



**RICHARD J. SZULBORSKI**

**CONTROLLER OF NORTHAMPTON COUNTY**

NORTHAMPTON COUNTY COURTHOUSE  
669 WASHINGTON STREET  
EASTON, PENNSYLVANIA 18042

**PAUL L. ALBERT, CIA**  
Audit Manager

**MICHAEL P. SHAY, ESQ.**  
Solicitor

**PHONE (610) 829-6615**  
FAX (610) 559-3137

**INDEPENDENT INTERNAL AUDITOR'S REPORT  
ON APPLYING AGREED-UPON PROCEDURES**

Members of the Northampton County Council  
Lamont G. McClure, Jr., County Executive  
County of Northampton, Pennsylvania

We have performed the procedures enumerated below, which were agreed to by the County Executive, on the activities related to Public-Private Partnership (P3) Projects (P3 Bridge Projects) and intended P3 Projects (Jail Reconstruction Project) involving the County and the Northampton County General Purpose Authority (NCGPA). The management of the NCGPA is responsible for monitoring the P3 Projects and the County is responsible to provide funding. The sufficiency of these procedures is solely the responsibility of the parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures enumerated below either for the purpose for which this report has been requested or for any other purpose.

**Procedures and Findings**

1. **Procedure:** Review 2016 and 2017 invoices for legal services related to P3 Projects or intended P3 Projects incurred by the NCGPA and reimbursed by the County. Compare invoices to any related written contracts or agreements for such services. Determine if fees charged are in line with agreed-upon rates and calculate overcharges, if any.

**Findings:** For the P3 Bridge Projects, the NCGPA employed two firms which provided legal services. The law firm Norris, McLaughlin and Marcus, P.A. (NMM) was the Solicitor for the NCGPA, with attorney John F. Lushis, Jr. specifically assigned this role; this firm provided the bulk of the legal work in structuring the P3 Projects and defending legal challenges throughout 2016 and 2017. In addition, the NCGPA employed the law firm Buchanan, Ingersoll and Rooney (BIR) to assist in the evaluation of responses to the P3 Bridge Requests for Proposals (RFP).

For work performed by NMM on the P3 Bridge Projects, we reviewed all 2016 and 2017 invoices submitted by them to the NCGPA. (Total paid by the County - \$607,087.73) This analysis proved to be difficult because of the inadequate documentation of agreed-upon rates to be paid by the NCGPA. The rates we used for our analysis were obtained from two documented sources: (1) The Engagement Letter accepted by the NCGPA on 3/1/16

retaining NMM, and specifically John Lushis as Solicitor, which stated that work related to projects under Pennsylvania's Title 74 Pa. C.S.A Part V Chapter 91 (which governs the P3 Projects) was to be paid at a rate of \$250/hour, and (2) The resolution (not numbered) passed by the NCGPA on 9/6/16 which increased this fee to \$295/hour. The resolution specifically states it "shall become effective immediately" and does not make any aspect of the resolution retroactive to any date prior to 9/6/16. Therefore, in our analysis, we applied an agreed-upon rate of \$250/hour for any work performed prior to 9/6/16 and \$295/hour for any work performed subsequent to that date.

In comparing the invoices submitted by NMM to contracts and agreements, we discovered the following:

