviewed by the CRC vastly underestimates the scope of contracts in Alabama. This figure does reflect, however, the parameters of the CRC's oversight efforts.

Relevant Institutional Structures in Alabama

Alabama's executive and legislative branches both have moderate formal powers. Squire (2017) ranks the legislature as the 34th "most" professional, and the National Conference of State Legislatures describes it as a hybrid chamber, meaning that legislators typically have a second source of employment. The governor is ranked the 22nd "most" powerful among the states.

This assessment of the legislature is based on several factors. Legislative sessions are limited to 30 days, with the potential for special sessions but only when called by the governor. Legislators' pay is tied to the state's median income (approximately \$45,000), which means that most legislators hold another job. The legislature employs approximately 400 staff members of which about 350 are permanent. This represents a small number of legislative staff, relative to

⁹² We focus on services contracts for two reasons: they tend to be high value contracts and when problems occur there can be severe consequences. Performance audits are typically needed to oversee the monitoring of this type of contract. This distinguishes services contracts from contracts for procuring things like office supplies, which often can be assessed using financial audits.

⁹³ This committee is also referred to as the Contract Review Permanent Legislative Oversight Committee on the Alabama State Legislature webpage in the section listing House Interim Committees and as the Contract Review Oversight Committee

other states the size of Alabama. On the other hand, Alabama has no legislative term limits, so it is possible for legislators to accumulate experience.

Alabama's executive branch is comprised of 20 separately elected positions, including the governor and lieutenant governor. Currently, the one-party dominance of government in Alabama means that efforts to construct a system of "checks and balances" within the executive branch are overshadowed by the governor's influence as leader of his or her state political party. On the other hand, gubernatorial control of many state agencies is formally limited. Moreover, despite strict separation of powers provisions in the Alabama constitution, the lines between the executive and legislative branches of government sometimes overlap, because the lieutenant governor not only presides over the state senate, but also holds ex officio positions on 23 legislative committees. In addition, although the governor possesses the line-item veto, the legislature can override gubernatorial vetoes by a simple majority in both chambers.

Overview of the Contract Monitoring Process in Alabama

In Alabama, the governor is ultimately in charge of contract approval.⁹⁴ Sections 42 and 43 of the Alabama State Constitution have been interpreted by the Alabama Supreme Court to prohibit the legislature from "interfer[ing] with the core power of the executive branch to execute the laws" including by interfering with the governor's power to enter into a contract to carry out a statute.⁹⁵ In other words, because it is within the executive branch's power to enter into a contract, the legislature cannot exercise this same power, based on the strict separation of powers provisions in the Alabama Constitution as interpreted by the state's courts.⁹⁶ So, although the Alabama legislature, through the CRC, may review contracts, this review does not include the power to reject contracts. The CRC can only raise questions and voice concerns about a state-issued contract and can delay approval of a specific contract for up to 45 days. It appears that the legislature would like to have more prerogatives in this area because in March of 2021, the Alabama House passed legislation that would create a Joint Legislative Oversight Committee on Obligation Transparency that would have 45 days to review agreements entered into by any state agency or department valued at more than \$10 million of 5% of that state agency or department's general fund appropriation. The bill at the time of this writing has been read once in the Alabama Senate and assigned to the Senate Finance and Taxation General Fund Committee, where it awaits action.⁹⁷

At the time of this writing, the Alabama legislature's power to oversee state-issued contracts relies heavily on information requests, public hearings, delay, and informal negotiation. The CRC can influence the contracting process by calling attention to a specific contract, including by holding a hearing or delaying its approval. Legislators can then provide critical

⁹⁴ interview notes 2020

⁹⁵ Opinion of the Justices, No. 2004-380, Supreme Court of Alabama (2004), <https://caselaw.findlaw.com/al-supreme-court/1025673.html>.

⁹⁶ <http://alisondb.legislature.state.al.us/alison/codeofalabama/constitution/1901/toc.htm>
[https://ballotpedia.org/Article_III,_Alabama_Constitution#:~:text=Text%20of%20Section%2042%3A&text=\(a\)%20The%20powers%20of%20the,legislative%2C%20executive%2C%20and%20judicial.](https://ballotpedia.org/Article_III,_Alabama_Constitution#:~:text=Text%20of%20Section%2042%3A&text=(a)%20The%20powers%20of%20the,legislative%2C%20executive%2C%20and%20judicial.)

⁹⁷ <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021RS/PrintFiles/HB392-int.pdf>

feedback about the contract and draw public attention to it. State media also appear to cover the rare delay of a contract by the legislature, which attracts additional public attention. The purpose of the CRC review is to provide advice to the executive branch about the contract, to provide the governor with time to reconsider signing a contract, and to allow concerns and opposition from other sources to evolve. If a contract requires increased funding, Alabama legislators can also use budget negotiations and the appropriations process to affect a contract. Finally, if the agency who issued the contract is subject to a sunset review, the legislature might be able, through its Sunset Committee, to address contract concerns.

Apart from the legislature, the elected Alabama State Auditor can, and does, take legal action against the governor to address problems with contracts. But this process constitutes the executive branch overseeing another part of the executive branch. In this context it is important to remember that Alabama elects numerous executive branch officials separately and that those officials sometimes clash, including over contracts.

Legislative Oversight of Contracts in Alabama

Alabama has three analytic bureaucracies, two of which are part of the legislative branch, with the potential to exercise detailed contract oversight: the Department of Examiners of Public Accounts (DEPA), the Legislative Service Agency (LSA), and the office of the elected State Auditor. None of the three, however, conducts formal contract performance audits, although DEPA reports sometimes include an assessment of contract effectiveness or efficiency along with financial audit information.

DEPA is part of the Alabama legislative branch.⁹⁸ The chief examiner of DEPA is appointed by the Legislative Committee on Public Accounts (LCPA) to serve a five-year term, and DEPA operates at the direction of the LCPA.⁹⁹ The LCPA is a joint chamber committee, meaning it draws members from both the Alabama House and Senate.¹⁰⁰ Of its 12 members, the House elects five and the Senate elects five. By law the Senate President Pro Tempore -- the state's lieutenant governor -- is the chair, and the House Speaker is the vice-chair.¹⁰¹ The DEPA chief examiner attends LCPA meetings in order to present information and evidence that the committee has requested. An Alabama statute limits this committee to meeting for no more than 10 days per year, with an option to hold special meetings for up to an additional 10 days at the call of the chair (who is the lieutenant governor). These institutional arrangements are spelled out in the Alabama Constitution and a 2018 statute, but during the past decade the legislature has introduced bills to cut DEPA's funding, to change its reporting relationship with the legislature,

⁹⁸ <https://examiners.alabama.gov/about.aspx>

⁹⁹ <https://casetext.com/statute/code-of-alabama/title-41-state-government/chapter-5a-examiners-of-public-accounts>; see Section 41-5A-2

¹⁰⁰ http://www.legislature.state.al.us/aliswww/ISD/JointIntCommResults.aspx?OID_COMM=2900&COMMITTEE=Legislative%20Committee%20On%20Public%20Accounts

¹⁰¹ <https://casetext.com/statute/code-of-alabama/title-41-state-government/chapter-5a-examiners-of-public-accounts/section-41-5a-16-legislative-committee-on-public-accounts-established-composition-vacancies>

and to eliminate the LCPA. DEPA's fate is crucial for contract monitoring in Alabama, but its future remains uncertain.

