

LEGISLATIVE AUDIT DIVISION

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MEMORANDUM

TO: Angus Maciver, Legislative Auditor
FROM: Kenneth Varns, Legal Counsel, Legislative Audit Division
DATE: January 24, 2023
RE: Hotline Submission FY 25-0076 Findings

The Legislative Audit Division completed an investigation into allegations related to former Senate President, Senator Jason Ellsworth, executing a consulting contract with Agile Analytics, LLC (Agile) on behalf of the Montana Senate and the Senate Select Committee on Judicial Oversight and Reform (Select Committee). The initial allegation was that Senator Ellsworth had a professional and personal relationship with Bryce Eggleston, the President of Agile, the implication being that he might personally benefit from the contract. Our work involved examining relevant procurement statutes and administrative rules, communications, executed contracts and procurement documents, Secretary of State filings, Federal Trade Commission filings and proceedings of the Select Committee. We also interviewed relevant state employees about what had occurred. Our focus of the initial work changed from the relationship between the contract parties to the method used to get the contract approved and whether the methodology used and the contracts themselves violated state procurement laws and regulations and constituted abuse of Senator Ellsworth's position as Senate President as well as a waste of state resources, even though no state money has been paid to Agile.

Based on our review, we did substantiate that the actions taken by former Senate President Ellsworth constituted abuse of his position as Senate President and that a waste of state resources occurred. The subsequent sections of this memo summarize the allegations, the investigation, and our conclusions.

Factual Findings:

According to its website, the Select Committee met on 12 occasions between April 29 and December 4, 2024. It generated 27 bills to be proposed to the 2025 Legislature. The Select Committee was chaired by Senate President Jason Ellsworth. \$500,000 was appropriated by the Governor's Office to the Senate in late April or early May 2024. Its purpose was to fund special committees that had been formed during the interim. The appropriation expired at the end of 2024, and any unused funds were to be returned to the Governor's Office.

In July 2024, Agile XO, LLC, via Eggleston, filed Articles of Organization with the Montana Secretary of State's Office (SOS) naming Bryce Eggleston of Stevensville, Montana as the registered agent and sole member. The business purpose was listed as consulting. On December 12, 2024, Eggleston filed a statement of change of principal address and a change of registered agent with the SOS on behalf of Agile. In those documents, he identified himself as a manager and member. No other members were listed.

At a Select Committee hearing on November 14, 2024, Chairman Ellsworth (who was appearing remotely) brought up the topic of hiring someone to track and report back to the committee the status of the 27 bills that were being proposed to the legislature. He indicated he would like to hire a bill tracker “if I can find somebody for what I have moneywise to track these bills...maybe a college student or someone cheap.” He suggested that a motion be made by a committee member to that effect. Senator McGillvray suggested that senate staff perform this task, so that an outside person need not be hired. Vice-Chairman Usher suggested that they attempt, between the November and December meetings, to find a senate staff member that could conduct the work. Nonetheless, Senator Ellsworth then made the motion to hire a non-staff person to conduct the work. In the following discussion on the motion, Senator Glimm mentioned that the Bill Tracker program could be used to monitor the progress of the bills. Bill Tracker allows a user (even members of the public) to create an account and create preference lists on bills that the user wishes to track. The program sends email alerts and calendar invites to the users regarding any actions scheduled on tracked bills. After further discussion, Vice Chair Usher indicated to Senator Ellsworth that there was not a lot of support for his motion, and he withdrew it.

During the December meeting, the Select Committee circled back to getting a report from staff on the status of their proposed bills. Legislative Services Attorney Jaret Coles again said the status of bills could easily be tracked via Bill Tracker and its preference lists tool. The committee did not revisit hiring an outside contractor.