- All invoices for work performed by John Lushis prior to 9/6/16 were billed at \$295/hour and not \$250/hour. We treated these as overbilled amounts.
- Many other associates and employees of NMM performed work on the P3 Bridge Projects as detailed on the invoices at hourly rates less than \$250 or \$295 per hour. These rates varied from \$130 to \$235 per hour. We could find no agreed-upon rate between NCGPA and NMM for these individuals other than the flat rate noted in the Engagement Letter and increased by the 9/6/16 resolution. But upon consultation with members of the County Solicitor's office and the current acting NCGPA Solicitor we agreed, for the purposes of our analysis, to accept the rates as billed and not to apply the full rate allowed for the NCGPA Solicitor. Therefore, we did not treat these as under-billed amounts, because the invoiced rates were likely reasonable for the individuals involved and the type of work performed.
- One attorney, Peter D. Hutcheon, performed work at various times throughout this period. The invoices from 2016 and 2017 indicate rates of \$350, \$610, and \$700 per hour for this individual. In a letter to the County's Solicitor dated 6/28/18, NMM stated, "For the P3 Project, our firm proposed and NCGPA agreed to set his rate at \$350 per hour." We read all of the minutes of the NCGPA from 2016 and 2017 and all resolutions passed during that period and could find no evidence that the full board approved any increased rate for Mr. Hutcheon. Therefore, in our analysis, we treated any amount invoiced at more than \$250/hour prior to 9/6/16 and more than \$295/hour subsequent to that date as overbilled.

Using the criteria detailed above, we found that the NCGPA was overbilled for work related to the P3 Bridge Projects in the amount of \$55,069. See Procedure 5 (page 7) for a review of violations of NCGPA Bylaws with regard to the rate billed for work by Mr. Hutcheon.

For legal services related to the Jail Reconstruction Project, the County paid NMM \$153,343.50 in 2017. As noted in Procedure 4 (page 4), we believe that NMM was not acting in its capacity as Solicitors for the NCGPA in relation to this project. Rather, they were acting as an agent of the County of Northampton. Since no contract exists between the County and NMM, it was again difficult to identify a proper agreed-upon rate with which to compare to invoices. For the purposes of this analysis we used the rate of \$295/hour which was the rate authorized by the NCGPA for the P3 Bridge Project. For the Jail Reconstruction Project, this was the rate Mr. Lushis consistently charged for his services. However, five other attorneys from NMM billed hours for work on the Jail Reconstruction Project at rates higher than \$295/hour ranging from \$325 to \$700 per hour. We treated all of these as overbillings. The

total overbilled for the Jail Reconstruction Project was \$21,827.50.

With regard to BIR, we found that the rate paid to them (\$580/hour) was in line with their Engagement Letter submitted on 5/9/16; however, this letter was never properly executed as it was not signed by a representative of the NCGPA. See also Procedure 5 (page 7) for a review of violations of the NCGPA Bylaws with regard to approval of this relationship by a quorum of members of the NCGPA. The total paid to this firm in 2016 was \$10,954.97.

2. **Procedure:** Review County payments made to the NCGPA under terms of the Service Agreement for the P3 Bridge Projects. Determine compliance with the Developer Payment Schedule, Third Party Engineer (TPE) Payment Schedule and any other caveats related to such payments.

**Findings:** We reviewed all invoices from the Developer (Kriger Construction) and TPE (Benesch and Company) related to P3 Bridge Projects. Compliance was noted with the Payment Schedules and all remittances were timely. Milestone payments totaling \$3,625,000 were made to Kriger Construction and payments to Benesch and Company totaled \$71,255.44 in 2016/2017.

3. **Procedure:** Review County payments made to the NCGPA for any other P3 Bridge vendors related to "Additional Services" permitted in the Service Agreement. Determine compliance with terms of the Agreement.

**Findings:** We reviewed invoices for all P3 Bridge vendors related to "Additional Services." This included:

- The PFM Group – These are Financial and Investment Advisors who assisted in the evaluation of the responses to the P3 Bridge Project RFPs. (Total paid in 2016 - \$41,028.34)
- RMG Insurance – This company is providing General Liability Insurance. (Total paid in 2016/2017 - \$102,890)
- PMA Companies – This company is providing Claims Administration services. (Total paid in 2016/2017 - \$15,000)

We found that payments to RMG and PMA complied with the terms of the agreements and that payments were made timely. With regard to the PFM Group, there was no formal, signed agreement between the NCGPA and this Group. PFM did provide the NCGPA with a proposal letter dated 4/25/16, but all work was performed before the NCGPA passed the resolution (not numbered) on 9/6/16 which authorized the engagement. See also Procedure 5 (page 7) for a review of violations of NCGPA Bylaws with regard to approval of this relationship by a quorum of members of the NCGPA. The rates charged by PFM did agree to the rates in the proposal letter.

