Report of the Commission on Indigent Defense Services to the Joint Legislative Commission on Governmental Operations:

Requests for Proposals and Contracts for Legal Services

Submitted Pursuant to Session Law 2013-360, § 18A.4

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EXECUTIVE SUMMARY

Section 15.16(c) of Session Law 2011-145, as amended by § 39 of Session Law 2011-391, directed the Office of Indigent Defense Services ("IDS Office") to issue a request for proposals ("RFP") for the provision of all legal services for indigent persons in all judicial districts. In cases where a proposed contract would provide cost-effective and quality representation, the special provision directed IDS to use private assigned counsel ("PAC") funds to enter into contracts. Pursuant to that special provision, IDS submitted a report on the issuance of RFPs to the Joint Legislative Commission on Governmental Operations on October 1, 2011.

Section 18A.4 of Session Law 2013-360 again directs the IDS Office to issue a RFP for the provision of all classes of legal cases in all judicial districts. In cases where a proposed contract would provide cost-effective and quality representation, the revised special provision directs IDS to use PAC funds to enter into contracts. The revised provision further provides that disputes about the ability of potential contractors to provide effective representation shall be determined by the senior resident superior court judge for the district. Finally, it directs IDS to submit another report on the issuance of RFPs to the Joint Legislative Commission on Governmental Operations by October 1, 2013.

Prior to 2011, IDS had a number of contracts with individual attorneys, consortia of attorneys, and two non-profits in Charlotte. However, those contracts covered a mere 2.7% of the non-capital cases at the trial level that were handled by PAC. During fiscal year 2010-11, excluding potentially capital cases and appeals, IDS processed almost 200,000 individual PAC fee applications from more than 2,600 different attorneys at a cost of approximately $68.7 million. Those fee applications represented more than 60% of the state's indigent trial-level caseload, which was handled by PAC pursuant to case-by-case appointments. Thus, a large-scale contract system represents a fundamental shift in the way that indigent defense services have been provided in North Carolina.

Prior to this shift toward a large-scale contract system, IDS relied on volunteer indigent appointment committees to determine the qualifications of roster attorneys and to provide oversight, particularly in non-public defender districts. IDS also relied on almost 400 district and superior court judges to set appropriate fee awards, and almost 2,500 deputy and assistant clerks to process a large volume of appointment and compensation paperwork. Under the new contract system, a significant portion of that work is being shifted to IDS. For example, by selecting contractors, IDS has become responsible for deciding which attorneys are able to handle indigent cases and which attorneys are not. IDS has also become responsible for providing oversight and for setting compensation and processing the associated paperwork. Those additional responsibilities have necessitated the development of new infrastructures for data collection and reporting, as well as some modest expansion of IDS' current staff, both in the central office and around the state.

A planned, well run, and properly resourced and supported contract system could lead to quality improvements while also containing costs. However, such a system can only succeed if each of those elements—proper planning, administration, resources, and support—are present. The IDS Commission and IDS Office have developed the necessary infrastructures and identified

the staffing needs, *see, e.g.*, "Data Collection and Reporting Systems" and "Staff Expansion" in Section III, below, so that IDS is in a position to meet the General Assembly's directive in a responsible and cost-effective manner.

Since the original special provision was enacted in July 2011, the IDS Commission and IDS Office have explored the legal and practical aspects of RFPs and contracts, and have gathered and reviewed RFPs and contracts from other jurisdictions, as well as national reports and recommendations detailing features of effective contract systems and pitfalls to avoid. The Commission also formed a Contracts Committee of the IDS Commission to work with the IDS staff on developing a contract system that is cost effective and that ensures quality legal services for North Carolina's indigent citizens. Due to the sheer volume of cases that would be covered by a large-scale contract system, IDS is staggering the issuance of RFPs by case type and geography. To date, IDS has issued two RFPs for offers to handle all of the adult criminal cases and a number of specialized per session courts, such as drug treatment courts, in Judicial Division III, which includes the following districts and counties: Districts 9 (Franklin, Granville, Vance, and Warren), 9A (Caswell and Person), 10 (Wake County), 14 (Durham), 15A (Alamance), and 15B (Chatham and Orange). IDS is in the process of preparing to issue a third RFP in November 2013 for the same case types in Districts 3A (Pitt), 8 (Greene, Lenoir, and Wayne), and 11 (Harnett, Johnston, and Lee).

This report describes the actions that the IDS Commission and Office have taken to design and implement an effective contract system, as well as planned next steps.