On December 26, 2024 (a Thursday between Christmas and New Year’s Day holidays), Senator Ellsworth presented to Angie Carter, Legislative Services Division Financial Manager, two signed contracts and two invoices totaling \$170,100.00, dated that same day. At this point, no member of staff in the Legislative Services Division was aware of the existence of these contracts or had been involved in any way in drafting them. The contracts were signed by himself as President of the Senate and by Mr. Eggleston on behalf of Agile. The two initial contracts, provided that Agile was to conduct a “thorough post-analysis” of bills generated by the Select Committee, following conclusion of the 2025 legislative session. Contract A specified that Agile was to be paid a “flat fee of \$88,200.00 payable in advance upon execution of this Agreement.” Contract B specified that Agile was to be paid “a flat fee of \$81,900.00, payable in advance upon execution of this Agreement.” Of the 27 bills, contract A governed 14 bills, and contract B governed the other 13. Other than that, the contracts were identical in all material respects. There is no documented or apparent reason why the bill tracking and analysis work was divided into the two contracts.

All state contracts involving the expenditure of state funds fall within the purview of the Department of Administration. Statutes and administrative rules, discussed later, set out procurement processes for such expenditures. However, statutes permit delegation agreements between state entities and the Department whereby the entities can go through the procurement process independently of the Department. In December 2024, there was a delegation agreement between the Department and Legislative Services for contracts in the amount of \$100,000 or less. Thus, if a contract involved amounts above \$100,000, the Department was required to oversee the procurement process.

Upon receipt of the contracts and invoices, staff in the Services Division advised Senator Ellsworth that they would not recognize the contracts or pay the invoices. Because Senator Ellsworth had not gone through a competitive bidding process, but instead directly contracted with Agile, Legislative Services Division via attorney Jaret Coles prepared a “Sole Source Justification” based upon what Senator Ellsworth had told them. In addition, because the total amount of the contracts was above \$100,000, the sole source justification had to be approved by the Department of Administration (Department). Coles began working on a sole source justification on Senator Ellsworth’s behalf and coordinated with the Department. Coles recognized in an email to the Department Director Misty Ann Giles, dated

December 27, that the contracts submitted by Senator Ellsworth were invalid. He stated: “Long story short, the President attempted to enter into 2 contracts without our support the day after Christmas.” He also noted the funding for the Select Committee expired on December 31. Giles, who was on vacation, referred the matter to Lauren Spatzierath, the Department’s Procurement Operations Manager. Spatzierath wondered why two seemingly identical contracts were executed rather than one. Coles speculated that it was because the procurement delegation agreement between Legislative Services and the Department was \$100,000. The Department decided the contracts needed to be combined. Services Division staff and Spatzierath worked together to draft the new contract.

A final “sole source” contract between the State of Montana and Agile was executed on December 31, 2024, and required monthly payments to Agile in the amount of \$7,087.50 beginning January 10, 2025, despite the fact that the work was not to begin until after the 2025 legislature adjourned in April 2025.

According to our interview of Department Director Giles, Senator Ellsworth called her while she was out of state on vacation and requested her department’s assistance. The Director looped in Spatzierath via email. They received a copy of the unsigned Sole Source Procurement Justification form that had been prepared on Senator Ellsworth’s behalf by Legislative Services Division as well as the two signed December 26 contracts on Friday evening, December 27, 2024. Spatzierath was unavailable to review the contracts until the following Sunday. Upon review, she and the Director felt that the two contracts had been artificially divided and determined that the two contracts should be combined as one. Thus, the total contract amount became \$170,100. By administrative rule governing sole source procurement, when a sole source contract exceeds \$100,000, a procuring agency must provide public notice of intent to sole source and the notice must be published on the agency website for 10 days to allow for public review and comment before the agency may approve sole source procurement. Admin. Rule Mont. § 2.5.604. Despite recognizing that the artificially divided contracts were not proper, the Director saw that the two contracts (Contracts A and B discussed above) had already been signed and therefore, despite attorney Cole’s opinion to the contrary, felt that the sole source justification was a moot issue, as there was already a binding contract between the state and Agile. Nonetheless, the newly combined contract was submitted to the Department’s sole source review committee, and it was purportedly approved on Sunday, December 29, 2024. According to an interview with John Thomas, Enterprise Procurement Manager, most of the actual committee, including himself, was unavailable during that timeframe due to vacation leave. The approval memo was authored by other staff on his behalf. Director Giles stated that given the situation presented, the best the department could do was to try to make the contract legal.