4. **Procedure:** Review County payments made to the NCGPA for the intended P3 Jail Reconstruction Project. Ensure compliance with Administrative Code and enabling legislation. Determine if there is a written agreement to reimburse the NCGPA for such expenses.

**Findings:** To properly analyze this procedure, we needed to determine if the County's Administrative Code was applicable to this project. We noted that in the 2/17/17 NCGPA meeting minutes John Lushis "mentioned as an FYI that Mr. John Brown has asked him to become fully involved and engaged on the new prison project which he is trying to do through the GPA." Then on 5/2/17, the NCGPA passed a resolution (not numbered) resolving that the "Authority and, specifically the chair of this Authority and this Authority's Solicitor, are hereby authorized to cooperate with the County in the development of the plans for the Capital Projects and the evaluation of undertaking the Capital Projects with the involvement of this Authority." Included among these Capital Projects was "the construction of a new jail." According to the resolution, the decision to involve the NCGPA in the Jail Reconstruction Project was based on the project being deemed a P3 Project as defined and regulated by PA Title 74, which was originally designed for transportation projects, such as bridge reconstruction and repair. The law defines such projects as contractual agreements between a "Public Entity" and a "Private Entity". The definition of "Public Entity" within the law includes a municipal authority such as the NCGPA. Therefore, to qualify as a P3 Project, bridges scheduled for replacement/repair which were owned by the County had to be conveyed to the NCGPA (with responsibility, in turn, transferred to the "Private Entity"), which County Council approved via Ordinance 605, enacted on April 3, 2016. As a result, all expenses related to the bridges could be legitimately classified as NCGPA expenses, with County reimbursement of such expenses fully authorized by County Council. This is not true for the Jail Reconstruction Project, for the following reasons:

- The NCGPA passed the resolution authorizing their involvement with the County on the Jail Reconstruction Project on 5/2/17. At the time, jail reconstruction was not addressed by Title 74 and, in fact, according to the invoices submitted by NMM and paid for by the County, one of the services provided by NMM was drafting new legislation related to jails. The resulting law allowing "Alternative Contracting Procedures" for jail facilities was not signed into law by the Governor until 10/30/17. All work performed by NMM for the County preceded that date.
- County Council never approved of a relationship between the County and the NCGPA regarding the jail, nor was a resolution passed conveying the jail to the NCGPA. At all times, the jail remained in County hands. County Council also did not pass a required resolution setting aside the provisions of Administrative Code Article XIII as a result of an "intergovernmental agreement" as it had in conjunction with the P3 Bridge Projects.
- The law passed on 10/30/17 (Title 71 P.S. State Government, Part I, Chapter 2, Article XXIV-B) makes no mention of using a Public Entity to partner with a Private Entity for jail reconstruction. In fact, the law specifically states "The Board of Commissioners may, in its sole discretion, elect to use an alternative contracting procedure to achieve the adaptive reuse of former jail facilities or construction of new jail facilities." The term "Board of Commissioners" is defined as "The governing body of a county of the third class with a population between 280,000 and 298,000 as of the 2010 census." According to the County's Home Rule Charter, the body that meets this definition is County Council.
- All of the work performed by NMM related to the jail, including (per invoice detail) drafting legislation, reviewing zoning ordinances, meeting with officials at the state level as well as in a number of municipalities, arranging financing, etc. appears to be services

rendered to the County and unrelated to the firm's function as Solicitors to the NCGPA.