DEPA "is empowered to audit the books, accounts, and records of all state and county offices, officers, bureaus, boards, commissions, corporations, departments, and agencies and to report on expenditures, contracts, or other audit findings found to be in violation of law."¹⁰² According to people with knowledge of its work, DEPA conducts primarily financial audits of state contracts, meaning it checks the amounts charged and paid under the contract, but does not evaluate the contractor's performance. DEPA forwards its findings not only to the LCPA, but also to the CRC, another joint chamber committee with explicit contract oversight responsibilities.¹⁰³

The CRC meets at least monthly, whether or not the full legislature is in session, to review contracts for personal or professional services. State agencies submit to the committee a form that includes itemized financial information and a justification for the contract along with other information. If there is an issue with a contract, CRC members may reach out to the relevant agency with any inquiries. The CRC can also subpoena witnesses and documents and hold public hearings. If the committee takes no action within 45 days of a state agency's submission of the information about a contract, the contract is approved by default. The committee's ten members, (five from each legislative chamber), include the Chair of the Senate Finance and Taxation General Fund Committee, the Chair of the House Ways and Means Committee, and three additional members each from the House and Senate appointed by the leaders.¹⁰⁴

As we described in our 2019 report, the extent of the CRC's contract review is unclear, despite the prominence of the committee on the website for Alabama's legislature. Even when the committee raises technical issues with a contract, the CRC can only delay, not prevent, a contract from being approved. In addition, many contracts are exempt from CRC review, including those used to purchase insurance, those let by competitive bid, those entered into by public corporations and authorities, and those which do not exceed \$1,500, and certain emergency contracts (Sec. 29-2-41.3). The expansive nature of these exemptions helps explain the problems Alabama has had with various contracts, including some designed by the executive branch to sidestep CRC review. As we explore below in the case of the STAARS financials systems contract, a \$41 million no-bid contract that led to a meltdown of the state's financial payments system, CRC appears to have been blocked from playing any role in reviewing the contract.

Despite these limitations, the CRC does occasionally use its review power to delay contracts. The rarity of CRC delays contributes to their newsworthiness when they occur,

¹⁰² <https://examiners.alabama.gov/about.aspx>

¹⁰³ http://www.legislature.state.al.us/aliswww/ISD/House/ContractReviewComm.aspx?OID_COMM=1200&COMMITTEE=Contract%20Review%20Permanent%20Legislative%20Oversight%20Committee

¹⁰⁴ <http://alisondb.legislature.state.al.us/alison/CodeOfAlabama/1975/29-2-40.htm>

according to media commentators. Claims about the infrequency of such delays is consistent with our search of the Alabama Political Reporter website.¹⁰⁵ Going back seven years to 2013, we found only a handful of instances in which contracts were delayed by the CRC.

The appropriations process provides another opportunity for the legislature to oversee contract spending. Membership on the CRC overlaps with the finance committees of each chamber. Therefore, each contract is brought to the attention of the chairs of committees responsible for state agency budgets, and the appropriations process provides another opportunity for legislative input. The legislature also has numerous joint committees designated to exercise oversight of the executive branch, such as the Committee on Homeland Security Oversight and the Prison Committee.¹⁰⁶

Sunset Oversight

Finally, a review of contracts can occur when DEPA provides sunset reviews to the Sunset Review Committee (SRC).¹⁰⁷ Sunset reviews cover all state-funded activities, including contracts. The SRC has the authority to discontinue or modify any state-funded activity,¹⁰⁸ although it requires legislation to carry this out.¹⁰⁹ The committee consists of 12 members, three elected from each chamber and two more from each chamber appointed by the chambers' presiding officers, and ex officio members, the President Pro Tempore of the Senate and the Speaker Pro Tempore of the House. It must annually review the operations of state agencies that are either scheduled for review by a sunset law or in enabling acts. However, it can choose to review the operations of any agency¹¹⁰ or the chambers may require a review via resolution. The SRC review can include agency operations related to contracts.

After conducting a review, the SRC can recommend three paths for an agency: (1) "continue without modification" (a bill is required); (2) continue with or without modification (a bills is required); or (3) termination (a bill might be required). Termination is automatic for agencies subject to the sunset process; a bill is required to continue these. The SRC meets multiple times between sessions to consider "information about specific agencies." Each meeting includes a public hearing where the agency and officers are "expected to attend and answer questions" from the committee. Sunset bills have priority on the calendar of legislative business beginning on the 10th day of the legislative session. Here again, the legislature uses this authority very, very rarely. As we noted in our 2019 report,¹¹¹ there are only two or three times that the SRC has terminated any entity, according to sources familiar with this committee.

¹⁰⁵ <https://www.alreporter.com/contact-us/>

¹⁰⁶ <http://www.legislature.state.al.us/aliswww/ISD/House/JointInterimCommittees.aspx>

¹⁰⁷ http://www.legislature.state.al.us/aliswww/ISD/JointIntCommResults.aspx?OID_COMM=1400&COMMITTEE=Sunset%20Committee

¹⁰⁸ interview notes 2020

¹⁰⁹ https://examiners.alabama.gov/sunset_members.aspx

¹¹⁰ https://examiners.alabama.gov/sunset_members.aspx

¹¹¹ https://law.wayne.edu/levin-center/pdfs/accessible_cus_full_report_07-08-19.pdf

Sunset reviews are a blunt instrument to address contracting problems. Terminating an agency solely for poor contract oversight would be an extreme response to a problem that could benefit from more targeted remedies. Still, SRC reviews do provide another avenue for the Alabama legislature to investigate and press for contract reforms.

ii. Three Alabama Case Studies

To deepen understanding of the Alabama legislature’s contract oversight efforts, three recent case studies follow. In the first, the legislature delayed approval of a \$360 million contract to provide mental health services in state prisons. In the second, the legislature helped sidetrack a controversial \$2.1 billion road and bridge construction contract financed by road tolls. In the third, the legislature worked with the State Auditor to challenge a \$47 million, poorly performing software contract that the governor claimed did not have to undergo legislative review because it involved renewal of an existing contract, even though that contract had expired decades earlier.

Case Study 1: Delay in Contract Approval for Prison Mental Health Services

In January of 2019, the CRC exercised its power to delay a contract. The Department of Corrections (DOC) ¹¹² planned to sign a \$360 million contract with Wexford Health Sources Inc., to provide mental health services to the state’s prisons. This contract was a response to a 2018 ruling by a federal judge charging the state with failure to provide mental health care that met “constitutional standards.”

To “satisfy the federal court,” the Alabama DOC initiated a bid process by contacting 12 vendors with a request for proposals. It received four responses, three of which were deemed adequate. These three bids were from Wexford Health Sources, from Centurion, the state’s current mental health care provider, and from Corizon Health, which provided medical care for DOC. A DOC spokesperson said the price for services differed very little among the three bids, but Wexford received a 96 percent score for service quality while the other two vendors received scores of 92 percent each. The CRC Chair Jack Williams said he was concerned about a lawsuit in Mississippi that involved mental health services provided by Wexford. This prompted the agency, the Alabama Department of Corrections, to meet with the committee and discuss protective measures to ensure the success of the contract.¹¹³ The contract included a \$15 million bond, which the DOC said protected the state from potential vendor failures to provide adequate services. The contract also included a termination clause if Wexford was found to have lied to Alabama about its role in the Mississippi allegations.

The source of Committee Chair Williams’ concern was a lawsuit in Mississippi in which several companies, including Wexford, were charged with bribing the Mississippi prison commissioner and providing kickbacks. The prison commissioner was sentenced to nearly 20 years in prison as a result of these schemes. Despite his concerns, CRC Chair Williams acknowledged that ultimately the decision would be made by the governor. He described the

¹¹² https://www.al.com/news/2018/03/health_care_contract_for_alaba.html

¹¹³ https://www.al.com/news/2018/03/health_care_contract_for_alaba.html

committee’s role as giving the governor additional time to “process the information and determine the direction they want to go in.” Although the governor’s office had not asked for a delay, the committee chair had informed Governor Ivey’s office that he intended to delay the contract.