REPORT

Section 15.16(c) of Session Law 2011-145, as amended by § 39 of Session Law 2011-391, provided:

> The Office of Indigent Defense Services shall issue a request for proposals from private law firms or not-for-profit legal representation organizations for the provision of all legal services for indigent clients in all judicial districts. The Office of Indigent Defense Services shall report on the issuance of this request for proposals to the Joint Legislative Commission on Governmental Operations by October 1, 2011. In cases where the proposed contract can provide representation services more efficiently than current costs and ensure that the quality of representation is sufficient to meet applicable constitutional and statutory standards, the Office of Indigent Defense Services shall use private assigned counsel funds to enter into contracts for this purpose. In selecting contracts, the Office of Indigent Defense Services shall consider both the cost-effectiveness of the proposed contract and the ability of the potential contractor to provide effective representation for the clients served by the contract.

Section 18A.4 of Session Law 2013-360 provides:

> The Office of Indigent Defense Services shall issue a request for proposals from private law firms or not-for-profit legal representation organizations for the provision of all classes of legal cases for indigent clients in all judicial districts.

> The Office of Indigent Defense Services shall report on the issuance of this request for proposals to the Joint Legislative Commission on Governmental Operations by October 1, 2013. In cases where the proposed contract can provide representation services more efficiently than current costs and ensure that the quality of representation is sufficient to meet applicable constitutional and statutory standards, the Office of Indigent Defense Services shall use private assigned counsel funds to enter into contracts for this purpose. In selecting contracts, the Office of Indigent Defense Services shall consider the cost-effectiveness of the proposed contract. Disputes regarding the ability of the potential contractor to provide effective representation for clients served by the contract shall be determined by the senior resident superior court judge for the district.

This report summarizes the work that the IDS Commission and IDS Office have undertaken to comply with these special provisions, as well as IDS' future plans for issuing additional RFPs and entering into cost-effective contracts with qualified attorneys and law firms throughout the state.

At the outset, it is worth noting that the United States Department of Justice's Bureau of Justice Assistance ("BJA") has found that strong contract systems can actually increase long-term per case costs compared to public defender and assigned counsel systems: "Typically, good contract systems cost more per case than do public defender or assigned counsel programs. In part, this results from the costs of administering the contracts, from the costs of overseeing and evaluating multiple providers, and from the costs of additional work necessitated when contractors lack the institutional knowledge that accumulates within a staff-based organization. . . . Jurisdictions with particularly strong bar associations often find that they must keep increasing contract rates to continue attracting competent attorneys." *See* Contracting for Indigent Defense Services: A Special Report, at 17 (BJA Apr. 2000).

I. INITIATIVES TO DEVELOP A RFP AND CONTRACT SYSTEM:

Review of North Carolina Law Governing RFPs and Legal Services Contracts

While the IDS Commission and IDS Office had experience using contracts as an alternative form of providing indigent defense services, IDS had not previously utilized the RFP process as a means of identifying contractors and securing contracts. Thus, after the original special provision directing IDS to issue RFPs for services was enacted, IDS staff first engaged in a review of the governing law. Most state-issued RFPs for goods and services are governed by Article 3 of Chapter 143 of the North Carolina General Statutes. However, contracts for legal services with the Judicial Branch are not subject to the competitive procurement requirements in Chapter 143.[1] Despite being exempt, IDS has followed the principles in Article 3 when

[1] G.S. 143-336(b) exempts the Judicial Branch from the Department of Administration Act (Article 36 of Chapter 143), and the Division of Purchase and Contract is a part of the Department of Administration. Article 3 of Chapter 143 instructs the Secretary of Administration as to how the Division of Purchase and Contract exercises its responsibilities. Because the Judicial Branch is exempt from the authority of the Department and the Secretary, it is also exempt from statutes that direct the operations of the Department.

appropriate. *See* "Development of Policies for the Issuance of RFPs and Establishment of Legal Services Contracts," below.

G.S. 143-64.70 governs personal service contracts by state agencies, and provides:

> By January 1 of each year, each State department, agency, and institution shall make a detailed written report to the Office of State Budget and Management and the Office of State Personnel on its utilization of personal services contracts that have an annual expenditure greater than twenty-five thousand dollars ($25,000). The report by each State department, agency, and institution shall include the following: (1) Identification of the department and employee responsible for oversight of the performance of the contract[; and] (2) Vendor or contractor name, object of expenditure description, contract award amount, purchase order or contract number, purchase order start and end date, source of funds, and amount disbursed during the fiscal year.

IDS' future annual reports under this statute will include service contracts pursuant to the required RFPs.