The Director, Mr. Thomas and Ms. Spatzierath all indicated that, in a normal situation, recognizing the monetary value of the sole source contract, they would have stopped the process and required (1) that the sole source justification be signed, and (2) that the requesting agency post the matter providing public notice for ten business days as required by the administrative rules. In this case, though, they felt that they were working under exigent circumstances as the appropriation from the Governor’s Office expired on December 31. There was insufficient time to post the matter for ten business days as required by the sole source exception. Additionally, Giles stated that, because a separate branch of government was involved, they felt they had to respect the separation of powers and have a “softer touch.” While acknowledging that the legal definition of exigency did not really apply here, they treated it as an exigent circumstance due to the imminent expiration of the Governor’s Office appropriation. They explained that they generally rely on the agency to determine whether there is an exigency, but they expect the agency to be able to substantiate the exigency in the event of a subsequent compliance review.

The extensive email chains generated during the contract drafting process are consistent with these interviews. We requested an interview with Senator Ellsworth, but following a discussion in our office on January 22, 2025, he declined to participate without the involvement of his attorney, who was out of state

and not available. We provided him with a written list of our questions and asked via email for a response by the end of the day, January 23, but he subsequently told us he was trying to secure legal representation from a local attorney and that it would take time. He did not respond to our written questions, and we have considered his public statements, where relevant, and have relied on the factual evidence of his actions as supported by official documents and witness interviews.

Required Contract Procurement Processes:

Laws governing the expenditure of public funds and procurements of government contracts (Montana Code Ann. Title 18, Chapter 4, known as the Montana Procurement Act) require that contracts involving expenditure of state funds undergo specific procurement processes, usually the issuance of a public invitation for bids and adequate public notice. It is the responsibility of the Department of Administration (Department) to adopt rules governing the procurement of all supplies and services to be procured by the state in order to ensure that the proper procurement process is followed (encouraging equal opportunity and competitive bidding on the contracts to protect the state's interest in not wasting money). Mont. Code Ann. §18-4-221(1). The department is authorized to (Mont. Code Ann. §18-4-222) and did enter into a delegation agreement with the Legislative Branch allowing its own procurement officer to approve contracts involving up to \$100,000. By submitting two contracts in amounts less than \$100,000, the Department approval process could be avoided *except for the fact that the rules governing procurement forbid artificially dividing contracts to avoid the otherwise required procurement process*. Mont. Code Ann. § 18-4-305, Admin. R. Mont. 2.5.603(5).

Realizing that the actual contract value was over \$100,000, Legislative Services Division required Senator Ellsworth to work with the Department to obtain approval as a “sole source” contract. All sole source contracts over \$100,000 must be approved by the Department and not the agency, unless an exigency exists (as discussed later, no evidence of an exigency as defined by law was found during this investigation). A sole source contract is an exception to the normal procurement process, to be used in very limited circumstances where it would generally be futile to advertise for proposals, as only one entity is suitable to perform the task at hand. To be justified as a sole source procurement under the circumstances here, a government entity must certify in writing that: (1) there is only one source for the supply or service item; or that (2) only one source is acceptable or suitable for the supply or service item. Mont. Code Ann. § 18-4-306.

In his communications to Legislative Services, Senator Ellsworth claimed he had consulted with attorneys about performing the work, but that they were too expensive compared to Agile. This does not justify a sole source procurement as more than one entity was acceptable or suitable to provide the service. In fact, during his request to the Senate Select Committee on November 14, 2024, Senator Ellsworth had proposed hiring someone “maybe a college student or someone that could work cheap.” (Note: even that modest proposal was disfavored by the committee members). It is evident that this contract was not suitable for a sole source exception. Nonetheless, Legislative Services staff then worked to prepare and submit a sole source justification for Department approval based on what Senator Ellsworth had told them. As discussed previously, the Department did not believe the sole source contract was appropriate either (albeit because there was no public notice posted as required) and treated it as an exigent circumstance exception to the procurement process.