For these reasons, we believe NMM was acting as a Professional Service vendor of the County and that all restrictions included in Article XIII of the County's Administrative Code (Procurement and Disposition of County Property) are applicable as to their retention for work related to the Jail Reconstruction Project. The only procedural difference was that invoices were addressed to the NCGPA but they were paid directly to NMM by the County. Following are the sections of the County's Administrative Code that were violated by structuring these transactions in this manner: (Article XIII was revised in 2018. The version quoted here is the one that was in force at the time these transactions occurred in 2017.)

- Section 13.07b – "Procurement of County property over \$25,000 shall be by Competitive Sealed Bid, Competitive Negotiation or Cooperative Purchasing unless, prior to the solicitation of any contract, the County Executive shall, with the approval of County Council, determine that these methods are not practical."

**Auditor's Comment:** Of the approved methods described in Section 13.07a, the closest match to the method used by the County Executive in the retention of NMM is Noncompetitive Negotiation. However, since the County Executive failed to obtain the approval of County Council for using this method, a violation is noted.

- Section 13.09a – Competitive Negotiation – "...All Professional Services shall be selected using this method."

**Auditor's Comment:** As noted, the work performed by NMM constituted a Professional Service. The Competitive Negotiation method was not used to select this vendor.

- Section 13.10 – Noncompetitive Negotiation – "A contract may be awarded for a required or designated supply, services or item to a sole supplier using Noncompetitive Negotiation when the County Executive or his designee determines that it is not practical or prudent to use other than the required or designated supply, service or item. Prior to the award of the contract the County Executive shall in accordance with Section 13.07b, issue an Executive Order stating the specific reasons for using Noncompetitive Negotiation."

**Auditor's Comment:** No Executive Order was issued stating the reason the selection of NMM was noncompetitive.

- Section 13.16a – Contracts and Agreements – "Written contracts are required for all purchases of goods and services exceeding \$25,000. All contracts and agreements shall be prepared and executed as directed by the County Executive by way of the Executive Order."

**Auditor's Comment:** NMM was paid \$153,343.50 for its work on the Jail Reconstruction Project. No contract was prepared between the County of Northampton and NMM, nor was an Executive Order issued.

- Section 13.16c, 13.16c (1), and 13.16c (2) –  
13.16c “At least twenty (20) days before the County Executive obligates the County to the proposed terms of any prospective contract, the County Executive shall provide written notification of the proposed terms of the prospective contract to County Council if the contract consideration exceeds \$100,000, regardless of whether the contract term spans more than one fiscal year or exceeds twelve months. Such written notice shall specify the procedure used to choose the individual or entity providing the services, including a copy of the Invitations to Bid/Request for Proposals, if applicable; the name of the successful bidder; the nature of the project and the scope of work; the projected total monetary amount of the contract; the hourly or other unit costs charged under the contract; a statement of the need for such services, and a disclosure of prior relationships between the vendor and the County or County Personnel. In addition, prior to making the award, approval of County Council is required in the following instances:  
13.16c (1) Any contract exceeding \$100,000 which was awarded using the Competitive Negotiation, Negotiation After Competitive Sealed Bidding, and Non-Competitive Negotiation source selection methods. For contracts with renewal clauses, the entire potential payout if all renewal clauses are exercised under the terms of the contract must be considered when determining if Council approval is necessary.  
13.16c (2) Any contract where costs are to be funded with monies outside of the County's General Fund, such as those funded through bonded indebtedness.”

**Auditor's Comment:** County Council was not notified of the contractual relationship between NMM and the County. Approval from County Council was required for two reasons: (1) The amount paid to the vendor exceeded \$100,000, and (2) The source of the funds used to pay invoices was the Capital Improvements – Corrections Facility Fund, not the County's General Fund. Since County Council was not notified of this relationship, approval was not obtained.

- Section 13.16e – “No work shall be authorized to begin nor payment made under a contract prior to the completion of the written notice process, set forth in Administrative Code Section 13.16 c, until sufficient appropriate funds have been encumbered, and where required, the approval process completed.”