Ultimately Chair Williams released the contract 30 days later, where upon the governor signed it. He said that his decision was based on the need for Alabama to reach an agreement over a federal lawsuit about inadequate prison services. The next point at which the legislature had input into this contract was their vote to approve an additional \$80 million budget request from Gov. Ivey to increase staffing and other mental health services for inmates—part of the contract with Wexford. The legislature approved the contract expenditures and the Governor signed the contract.

This case study illustrates two ways in which the Alabama legislature exercised its limited contract oversight authority over a \$360 million contract – by delaying the contract’s approval and by reviewing a related request for additional state funding. While the legislature’s oversight did not result in any contract changes, it still served as a check on the governor, forcing her to justify her contracting decisions.

Case Study 2: Back to the Drawing Board on the Mobile River Bridge Project

In 2019, the Alabama Department of Transportation (ALDOT) proposed a \$2.1 billion project to build a new bridge and expand the existing “Bayway” crossing the Mobile Bay using Route I-10. The proposed bridge was described as a six-lane cable-stay bridge that would rise 215 feet above ground.¹¹⁴ To cover part of the cost of the project ALDOT proposed charging a \$6 toll. The cost for people using the bridge to commute to work would be about \$90 per month. Not surprisingly, there was public outcry, and the trucking industry protested. Public meetings held in the spring and summer of 2019 demonstrated local opposition. The Governor’s office described the project as vital for “commerce, efficiency and safety.” The State Auditor, Jim Ziegler (a member of the governor’s party), opposed the project, creating a Facebook page “Block the Mobile Bayway Toll” that attracted more than 42,000 members.

At its August 2019 monthly meeting, the CRC refused to immediately renew a \$750,000 contract for ALDOT to pay for legal services from Maynard, Cooper, and Gale. This law firm had expertise with P3 public-private partnerships with tolls. The bridge project would be the state’s first P3 project, and ALDOT expressed concern about the prospect of continuing the development of the bridge project without legal representation.¹¹⁵ The committee decided that the contract was too controversial for it to approve immediately, so it put a 45-day hold on its decision. This was a contract renewal, so it seems likely that it was not the contract itself but rather the law firm’s toll road expertise that was controversial.

¹¹⁴ <https://www.wsfa.com/2019/07/31/toll-proposal-mobile-bridge-project-raises-concerns/>

¹¹⁵ <https://www.wsfa.com/2019/08/02/legislative-committee-holds-legal-contract-mobile-river-bridge-project>

In response to the CRC delay, Governor Ivey objected to slowing down the project, saying that it was not wise to delay a project that was nearly 25-years old. “The cost of doing nothing is too high and no one is suggesting it will get any cheaper if we just wait.”¹¹⁶ But by the end of the month the Governor “pulled the plug” on the bridge project. The crucial change appeared to have been a decision by the Eastern Shore Metropolitan Planning Organization to eliminate the bridge from its short-term planning documents.

The sunk costs of the project, nearly \$60 million, dated back to its inception in 1997. That money had paid for design, environmental, traffic studies, land acquisition, and other preliminary costs. Some people and businesses had lost their property through the state’s use of eminent domain. State taxpayers had also paid for these costs. As of 2019, the project appeared stalled. But given the previous investment it was unlikely that the project would be completely abandoned.

So, it was not surprising that in early 2020, a new plan surfaced that scaled back the cost of the bridge. This new plan did not require tolls and would cost about half as much as the original \$2.1 billion dollar project. The new proposal was designed by a group called the Common Sense Campaign. At the end of 2020, advocates of the new bridge proposal were trying to gain support from city councils of Eastern Shore communities and to gain support from Senator Greg Albritton, chair of the Senate Finance and Taxation General Fund Committee. His support was considered key to moving the project forward.¹¹⁷ This effort to gain support from Senator Albritton underscores the way in which the linkage between the CRC and the budget process empowered the legislature to influence a project like this. Even though it was not direct contract oversight, the power to delay a key contract as well as the power of the purse to provide contract funding provided mechanisms for the Alabama legislature to exert influence over an important state-issued contract.

In November 2020, ALDOT was asked to bring the Eastern Shore Metropolitan Planning Organization “up to speed” on the project. Despite the existence of an alternative, less costly plan, according to media reports,¹¹⁸ the plan presented by ALDOT was the same \$2.1 billion plan that had been pulled earlier. Differences were a new Metropolitan Planning Organization chair and possible discussion of ways to allow local residents to use the bridge and causeway without paying a toll. More meetings are scheduled for 2021.

Case Study 3: No Bid Contract Dodges Legislative Oversight

In 2016, the Alabama State Auditor Jim Zeigler filed a lawsuit challenging a contract issued by the Alabama state Finance Department to install software for a state financial system called the State of Alabama Accounting Resources System, or STAARS. The contract had not

¹¹⁶ https://www.fox10tv.com/news/mobile_river_bridge_and_bayway/gov-ivey-no-build-option-not-acceptable-for-i-10-bridge-project/article_7ee4b364-bae3-11e9-88cb-b7248d716eda.html

¹¹⁷ <https://www.wkrq.com/mobile-river-bridge/part-3-the-alternative-bridge-and-expressway-plan-politics-consensus-and-exit-35/>

¹¹⁸ <https://myabc15.com/news/local/mobile-river-bridge-project-back-on-the-table>

been bid competitively. The Department of Finance claimed that a bid was not necessary, because it was merely modifying an existing though dormant contract with CGI Technologies and Solutions to pay for this work. The lawsuit alleged that “the massive no-bid contract violate[d] Alabama’s bid laws and the software does not work” (Moseley, 2016).

The 15-year \$47 million STAARS contract had never been submitted to the legislature’s Contract Review Permanent Legislative Oversight Committee before being signed. State officials had bypassed the bid laws by resurrecting a dormant contract from 1982 that had expired in 1997 (Moon, 2017). They claimed an existing contract did not have to undergo CRC review. The state officials also declined to submit their amendments to the dormant contract to the CRC. State Auditor Zeigler challenged the state’s action to bypass committee review, because the resurrected contract had not been active for years.

According to the Department of Finance if it had to competitively bid the STAARS contract it would have cost Alabama approximately \$100 million more in contract costs. The state sought instead to purchase “off the shelf” software from CGI using the dormant contract. This action was consistent with ongoing claims by state officials that no-bid contracts were more efficient. Yet, it turned out that legal advisors to then Gov. Bob Riley had advised the relevant software selection committee that state law required it to follow an Invitation to Bid (ITB) process, a process that was consistent with state attorney general opinions in this same area (Britt, S. 2016).

But even more important than the no-bid contracting maneuver was the fact that the resulting system was an accounting nightmare. The facts showed that the state could not pay its bills on time or process inter-agency funds transfers. Vendors were not paid on time. Audit reports were not submitted on time. Payroll vouchers had to be resubmitted. During a joint budget oversight committee hearing exposing those problems, acting Finance Director Bill Newton was aggressively questioned about the failed STAARS system. According to one observer, however, “he was allowed to dance around the subject by offering a vague mea culpa” (Britt, 2016), and the hearing had no tangible effect on the contract with CGI.

In 2017, prior to an Alabama Supreme Court hearing on the CGI contract, the Finance Department announced that it was canceling the contract and moving maintenance of the STAARS system “in house.” Alabama sent a “disengagement letter” to CGI asserting that all contractual obligations were satisfied. Governor Kay Ivey and a CGI executive signed the letter on April 28, 2017.¹¹⁹ Consequently the Finance Department filed a motion to dismiss the case (Brownlee 2017).