The Exigent Circumstances Exception to the Procurement Process Does Not Apply to This Contract.

Although Senator Ellsworth did not articulate a need to use an exigency exception to the procurement process, the Department did feel that exigent circumstances existed, based upon the imminent expiration of the Governor's Office appropriation. Montana law is very clear about what amounts to an exigent circumstance justifying deviations from the normal procurement process. ARM 2.5.501(16) provides that the term exigency “means a purchase made without following normal purchasing procedures due to a

sudden and unexpected happening or unforeseen occurrence or condition which requires immediate action. ARM 2.5.605 provides “[a]n exigency does not exist when: (a) an agency failed to procure supplies or services before the time they were needed; (b) an agency failed to timely renew an expiring contract; or (c) *other inaction by the agency created the exigency*.”

As noted above, the appropriation from the Governor’s Office became available in the Spring of 2024. It was requested by former President Ellsworth, so he had to have known of its existence and its parameters. The senator had a conversation with Carter regarding the appropriation in October 2024. He asked how to hold funds to prevent them being reverted to the Governor’s Office. Carter explained to him that the funds had to be obligated (by entry of a contract) prior to the end of 2024. Nonetheless, and even though he had proposed the hiring of a bill tracker during the November 14 committee hearing, he waited until December 26 to enter into a contract for an entity to track and analyze the status of the committee’s bills, leaving only three business days to attempt to correct the illegal contract and generate a new one (which was impossible at that point).

Analysis:

Mont. Code Ann. §5-13-311 requires the Legislative Auditor to investigate allegations of “fraud, waste and abuse in state government.” Waste and abuse are not defined by statute. However, Government Auditing Standards issued by the Comptroller General of the United States do define the terms:

Abuse is behavior that is deficient or improper when compared with behavior that a prudent person would consider reasonable and necessary business practice [sic] given the circumstances. ... It also includes misuse of authority or position for personal financial interests or those of an immediate or close family member or business associate.

GAO-18-568G Government Auditing Standards, Para. 6.23.

Abuse is also defined as:

An intentional, wrongful, or improper use or destruction of government resources, or seriously improper practice that does not involve prosecutable fraud. Abuse can include the excessive or improper use of an employee or official’s position in a manner other than its rightful or legal use. Abuse can occur in financial or non-financial settings.

Our internal hotline procedures manual adopted this definition based on Generally Accepted Government Audit Standards and other sources.

Conclusion:

There was and is no logical reason that the original contracts were bifurcated other than to unlawfully avoid oversight of the contracts by the Division of Administration which oversees procurement of services and supplies by state agencies of all procurements over \$100,000. State law specifically prohibits artificially dividing contracts to avoid the required procurement process. Thus, these actions constitute an abuse of his government position by the former Senate President. The attempted procurement of over \$100,000 in consulting expenses when the former Senate President earlier had sought and was discouraged from entering into a very modest contract with someone “cheap” such as a college student constitutes abuse of his position.

Waste is the act of using or expending resources carelessly, extravagantly, or to no purpose. Importantly, waste can include activities that do not include abuse and does not necessarily involve a violation of law. Rather, waste relates primarily to mismanagement, inappropriate actions, and inadequate oversight.

GAO-18-568G Government Auditing Standards, Para. 6.21.

Conclusion: *Presenting an artificially bifurcated signed contract on a Friday evening during the Christmas and New Year Holidays and on the eve of the appropriation expiration caused an inappropriate use of staff time during what otherwise would have been a weekend or holiday in impossible attempt to correct an illegal contract constituted a waste of state resources by Senator Ellsworth.*

The Department, recognizing that the original contracts had been artificially bifurcated, and knowing that the procurement process for a sole source contract involving state funds over \$100,000 required public notice and a ten-business day comment period, proceeded under the belief that the contract was justified as an exigent circumstance exception to the procurement process. As explained above, it was not. The initial effort to artificially bifurcate the contracts and the subsequent acceptance of decisions to forgo proper sole source exceptions and exigency procedures deprived the state of the financial benefits of open competition in procurement, and therefore constituted a waste of state resources.