Review of RFPs and Contracts in Other Jurisdictions and National Reports and Recommendations for Contract Systems

IDS Office staff reviewed RFPs and contracts in other jurisdictions that utilize the RFP process to provide indigent defense services, including Missouri, New Hampshire, New Mexico, Oregon, and Wisconsin; some counties in Arizona, California, North Dakota, and Washington; and New York City. The staff then reviewed a number of national reports, guidelines, and recommendations, including the National Legal Aid and Defender Association's ("NLADA") Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services. The reports, guidelines, and recommendations all describe features of effective and deficient contract systems, which helped the IDS Commission and Office identify best practices and pitfalls to avoid in the RFP process. *See, e.g.*, Contracting for Indigent Defense Services: A Special Report, at 16-17 (BJA Apr. 2000) ("Oregon has developed a detailed RFP to solicit bids from potential contractors. The RFP is based on a model contract that establishes expectations for caseloads, costs, areas of coverage (including geographic limits and types of cases), level of services, staffing plans, and the applicants' experience and qualifications. The review process includes consultation with local courts and judicial staff and an assessment that the proposal is consistent with the needs of the county, region, and state. Oregon has also established a process by which extraordinary expenses related to cases are paid through a mechanism outside the standard contract.").

Contracts Committee of the IDS Commission

The IDS Commission formed a Contracts Committee that has guided the IDS Office staff in designing and implementing a contract system that is both cost effective and ensures that the quality of representation meets applicable constitutional and statutory standards. As of the date

of this report, that Committee has met six times. Additional meetings will be scheduled as needed.

Development of Policies for the Issuance of RFPs and Establishment of Legal Services Contracts

To establish governing procedures and ensure that the process is as transparent as possible and to help protect IDS in the event of legal challenges from unsuccessful offerors, the IDS Commission and Office developed policies to govern the issuance of RFPs and the establishment of legal services contracts. The initial draft of those policies was based on the Administrative Office of the Court's ("AOC") purchasing policies, which are in turn based largely on the Department of Administration's rules, as well as extensive discussions with AOC's Purchasing Officer. The draft was then reviewed by two School of Government ("SOG") professors with expertise in this area, and revised significantly in light of their feedback and suggestions. The IDS Commission approved the original policies in September 2011 and subsequently approved a number of revisions based on experience. In September 2013, the Commission approved a series of revisions that are intended to implement the new language in § 18A.4 of Session Law 2013-360 about the senior resident superior court judges resolving any disputes about the ability of potential contractors to provide effective representation. The current policies are attached to this report as Appendix A.

The policies cover a wide range of topics, including but not limited to offeror qualifications, general contracting requirements, sealed offers, public opening of offers, evaluation of offers including two-step evaluations, basis for awards, negotiations, waiver of competition, record maintenance, and procedures for an unsuccessful offeror to protest an award to a Committee of the IDS Commission or, if there is a dispute about quality, to the local senior resident superior court judge. In light of the cost and time associated with the competitive bidding process, the policies provide that service contracts involving an annual expenditure of less than $25,000 do not have to be the subject of competitive bidding, which is consistent with the bid value benchmark set forth in G.S. 143-53.1(a). Despite that provision, IDS will solicit competitive bidding for some contracts below the threshold when the IDS Director determines that it would be advantageous to do so. Thus, in rural districts with small caseloads and/or for relatively small dollar contracts, IDS may be able to negotiate informal contracts under the threshold for competitive bidding.

Virtual CLE for Interested Lawyers

Because most defense attorneys are unfamiliar with the RFP process, IDS and SOG developed and released a virtual continuing legal education program for interested lawyers during the fall of 2011, prior to the issuance of the first RFP. That program enabled IDS staff to explain the process and to respond to common questions in a format that attorneys across the state can access at their convenience.

Question Period

Before soliciting final proposals through the first RFP, the IDS Commission and Office issued a preliminary RFP that included a built-in question phase, which allowed the IDS staff to respond to common questions and to clarify ambiguities in the RFP. Answers to all questions received from individual attorneys and/or clarifications are posted on the IDS website. *See* "RFPs and Contracts Page on IDS Website," below.

RFPs and Contracts Page on IDS Website

The IDS Office created a dedicated page on the IDS website to post information about RFPs and contracts, and notified the defense bar through all available listservs and IDS' EBlast system. IDS has posted on that page an introduction to the RFP process; responses to all questions that IDS received during the question period that followed the release of the first preliminary RFP; the virtual CLE described above; county-by-county case and cost data; the governing policies described above; the standard terms and conditions of contract; any current RFPs and fillable offer forms; all expired RFPs and awards lists; and forms and resources for contractors, including an orientation packet and a user guide for the online contractor case reporting system that is described in Section III, below.