The CGI contract was not an isolated instance of questionable use of no-bid contracts in Alabama. In 2015, the Alabama Department of Commerce paid Big Communications nearly \$100,000 to build a website that investigative reporters discovered could have been built for

¹¹⁹<https://www.alreporter.com/2017/05/02/finance-department-set-terminate-staars-contract-ahead-court-date/>

\$10,000 or less by other potential bidders, had a competitive bidding process occurred.¹²⁰ The Department of Commerce responded that the contract was not with Big Communications, but was a “piggy-back” on the marketing budget of the Alabama Industrial Development and Training (ALIDT) office, a subunit within the Commerce Department. The department claimed that piggy-back provided a mechanism to avoid the competitive bidding process. To further underscore the frequency of this practice, that same marketing contract with ALIDT was also a no-bid contract which paid \$384,000 for professional services related to advertising. Classifying a payment as one for professional services appears to be a loophole that state agencies can and have used to avoid the bidding process and to sidestep legislative oversight.

iii. Conclusions

Alabama’s legislature has limited opportunities for contract oversight due to court decisions restricting the legislature’s ability to oversee state-issued contracts. At the same time, the legislature appears to make some use of its limited oversight opportunities by engaging in contract delays, related appropriations assessments, and sunset reviews.

Given that the CRC’s contract oversight role is advisory only, its reluctance to delay contracts regularly during the bidding process could reflect the need for the legislature to negotiate changes to contracts rather than formally approve or reject them. This leads to one best practice—engagement of the public in support of or opposition to a contract. It appears that the CRC uses news coverage of its infrequent contract delays to inform the public of contracts the committee members see as questionable. Providing an “opportunity” for the governor to consider more information also provides an opening for other interest groups and citizens to raise their voices in opposition. In the case in the Mobile Bridge Project, public pressure at least temporarily derailed a \$2.1 billion contract and may still alter the plans of the executive branch. In the case of the CGI contract, the legislature used a public hearing to expose significant contract deficiencies crippling government functioning. That hearing supported a contemporaneous state auditor lawsuit that eventually led to the contract’s cancellation.

The legislature’s strongest powers lie in the sunset review process. While this is a post-hoc strategy, in the case ongoing contracts like the Mobile Bridge Project, the ability to terminate the agency administering the contract may help the legislature to force the executive branch to negotiate with it.

The case studies confirm that, in Alabama, the balance of influence over contracts tilts heavily toward the executive branch. They also show that, even with its greater powers, the executive branch appears to engage in a variety of maneuvers to dodge legislative oversight, including by reviving dormant contracts or piggy backing on existing contracts to avoid appearing before the contract review committee. The Alabama legislature faces additional work to strengthen its ability to act as an effective check on the state’s executive branch when it comes to issuing contracts paid with taxpayer dollars.

¹²⁰ <https://www.alreporter.com/2013/07/24/sec-of-commerce-uses-aidt-no-bid-contract-to-build-website-costing-almost-100k/>

f. Contract Oversight in Tennessee

i. Overview

Scope of Contracting in Tennessee

The state of Tennessee maintains a database tracking state-issued contracts and other procurements and also a list of active statewide contracts.¹²¹ According to the list of active contracts, there were 146 contracts in 2021. The state database shows 14,054 entries for calendar year 2020 and includes both services and product procurements. The data on services contracts and purchases of routine materials are not separated. The largest contracts are for professional services. For example, the state paid one private vendor \$5 million to initiate implementation of “mass notification software.” Additional contracts appear to be located in the budgets of individual state departments, such as the Department of Corrections. Surprisingly, the database does not provide a grand total for contract spending and the list of statewide contracts does not provide information about costs. More public access to this information would enhance government transparency and accountability.

The 2020 budget for the state of Tennessee totals nearly \$41 billion, which includes \$14.6 billion in federal funds. Contract information is distributed across state agencies or embedded in the 14,000+ line state database of contracts and products. Therefore, we cannot determine the proportion of the state budget that is spent through contracts with private vendors. Given the contracted services that we examine here (prisons, educational testing software, and facility maintenance), we can be confident that spending on contracts is in the billions of dollars and represents a significant portion of the state’s budget.

Relevant Institutional Structures in Tennessee

Tennessee’s General Assembly is a hybrid legislature. Its 33 senators and 99 representatives are paid poorly (approximately \$24,000 per year)¹²² and typically hold another job. Sessions are short. Tennessee’s legislature cannot meet more than 90 days during each two-year legislative session, although special sessions can be called by the governor or by the presiding officers of the legislature with written consent from two-thirds of the general assembly. Staff resources are quite limited compared to other similar hybrid legislatures, with only 322 staff; only 264 of these are permanent. Thus, Squire (2017) ranks Tennessee’s legislature as the 44th most professional legislature in the country.

The state executive branch has several unusual institutional characteristics; several executive officers are appointed by the legislature rather than elected or appointed by the

¹²¹ Central Procurement Office – Statewide Contracts
[https://hub.edison.tn.gov/psp/paprd/SUPPLIER/ERP/c/TN_PUBLIC_SUPPLIER.TN_ACTIVE_SWC_CMP.GBL?](https://hub.edison.tn.gov/psp/paprd/SUPPLIER/ERP/c/TN_PUBLIC_SUPPLIER.TN_ACTIVE_SWC_CMP.GBL?Page=TN_ACTIVE_SWC&Action=U&ExactKeys=Y&TargetFrameName=None)
Page=TN_ACTIVE_SWC&Action=U&ExactKeys=Y&TargetFrameName=None ; Statewide Contract Line
Details available on the

https://hub.edison.tn.gov/psp/paprd/SUPPLIER/SUPP/h/?tab=PAPP_GUEST;

¹²² <https://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx>

governor. For example, the legislature appoints the secretary of state, the state comptroller, and the state treasurer. The attorney general is appointed by the state's Supreme Court. There is no lieutenant governor; the speaker of the senate succeeds the governor and holds the honorary title of lieutenant governor. Finally, the governor's line-item vetoes of appropriations bills can be overridden by the simple majority in the legislature.

Although Tennessee's governor is ranked as the 15th most powerful in the country, he or she has less budgetary power than many governors. Although gubernatorial line-item vetoes are available, the legislature can override with a simple majority. As a result, Tennessee's governors rarely use their veto pen. Although the legislature is not term limited, the governor is. The limits apply only to consecutive terms of service, however. After two consecutive four-year terms, a governor may sit out for four years for being eligible to run again. The source of power for Tennessee's governor reflects extensive executive order powers. These include the ability to reorganize the state's government single-handedly.

Overview of the Contract Monitoring Process in Tennessee

Oversight of contracts in Tennessee focuses on procurement rather than the performance of vendors delivering state services. Tennessee state code Title 4, Chapter 56, identifies four government bodies that play significant roles in Tennessee's procurement process: the Procurement Commission, the Central Procurement Office, the Advisory Council on State Procurement, and the Joint Fiscal Review Committee of the Tennessee legislature.

The first of these, the Procurement Commission, is tasked with creating the state's procurement rules and provides recommendations to state agencies. This commission is composed of the Tennessee commissioners of finance, general services, and administration, as well as the comptroller of the treasury.

The second, the Central Procurement Office, handles procurement issues that fall below the \$250,000 threshold (the level requiring legislative approval) and competitive bids. The Chief Procurement Officer, who is appointed by the governor, leads this office. The Tennessee Department of General Services is the executive branch home of the state's Central Procurement Office. Both the Procurement Commission and the Central Procurement office are part of the state's executive branch.

