

TO: Aaron Allred, Legislative Auditor

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SUBJECT: Current procedures of the Legislative Claims Commission

DATE: December 7, 2018

Description of Current Situation

The Clerk of the Legislative Claims Commission (“Commission”) reports the Division of Corrections (“DOC”) has come to the Commission to obtain authorization to pay a few contractors through a process that may conflict with constitutional and statutory law. After some investigation, we have learned that this procedure was instituted under the prior Clerk of the Court of Claims and has been applied in a few situations involving other agencies in the past.

In these cases, contractors have filed claims before the Commission, then attorneys for the state have admitted the validity of the claims. There is no hearing on these claims. The agency merely asks the Commission for a decision and order approving payment.

Rather than waiting for the Legislature to pass a bill with special appropriations for the claims, the claimants have presented their invoices, along with documentation from the Commission, and received payment of the agreed amounts out of agency’s current operating expenses. In one instance in 2016, the DOC paid Norment Security Group Inc. approximately \$309,000 through this method. We do not know the exact number of these instances, but believe there may be less than a dozen.

When this was discovered, the initial concern was that this bypassed constitutionally required action by the full Legislature and specific appropriations for the claims. From our limited research, it has become apparent that the legal issues are more complex and extend beyond the analysis of one or two constitutional clauses. The claims procedures in the West Virginia Code do not clarify the matter and the statutes themselves may need significant revision to conform to the Constitution.

Legal Framework

The West Virginia Constitution states that the Legislature shall not “authorize the payment of any claim or part thereof, hereafter created against the state, under any agreement or contract made, without express authority of law.” This provision has been interpreted to prohibit payments to vendors when goods or services are provided that go beyond the explicit terms of a written contract even when the state benefits from these additional goods and services.

Although the state may contract with vendors to serve “public purposes,” the state does not have a legal obligation to pay a vendor when, through no fault of the vendor, the necessary work exceeds the terms of the contract. This may give rise to a moral obligation rather than a legal obligation of the state. The courts have ruled that the Legislature may appropriate money to pay a vendor if the Legislature finds there is a moral obligation to pay the claim. Such payment is then considered to serve a public purpose.

The Commission has been established to assist the Legislature to evaluate whether there is a moral obligation to pay claims against the State. The W. Va. Code authorizes the Commission to approve a claim and recommend payment in two circumstances: if a claim arises during a current fiscal year in which case the claim could be paid from current appropriations (W. VA. CODE §14-2-19), or if a claim arises out of a different fiscal year, then the Legislature must make a special appropriation (W. VA. CODE §14-2-20). It is important to note that determinations of the Commission are recommendations to the Legislature and not legislative acts in themselves.

In discussion with the Department of Military Affairs and Public Safety, we have learned that their current claims involve services provided in an emergency involving public health and safety arising at the end of the fiscal year when the regional jails were reconstituted under a newly consolidated division. DMAPS does not dispute that these contractors provided necessary services to the state in good faith and reliance on the state’s commitment to pay for the services rendered.

Legal Questions

These circumstances give rise to critical questions regarding the constitutionality of the procedures being pursued before the Commission:

1. Can the Legislature lawfully delegate its authority to find that the state has a moral obligation to pay a claim or must that determination be made by the full Legislature?
2. Is there a legal means to allow a state agency to correct some forms of contracting issues to facilitate payments to innocent vendors without invoking the legislative claims process?
3. Do current statutes provide a comprehensive procedure for the Commission to determine awards in compliance with the Constitution and rulings of the state supreme court?
4. Because the Legislature's authority is based upon the power to appropriate money, how should claims be handled when a government entity has a special revenue account and expends money "from collections" rather than from appropriations?

Additional Audit Issues

5. Do these repeated circumstances indicate that the DOCR is using appropriate and sound procedures to obtain goods and services?
6. Are there adequate controls in the legislative claims process to deter improper agreements to pay claims made against state agencies?