**Auditor's Comment:** Since County Council was not notified of the relationship with NMM, this section was violated. It should be noted that some of the work was performed even before the NCGPA approved the relationship. Work was performed beginning 1/30/17, and continued (with detailed monthly invoices) through 10/26/17. The resolution authorizing the NCGPA Solicitor to work with the County on the Jail Reconstruction Project was dated 5/2/17.

In addition, all Article XIII provisions related to contract wording were violated, as no contract was drafted and signed.

5. **Procedure:** Review regulations, resolutions, policies and procedures with regard to vendor selection applicable to the NCGPA and P3 Projects. Review agreements with vendors receiving payments in 2016 and 2017 for compliance.

## Findings:

### Regulations and Statutes:

As noted in Procedure 4 (page 4), many violations were noted with Article XIII of the County's Administrative Code in relation to the Jail Reconstruction Project. For the P3 Bridge Projects, both the contractor repairing/replacing the bridges and the third party engineer were selected using a Request for Proposal (RFP) in compliance with PA Title 74 – Public Private Transportation Partnerships. However, other Professional Service vendors were employed in conjunction with the P3 Bridge Projects that were selected without using any competitive procedures. We attempted to determine if this violated any statutes or regulations in addition to Title 74, specifically:

- PA Municipalities Act (Title 53 Pa. C.S.A. Part V, Subpart A, Chapter 56)
- Commonwealth Procurement Code (Title 62 Pa. C.S.A. – Procurement)
- County Administrative Code.

To assist in this analysis, we consulted with representatives of the County Solicitor's Office and the current acting Solicitor to the NCGPA. We determined that Title 53 was not applicable; while this act does include bidding requirements for certain purchases (§5614), it does not appear to apply to professional services. Similarly, the restrictions in Title 74 appear to apply only to the companies involved in repairing the bridges. The applicability of the County's Administrative Code appears to be a matter of dispute. Although Section 13.04c of the Code states that County agencies shall follow the purchasing procedures outlined in the Code and Section 1.03 (5) includes "authorities" in the definition of the term "agencies", potential vendors attending the P3 Bridge Pre-Bid meeting were told the following (quoted from the notes of the meeting):

"Further, and most significantly, the GPA is not subject to the provisions of the County's Administrative Code. While the Administrative Code applies to "agencies" of the County, and the Code defines "agency" to include an "authority of the County", the GPA is not an authority of the County. Pennsylvania courts have long held that an "authority" organized pursuant to Municipal Authorities Act is a corporate agency of the state, created by the state with powers and duties prescribed by statute and charter, and not the creature, agent or representative of the municipality organizing such authority."

If true, however, this opinion appears to support the applicability of Title 62 – Commonwealth Procurement Code. That Code states that "Independent Agencies must use the procedures provided in this part for any procurement of supplies, services or construction." (§301 (b)) Independent Agencies are defined as "Boards, commissions and other agencies and officers of the Commonwealth which are not subject to the policy supervision and control of the Governor." (§103 – Definitions)

Both the County's Administrative Code and Title 62 require that Professional Services be acquired using a competitive procedure, specifically a request for proposal. If the service is awarded as a sole source contract, both the Code and Title 62 require full documentation of the reason the sole source method was used. Both the Code and Title 62 also include small procurement thresholds which negate the need for a

competitive procedure if the amount of the award does not exceed the threshold. The threshold in the Code is \$25,000 and the current threshold for Title 62 (modified annually) is \$18,987. Of the awards to vendors associated with the P3 Bridge Project, two exceeded the thresholds in both the Code and Title 62 – PFM Financial Advisors (\$41,028.34) and RMG Insurance (\$102,890).

Therefore, we found possible violations related to competitive vendor selection requirements in either the County's Administrative Code or Title 62, depending on applicability.