A third body, the Advisory Council on State Procurement, has both executive and legislative branch members. It is comprised of 12 individuals (five voting, seven nonvoting) who approve state procurement policies, advise the comptroller, and monitor and evaluate the implementation of procurement practices. The Chief Procurement Officer is part of this body, serving as one of the seven nonvoting members. Other nonvoting members include appointees chosen by the Governor (2), Lt. Governor (2), the House Speaker (2), and the Chair of the Fiscal Review Committee. Voting members include the commissioners of finance, general services, and administration and the comptroller. This council meets annually to discuss changes to procurement policies and procedures. The meeting minutes from February 10, 2020 indicate that

this body periodically makes recommendations to the legislature about bills it could pass to codify changes to state procurement procedures.

Fourth is the Joint Fiscal Review Committee (FRC) of the Tennessee General Assembly.¹²³ The committee is composed of seven senators and seven representatives, elected by members of the Senate and House of Representatives, respectively. In addition, the speaker of each house and the chairman of the Finance, Ways and Means Committee of each house serve as ex officio members. Among other matters, the committee conducts oversight of the fiscal operations of state departments and agencies, prepares revenue estimates for state programs and legislative proposals, and requests and reviews all comptroller audits. The committee also reviews, provides comments on, and provides legislative approval of all proposed noncompetitive contracts exceeding \$250,000 in value and one year in length. It is this fourth government body that we examine in our investigation of legislative oversight of state agency contracting.

To do its work, the FRC (and other legislative committees) relies on a key legislative support agency, the Office of the Comptroller of the Treasury (OCT), to perform much of the heavy lifting on oversight. The legislature elects the comptroller every two years, along with the deputy comptroller, who jointly manage the OCT's 12 divisions and staff. The OCT is authorized to investigate fraud, waste, and abuse, evaluate the efficacy of state agencies and programs, and assess the efficient use of resources. Its authority includes the ability to audit state and local government entities. With its robust staff of 550 employees, the OCT not only conducts regular audits of state government and its constituent agencies, but also has a sunset review department which, by law, performs sunset reviews of state agencies and other state-funded entities every eight years. The OCT submits all of its audit reports to the FRC which may hold hearings on the audit findings.

According to a senior staff official in the comptroller's office, most contract management and monitoring activities occur at the state agency level and are carried out by executive branch personnel. The Procurement Commission, Central Procurement Office, and Advisory Council on State Procurement provide guidance to those state agencies by issuing contract guidance and regulations. The FRC and OCT act on behalf of the legislature to provide legislative oversight of the state's contracting activities.

Legislative Oversight of Contracts in Tennessee

In our 2019 report which reviewed 2017-2018 legislative oversight activities in all 50 states,¹²⁴ we wrote that the Tennessee Joint Fiscal Review Committee (FRC) spent considerable time granting and extending contracts. That's because, based on Chapter 403, Public Acts of 2013, this committee is charged with reviewing and approving noncompetitive state contracts exceeding \$250,000 in value and one year in length. This committee also is responsible for

¹²³ <https://www.capitol.tn.gov/joint/committees/fiscal-review/>

¹²⁴ https://law.wayne.edu/levin-center/pdfs/accessible_cus_full_report_07-08-19.pdf

overseeing all fee-for-service state contracts. (TN Code [§ 3-8-112 2016](#)) Other contracts are approved or monitored by the Department of General Services (DGS) Chief Procurement Officer's office, located in the executive branch.

In May of 2019, Tennessee's legislature altered some of the FRC requirements. Public Chapter Number 476 specified for the first time that the House speaker and Senate speaker were responsible for appointing a non-partisan, highly qualified executive director of the FRC and for determining this director's compensation. It appears that the legislature intended to enhance its ability to conduct oversight by ensuring a highly qualified, nonpolitical committee staff director. In addition, in January 2021, the FRC, which previously was a 15-member joint committee composed of six senators and nine representatives (The Sycamore Institute), became a 14-member committee composed of seven senators and seven representatives selected to reflect the partisan composition of the two legislative chambers (Public Chapter Number 476 of May 2, 2019).¹²⁵ The law also provided that the minority party must be allotted at least two seats on the committee (The Sycamore Institute May 22, 2019). These actions enhanced the committee's nonpartisan, fact-based foundations and suggest some interest in renewed legislative oversight of contracts.

During 2020, video recordings of two committee meetings—one for 48 minutes on January 23rd and another for 58 minutes on August 10th—focused solely on contract oversight demonstrate that the FRC takes its contract oversight responsibilities seriously. The January meeting featured questions from several committee members directed toward agency staff presenting information about non-competitive contracts. One legislator inquired about language that limited the liability of private vendors. Agency staff indicated that the language had come from a template provided by the state's procurement office. The legislator then suggested to the FRC chair that the committee might want to meet with the procurement office to pursue the issue of limits on vendor liability. This exchange suggests that the committee was willing to proactively oversee state contracting issues rather than simply review and approve individual contracts presented by the executive branch.

The FRC is not the only committee in the Tennessee legislature that conducts oversight of state contracts. Other committees can and do review state contracts delivering services to the public when the nature of those services fall within their jurisdiction. Comments made by agency witnesses at the FRC committee hearing made it clear that the substantive area legislative committees had reviewed the contracts in their agency oversight hearings. According to a senior staff official in the Comptroller's office, most contract management and monitoring occurs at the agency level, which would be consistent with substantive area legislative committees monitoring the work of state agencies under their jurisdiction. So, the FRC appears to provide a second review that focuses on contracting more generally rather than the agency's substantive activities.

¹²⁵ <https://trackbill.com/bill/tennessee-senate-bill-1235-fiscal-review-committee-as-enacted-designates-the-fiscal-review-committee-as-a-joint-office-of-the-general-assembly-revises-other-provisions-governing-the-committee-amends-tca-title-3-title-4-title-8-title-9-and-title-12/1678604/>, last visited 12/1/2020.

One ongoing challenge to the strength of oversight in Tennessee is the legislature’s prior decision to eliminate oversight committees in key sectors of state government. “In 2011, Lieutenant Governor Ron Ramsay and Speaker Beth Harwell made the decision to abolish joint oversight committees. A total of eleven oversight committees were abolished in an attempt to save the state money on staffing costs, which were estimated to be about \$850,000 at the time” (Ebert). Abolishing the 11 committees not only reduced the capacity of the legislature to monitor state agencies and programs, but also slowed its ability to examine state contracting. The rationale for these eliminations was controversial but was justified as saving the state on staff costs.

In 2018, legislative leadership revisited the topic of oversight as an important government function. Reasoning that it is essential for legislators to be informed of current issues relating to government functions and contracted services, House Speaker Glen Casada sought to reestablish oversight committees in three key areas of prisons, children and family services, and TennCare, the state’s healthcare exchange system (Ebert 2018). His effort to revive those oversight committees failed, but in 2019, the legislature did enact the legislation described above, which seems designed to enhance the quality of contract oversight through the FRC.

ii. Three Tennessee Case Studies

To deepen understanding of the Tennessee legislature’s contract oversight efforts, three recent case studies follow. In the first, the legislature audit agency issues reports exposing year-long poor performance by a contractor managing several state prisons. In the second, legislators used a joint letter, hearings, and legislation to oppose actions by the governor to outsource facility maintenance work from state employees to a private contractor. In the third, the legislature used OCT audit reports and hearings to address a problematic online testing assessment contract that repeatedly harmed students, teachers, and communities statewide.

Case Study 1: Oversight of Tennessee’s Corrections System

For many years, the State of Tennessee has used a private contractor, CoreCivic, to run some of its state prisons. The OCT has repeatedly conducted audits of Tennessee’s prisons, and these audits have repeatedly documented serious problems (Reutter, 2014). The legislature has held hearings exposing the problems but has yet to cure them. Two examples of the legislative oversight efforts follow, one in 2017 and another in 2020.

The 2017 oversight effort was triggered by a prison riot in April of 2017. In response, the OCT conducted an in depth audit of both the Tennessee Department of Corrections (TDOC) and CoreCivic, which ran the prison for the state. The audit found multiple staffing violations that put prison employees at risk, inadequate health care for prisoners that resulted in deaths, and severe overcrowding. The OCT audit report criticized TDOC for not holding CoreCivic accountable for its failures.

In November 2017, Joint Government Operations Committee (GOC), which has jurisdiction over corrections issues, met for four hours with the OCT to grill TDOC.¹²⁶ The GOC has the power to terminate state agencies and departments, including the Department of Corrections, and reportedly has considered it. In December 2017, the committee decided to reauthorize the department for one year instead of the usual four-year extension because if they terminated TDOC, then the entire corrections system would have to be run by contractors. Given that the audit determined the prison problems emanated from poor performance by a private contractor, CoreCivic, some legislators argued that terminating TDOC could make the problems worse. In exchange for another year of existence, TDOC promised to fine CoreCivic for violations, and a legislator on the committee promised to write legislation addressing problems with prison privatization.

In 2020, OCT released another audit report with scathing criticisms of Tennessee’s prison system, TDOC, and key private contractors, including CoreCivic.¹²⁷ The 210-page audit report cited a litany of problems, summarized in one media report as “understaffing, sexual assaults, poor medical services, failure to report violent incidents and investigate them properly, failure to test inmates for drug use, and a lack of oversight by prison officials” including at three prisons run by CoreCivic.¹²⁸ The audit report condemned TDOC leadership for failing to provide adequate oversight of the state’s correctional facilities and called in particular for “sufficient oversight over contracted services and other procurements.” (“Audit Highlights ... Department Leadership Oversight”)

The OCT audit report included detailed information about one of the CoreCivic-run prisons, Hardeman County Correctional Facility. Among other deficiencies, it described problems with the compliance metrics used to evaluate CoreCivic’s performance, noting that the measures calculated compliance based on the number of compliant items without regard for the severity of “critical findings.” Moreover, there was no distinction made between critical findings that might “directly impact the safety and security of inmates, staff, and the general public” and other findings. (p. 5) The report also determined that correctional facilities like Hardeman did not collect accurate information on inmate deaths, accidents and injuries, inmate assaults and violence, correction officers’ use of force, or facility lockdowns.

The report also criticized two other contractors, Centurion and Cozison Health, paid to provide medical and mental health services for inmates at all Tennessee correctional facilities. The audit report concluded that both contractors had failed to provide required medical services and consistently failed to meet required staffing levels. The audit report also indicted TDOC for its failure to follow statewide procurement policies to hold these contractors accountable.

¹²⁶ <https://www.wknofm.org/post/tennessee-lawmakers-say-they-want-better-answers-scathing-prison-audit#stream/0>

¹²⁷ <https://comptroller.tn.gov/content/dam/cot/sa/advanced-search/2020/pa19032.pdf>

¹²⁸ Peter White. “Lawmakers Give Tennessee Prisons a Pass.” *Tennessee Tribune*, Jan. 14, 2020, <https://tntribune.com/lawmakers-give-tennessee-prisons-a-pass/>.

On January 13, 2020, a joint subcommittee from the legislature’s Government Operations Committees held a hearing on the audit findings. The hearing presented the failures of both the state agency and its contractors. The hearing was part of the committee’s “sunset” review of TDOC. At its conclusion, despite the negative findings and TDOC’s long history of dysfunction and poor contract management, lawmakers again declined to abolish TDOC and instead renewed it for four more years, until 2024. If the committee had abolished the agency, all of the state’s correctional facilities would have been managed by the very contractors criticized in the audit report, demonstrating again how sunset solutions often aren’t practical solutions for contract problems.

As noted above, in 2011, Tennessee’s legislature, in an effort to save money, eliminated several oversight committees, including one dedicated to overseeing operation of the state’s prisons. In response to the 2020 audit which called for more legislative oversight of TDOC and the prison system, Senator Jeff Yarbro (D) sought unsuccessfully to reestablish legislative oversight of the state’s corrections system by establishing a legislative oversight committee specifically dedicated to the purpose. Senator Yarbro’s legislative initiative (Senate Bill 1757) was a response to a report from the state’s Comptroller,¹²⁹ which called for more oversight over the Department of Corrections and the state’s prison system. This report cited instances in which the Department of Corrections did not ensure that contractors provided adequate medical and mental health services to inmates (Arnold 2019).

Despite problems identified by the comptroller, CoreCivic still manages four of Tennessee’s correctional facilities, and the state manages 10 others itself. The Comptroller’s Performance Audit describes problems with the compliance metrics used at both CoreCivic and state-run facilities but points out that these measures are used to reward CoreCivic at one facility it operates. The measures in question calculate compliance based on the number of compliant items without regard for the severity of “critical findings.” Moreover, there is no distinction made between critical findings that might “directly impact the safety and security of inmates, staff, and the general public” (p. 5) and other findings. The report goes on to say that the correctional facilities do not collect accurate information on inmate deaths, accidents and injuries, inmate assaults and violence, correction officers’ use of force, or facility lockdowns. Neither CoreCivic or state-run facilities reported sexual assaults and harassment in a timely way.

In response to this audit report, Senator Yarbro complained that four legislative committees currently had input into the operation of TDOC, leading to oversight efforts that were inconsistent and fragmented with no specific legislative staff tasked with assisting legislators with these problems. But Republican legislators opposed re-establishment of the oversight committees. One, Senator Kerry Roberts, advocated for alternative methods of oversight. Another, Senator Mike Bell, advocated for individual legislators to provide oversight, rather than adopt an oversight committee system. Ultimately, both the Senate Government

¹²⁹ <https://comptroller.tn.gov/content/dam/cot/sa/advanced-search/2020/pa19032.pdf>

Operations Committee and the State and Local Government Committee rejected the bill (Arnold 2019).

This incident is merely the latest in a multi-year effort to restore a committee specifically responsible for state corrections oversight. State media report efforts as early as 2015 to restore the corrections oversight committee, which was decommissioned in 2011. The OCT recommends restoring the committee. In general, the House supports restoring this committee, while the Senate and, in some cases, the Governor oppose it. The outcome of Senator Yarbrow's efforts to restore a corrections oversight committee continued this pattern, suggesting that Tennessee's legislature is not eager to enhance its state Department of Corrections oversight capacity even when poor quality persists and when contractors are not providing the quality of service citizens are paying for.

This case study illustrates the persistent, fact-based approach of a legislative support organization empowered to conduct performance audits and publish audit reports detailing state agency problems, including poor management and oversight of state contractors providing vital state services. It also demonstrates that even powerful, repeated audit reports on the same constellation of problems cannot effect change without the support of legislators. Here, despite overwhelmingly negative findings and a long history of mismanagement, legislators did not debar any contractor, did not cut off funding, did not abolish the dysfunctional agency, and did not re-establish a dedicated oversight committee. In many ways, it is a story of failed legislative oversight.