NCGPA Bylaws:

We also found that some of the methods used to hire certain vendors and set reimbursement rates violated NCGPA Bylaws. Section 8 of the Bylaws states, "The members of the Board shall have the general management and control of the business and affairs of the Authority, and shall exercise all powers that may be exercised or performed by the Authority under the existing laws, the Articles of Incorporation, and the Bylaws". Section 7 states, "A majority of the Board members then in office shall constitute a quorum for the transaction of business." (The Board consists of seven members.) Section 7 also states, "All actions of the Board may be taken by vote of the majority of the members."

We found that in many instances in 2016 and 2017, official action of the Board in the form of a motion or resolution was obtained after decisions related to the engagement of professional services vendors apparently had already been made. In some instances, work was performed by these vendors prior to the Board approving their engagement. This rendered the action of the Board superfluous, as invoices would be due and payable regardless of the actions of the Board.

Following are the specific instances we noted:

Norris, McLaughlin and Marcus (NMM), P-3 Bridge Project – As noted in Procedure 1 (page 2), on 3/1/16, the Board passed a resolution retaining NMM as Solicitors and accepting the terms of the Engagement Letter submitted by that firm. Within that letter, NMM agreed to a rate of \$250/hour for work related to "projects under Pennsylvania's Act 88." (Title 74) On 9/6/16, the Board passed a subsequent resolution increasing the salary to \$295/hour. Invoices for work performed between 1/11/16 and 8/31/16 were all billed at \$295/hour and paid by the County. Four invoices were for the period prior to the increase in the rate with two of those invoices dated, submitted, and paid by the County prior to the increase. Therefore, NMM was billing at an increased rate that had not yet been approved by the Board.

Also, according to NMM in their letter to the County dated 6/2/18, they discussed the rate paid to Peter Hutcheon, which was greater than the rate being paid to John Lushis. They stated, "...our firm proposed and NCGPA agreed to set his rate at \$350/hr." There was no reference to this "agreement" in NCGPA minutes or in any resolution passed by the NCGPA. Therefore, if an agreement existed, it was entered into without the approval of a quorum.

Norris, McLaughlin and Marcus (NMM) – Jail Reconstruction Project – On 5/2/17, NCGPA passed a resolution authorizing the President and Solicitor to work with the County on a new jail. We found that the Solicitor had already been working with the County on this matter since 1/30/17. Four invoices were for the period prior to the approval with three of those invoices dated and submitted prior to the passage of the resolution.

Buchanan, Ingersoll and Rooney (BIR) – The NCGPA resolution retaining this firm for work evaluating responses to the P3 Bridge RFP was approved on 9/6/16. The Engagement Letter with this firm (which was never executed) was dated 5/9/16 and all work was performed prior to 8/23/16. It should be noted that the County Executive approved payments to this firm without the presence of a fully signed and executed Engagement Letter.

PFM Group – The NCGPA resolution retaining this firm for work evaluating responses to the P3 Bridge RFP was approved on 9/6/16. The proposal submitted by this firm was dated 4/25/16. No formal agreement was drafted and signed. All work was performed prior to 9/1/16. As with BIR, the County Executive approved payments to this firm without the presence of a formal agreement.

We conducted this agreed-upon procedures engagement in accordance with generally accepted government auditing standards. We were not engaged to and did not conduct an examination or review, the objective of which would be the expression of an opinion or conclusion, respectively, on the activities related to P3 Projects and intended P3 Projects involving the County and the NCGPA. Accordingly, we do not express such an opinion or conclusion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of the management of the County of Northampton, Pennsylvania and is not intended to be and should not be used by anyone other than these specified parties.



Richard J. Szulborski  
County Controller



Anthony Sabino, CIA  
Lead Auditor

December 10, 2018

cc: Stephen Barron, Director of Fiscal Affairs  
Paul Anthony, Jr., NCGPA Chair  
Charles Dertinger, County Director of Administration and NCGPA Secretary