Case Study 2: Facility Maintenance Outsourcing Contracts

In 2017, Tennessee's governor sought to increase the use of contract personnel to perform work then being performed by state employees to manage certain state facilities, an effort referred to as "outsourcing." In response, a bipartisan group of Tennessee legislators wrote a letter to the governor opposing his efforts to expand outsourcing of facilities management, in particular at the University of Tennessee. Their opposition to outsourcing ultimately led the legislature to amend public statutes to increase their power to oversee state contracts that affected the employment of any Tennessee state employee.

In 2015, the Tennessee government entered into a contract that outsourced 10% of its facilities management services to a Chicago-based firm, JLL. (Tamburin and Ebert 2017). During the bid process with JLL, the governor's office was criticized in local media outlets for shrouding the process in secrecy amid allegations that the companies bidding on the work had helped develop the outsourcing plan (Gervin 2016). The state asserted that the facilities management contract was competitively bid, although according to an OCT senior official the state had used a process known as *collaborative value development*, in which qualified vendors assisted in drafting the contract specifications. In a May 18, 2017 letter, the Tennessee State Employees Association (TSEA) pointed out that Tennessee's governor, prior to taking office, had been an investor in the winning contractor, JLL. The letter also reported several last-minute changes in the official request for proposals (RFP) and bidding process that suggested JLL had

the inside track all along. Those changes included altering the due date of the bids, which should have required a formal amendment to the RFP but, according to the TSEA, no such amendment was made.

In 2017, Governor Haslam sought to expand JLL's contracted services to include management of Tennessee's state park facilities, prisons facilities, and college campuses, primarily at the University of Tennessee. According to the governor's office, the move to outsource facilities maintenance purportedly would save the state upwards of \$35 million annually in staffing costs (Tamburin and Ebert 2017). However, members of the legislature, a group comprised mostly of members of the Governor's own party, strongly opposed the move. The group, which was composed of 16 Republicans and three Democrats in the House and Senate, sent a signed letter to the governor opposing the proposed increase in outsourcing, especially at state universities. Although the legislature had no ability to stop the outsourcing decision due to a law passed in 2016, the legislators decided to take a public stance anyway by sending the letter to the governor's office (Tamburin and Ebert 2017).

Their action mirrored a prior effort in 2015, when 75 senators and representatives asked the governor to halt the original contract to outsource state facilities management jobs to JLL. Those legislators cited prior failed outsourcing initiatives. They noted, for example, that the state privatized its motor pool to save money only to see costs more than double; and on another occasion when the state outsourced the management of student testing it had been unable to get the students' standardized test scores. They also noted that UT-Knoxville had such a bad experience outsourcing custodial services that it had to reverse course and recreate its own in-house custodial services (Dwayne Thompson 2017).¹³⁰

In 2017, the state senators followed up on their letter opposing increased outsourcing by holding an August meeting of the investigations and oversight subcommittee of the Senate's Finance, Ways and Means Committee. During the meeting, legislators asked how outsourcing would save taxpayer money given that they were told that workers would be paid the same and would have the same benefits. They also heard from the Tennessee State Employees Association (TSEA) which not only opposed increased outsourcing, but also supported an amendment (HB 0944/SB 1047) to increase contracting accountability, especially by enabling both the state government and the legislature to monitor contract performance. The bill would have also required that oversight costs be included in the cost of state contracts, in order to fund staff, training, and other functions necessary to oversee the contracts. Moreover, the bill provided that none of these oversight functions could be outsourced. Legislators announced that they planned to initiate a more comprehensive review of the state's outsourcing practices during the 2018 legislative session (Tamburin 2017).

¹³⁰ <https://www.tennessean.com/story/opinion/2017/08/10/outsourcing-not-working-and-hurts-working-tennesseans/556621001/>

On February 26, 2018, the legislature enacted the Contract Accountability and Responsible Employment (CARE) Act as SB 1047 Public Chapter No. 544. The final bill was not as sweeping as the one recommended by the TSEA; it only limited contracts exceeding \$2.5 million that led to a layoff or furlough of one or more state employees, and it required the state to provide economic impact statements rather than imposed contract monitoring requirements. It made no mention of including oversight costs in the costs calculated for those contracts or training contract monitors. Nevertheless, the new law did restrain the executive branch's contracting authority and compelled an economic analysis that otherwise might not be done.

This case study is evidence that Tennessee legislators are willing to exercise oversight of state-issued contracts, oppose contracts they view as ill-advised, and use letters, hearings, and legislation to check the governor's contracting authority, even when the governor belongs to the same political party. The legislative changes finally enacted into law were narrowly focused and failed to put into place the type of broad contract management and monitoring requirements that other states in this study have enacted. The Tennessee legislature will have to take additional steps to match the contract oversight mechanisms now active, for example, in Idaho.

Case Study 3: Questar and the Department of Education

This case study discloses a multi-year effort by the Tennessee legislature to deal with a problematic contract issued by the state's Department of Education to conduct testing for students statewide. Those testing assessments affected not only the students' future, but also future evaluations of their teachers.

In July 2016, the Tennessee Department of Education contracted with Measurement Inc. to provide statewide computer-based student testing programs, automating the state's TNReady assessment tests for grades 3 through 12. On the first day the new tests were used, however, the online test experienced server problems with negative consequences for students, teachers, schools, and their communities. Students ended up taking a paper and pencil version of the test instead. In response, Tennessee fired the vendor and entered into a two-year contract with a new vendor, Questar Assessment, Inc. (Questar).

In 2017, the online tests again encountered problems when it was discovered that Questar had incorrectly scored nearly 10,000 paper tests in 33 districts due to scanning mistakes. In October 2017, the House Government Operations Committee held a three-hour hearing in which legislators pressed both the Tennessee Education Commissioner and Questar CEO about the online testing problems.¹³¹ The committee also took testimony from teachers, a superintendent, school board member, and researcher. Legislator questions included whether the Questar contract had been or should be modified or terminated. According to a state audit, lax oversight of Questar by the Tennessee Department of Education contributed to the problems, (Pignolet 2018).

¹³¹ Marta Aldrich. "As lawmakers grill McQueen about Tennessee's testing problems, here are five things we learned." *Tennessee Chalkbeat*, October 25, 2017, <https://tn.chalkbeat.org/2017/10/25/21103629/as-lawmakers-grill-mcqueen-about-tennessee-s-testing-problems-here-are-five-things-we-learned>.

In April 2018, the online test was presented to students again and again experienced widespread problems over a two-day period. Some students were unable to log into the test, some tests failed, and some districts ended up halting or canceling the testing, again harming students, teachers, schools, and their communities. The company at first blamed a possible cyber-attack on its system, but later discovered it had inadvertently caused the problems.¹³²

On April 18, 2018, the House Committee on Government Operations held a two-hour hearing in which the Tennessee Education Commissioner apologized for the repeated mishaps and testified “[w]e were devastated” by the events.¹³³ Lawmakers asked multiple questions about the failure of the \$30 million per year contract. Some called for the commissioner’s resignation. On April 24, 2018, the House Speaker and the Chair of the House Government Operations Committee sent a letter to the state Comptroller asking the OCT to initiate a performance review of the Questar contract.¹³⁴ Among other issues, they asked if the Questar contract would allow the state to recover money after testing failures.

In response, the OCT emailed surveys to about 64,000 school educators and testing coordinators to get information about the testing assessments. In addition, OCT conducted the contract performance review requested by the legislature as part of a larger OCT performance audit initiated by the state’s sunset laws--the Tennessee Governmental Entity Review Law, Section 4-29-111, Tennessee Code Annotated. This audit, which was complete in December of 2018, addressed the overarching question of whether the following entities should be terminated on their sunset date of June 30, 2019: Department of Education, the State Board of Education, the Energy Efficient Schools Council, and the Tennessee Public Television Council. The cover letter from OCT (dated December 10, 2018 from Deborah V. Loveless, CPA Director) transmitting its report to the legislature contains the following paragraph, and the report notes that the scheduled termination date for these government entities, under the state’s sunset provisions, was June 30, 2019.

The resulting audit report was issued in December 2018.¹³⁵ It covered the period January 1, 2014, through October 31, 2018, addressed multiple issues, and made multiple recommendations for the improvement and the restructuring of the department. One section of the audit report chastised the department for poor contract management practices that led to the department’s inability to ensure that Questar performed its duties adequately. In general, the OCT called on the department to improve the contract language and to create stronger internal

¹³² Jason Gonzales. “TNReady issues were vendor’s fault, not cyber attack, Tennessee officials say.” *The Tennessean*, June 20, 2018, <https://www.tennessean.com/story/news/education/2018/06/20/tennessee-student-testing-tnready-issues-were-vendor-questar-fault-not-cyber-attack/717911002/>.

¹³³ Jason Gonzales. “Tennessee education chief to lawmakers in wake of TNReady mishaps: ‘We are devastated’].” *The Tennessean*, Apr. 18, 2018, <https://www.tennessean.com/story/news/education/2018/04/18/tennessee-education-officials-tnready-running-smoothly/527480002/>.

¹³⁴ <https://tn.chalkbeat.org/2018/5/7/21104999/how-did-tennessee-testing-go-this-year-an-investigator-is-about-to-ask-64-000-educators>

¹³⁵<https://bloximages.newyork1.vip.townnews.com/wsmv.com/content/tncms/assets/v3/editorial/a/a4/aa4d7b2a-03a1-11e9-a933-4f855134838c/5c1a61eae7ade.pdf.pdf>

controls and better communication with the vendor (Cavanaugh). Specific audit report findings related to Department of Education contract monitoring failures included the following:

- The department failed to adequately evaluate and monitor the internal controls used by external information technology service providers.
- The department did not ensure that its testing contractor, Questar, could provide sufficient information and document to districts about student test results.
- Department management did not ensure that Questar had enough customer support resources and, as a result, school districts experienced lengthy call wait times . . . and abandoned calls.
- Department management failed to monitor contractor changes to the technology platform.

The report also stated that the department's 2017-2018 Annual Work Plan with Questar did not ensure that it would have information needed to determine whether the contractor was meeting deadlines. In other words, the work plan did not provide the foundation needed for effective contract management. As we noted in our previous work, the remedies provided in this sunset law could be extreme. We observed this problem with respect to poor prison contracting performance in our earlier work.

In January 2019, the House Education Committee held a hearing focused on the OCT audit report and the Department of Education. During the hearing, committee members again raised the testing issue. At one point, Republican Representative Terri Lynn Weaver asked why Questar was still doing business with the state (Associated Press).

The Department disclosed that, due to the testing failures and complications, the state had withheld nearly \$4 million from the \$30 million annual contract with Questar. “[Director] McQueen said that the state would renew the contract with Questar for one year, given how hard it would be to replace them before this year’s tests, however, they [were] working on an RFP for a new vendor (Pignolet 2018).” The Department later described how it would strengthen the RFP to ensure better online testing assessments.

This case study traces a multi-year legislative oversight effort to address state contracting problems that harmed students, teachers, and families across Tennessee. The 2018 OCT audit report provided solid factual evidence and a comprehensive analysis showing that poor contract monitoring by the state’s Department of Education contributed to the problems with the online testing program. The legislature held multiple hearings to investigate and press for better contract management, convinced the state to withhold funds from the contractor, and pressured the Department of Education to issue a stronger RFP for testing program services. At the same time, the case study presents a litany of contract management failures that adequately trained contract managers should have prevented.

Other states, Idaho, for example, have resolved similar problems by working with the executive branch actors in the procurement department to develop model RFPs, circulate useful contract management guidelines, and train state agency contract managers in the contract

monitoring tasks. Although the OCT performance audit recommends that the Department of Education work with procurement staff to improve the RFP, the audit report fails to recommend a broader plan for a state-wide improvement in procurement practices and contract management. It is clear from this performance audit that Tennessee needs systemic improvements in contracting and contract management. The approach taken, treating each contract failure as an individual problem, has not, at this point, produced the sorts of systemic changes that we observed in Idaho after they experienced a similar state-wide testing fiasco.

iii. Conclusions

The governor's office possesses significant power over contracting public services to private organizations. The Joint Fiscal Review Committee (FRC) in the legislature can oversee large value contracts, those greater than \$250,000, and could act as a counterweight to the governor. After an examination of several FRC hearings, however, it appears that there is little discussion of the merits or performance of the contracts by the committee members. There is a routine quality to the hearings, suggesting that a lot of groundwork about the contracts is done prior to the hearings themselves. Moreover, the poor performance of some private contractors, such as CoreCivic, is a major problem in Tennessee, as it is in many other states. Thus, despite having a committee with clear jurisdiction to oversee large-value state-issued contracts, it is not clear how effectively Tennessee's general assembly exercises oversight of this method of delivering state services. Given that the review is conducted by the Fiscal Review Committee, the oversight may involve financial accounting rather than performance monitoring.

The powerhouse of legislative audit and performance evaluation is the Office of the Comptroller of the Treasury, whose head is elected by the legislature and who responds to legislative audit and information requests. The OCT sunset department also wields considerable power over existential questions of state agencies and programs, though abolishing an agency for poor contract management is an extreme penalty that is neither practical nor often used.

The State's ability to conduct oversight through the appropriations and procurement process is fairly robust, and legislative committees have some authority to conduct oversight of the delivery of public services that have been contracted out. Additionally, the legislature possesses the power of the purse, and a classic best practice of oversight is to turn off the tap when there is an apparent lack of accountability. This was the case when \$4 million was withheld from Questar's \$30 million contract.

The Tennessee legislature also uses tools short of legislation to influence state contracting, including by sending letters to state officials, pressing departments to strengthen their RFPs or switch vendors, and questioning agency heads at hearings. These tactics, although not backed with the force of law, also can affect government decisions about contracting.

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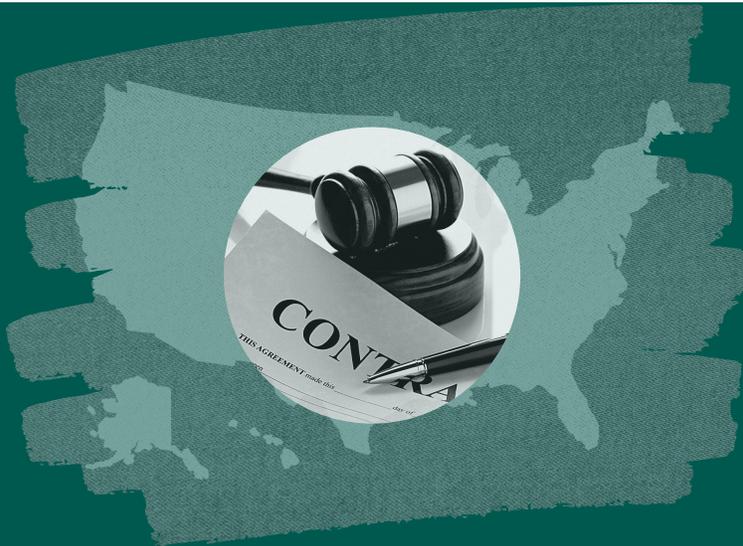
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April 2021

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This report is sponsored by the Levin Center at Wayne Law and
Wayne State University's Center for Urban Studies