II. COMPONENTS OF RFPS AND CONTRACTS:

Quality Components of RFPs and Built-in Evaluation Criteria

In an effort to ensure that the quality of representation provided by contractors is sufficient to meet applicable constitutional and statutory standards, the IDS Commission and Office have included the following requirements in the RFPs that have been released to date. Individual offerors are able to seek a waiver of specific requirements, although an inability to meet all requirements is material to the evaluation:

- Minimum years of experience depending on the type of case, which are uniform across the state and based on the IDS Commission's model indigent appointment plan, as well as a requirement that offerors describe their specific background and experience;
- A description of the offeror's current legal practice broken down into types of cases handled;
- A demonstrated commitment to indigent defense;
- A plan for handling immediate appointments and an ability to identify conflicts of interest as of the contract's effective date;
- Demonstrated experience with mental health, substance abuse, domestic violence, and forensic issues, as well as non-English speaking clients;
- A strong ethical track record and reputation;
- Adequate access to legal research tools, including a law library or online research tools;
- Adequacy and proximity of office facilities, or some other demonstrated ability to meet with appointed clients in the county, including incarcerated clients, as well as an ability to provide adequate phone coverage for calls from clients;

- Adequacy and appropriateness of staffing levels, including attorneys, support staff, and any outside resources such as law student interns; if a bidder is a sole practitioner or staffing levels are minimal, he or she may supply a plan for providing necessary support services in appropriate cases;
- Ability to handle court schedules for the covered case types;
- For offers from firms or non-profits with more than one attorney and support staff, adequacy and appropriateness of attorney and support staff supervision;
- Ability to track and report pending cases, disposed cases, and other data in a format and timeframe mandated by IDS;
- Ability to adhere to caseload and workload standards;
- Ability to prioritize the contract work vis-à-vis retained work and other federal and state appointed work;
- Ability to adhere to applicable performance guidelines, including but not limited to timely client contact and the filing of necessary and appropriate motions;
- For high-level felony offerors, writing samples, including substantive motions and/or trial transcripts; and
- Professional references.

For further discussion of references, see "Waivers of Confidential References," below. The RFPs also notify offerors that, if they are awarded contracts, their performance will be evaluated on an ongoing basis.

Key Personnel Requirements

RFPs and contracts often include "key personnel" requirements, which provide that all persons rendering services pursuant to the contract must be named in the contract and that no substitutions may be made without advance approval from the contracting agency. The IDS Commission and Office do not want to enter into a contract with a law firm based on the demonstrated qualifications of the attorneys employed by that firm, and then have the firm hire less qualified attorneys to handle the actual cases. Thus, for contracts with individual attorneys and law firms, the RFPs and resulting contracts specify that all attorneys rendering services pursuant to a contract must be named in the contract and that no substitutions may be made without advance IDS approval. *See* Standards for Criminal Justice Providing Defense Services, Standard 5-3.3(b)(iv) (Am. Bar Ass'n 3rd ed. 1992). If IDS enters into any future contracts with non-profits or large established law firms, IDS may decide to require offerors to submit the names of the initial attorneys along with a hiring plan and/or hiring criteria.

Waivers of Confidential References

In an effort to ensure quality and to account for the invaluable opinions of local court system actors, IDS seeks references about offerors, both from people identified by the offeror and others not identified by the offeror. However, some local actors have been hesitant to provide candid responses because IDS cannot assure them that their responses will be kept strictly confidential. While references concerning potential contractors would be subject to disclosure under North Carolina's public records laws, the IDS Office includes in all RFPs a provision that, by submitting a proposal, offerors waive their right to access any confidential references that IDS

obtains. The IDS Commission and Office also respectfully suggest that the General Assembly create an exemption from the public records laws for reference information that IDS obtains during the RFP process.

Qualifying Offers Only

Most jurisdictions that utilize contract systems for indigent defense seek only technical offers about the offerors' qualifications and experience ("qualifying offers"), and the funding agency then sets a cost-effective contractual price without seeking price offers. For example, New Mexico seeks qualifying offers and then pays set flat fees per case, and one county in Missouri pays a set annual amount for two attorneys to handle felony cases and to serve as backup for juvenile and parent cases. With the exception of some low-cost, high-volume cases described in "Price Bids and Two-Step RFPs," below, the IDS Commission and Office believe that is the best approach for the vast majority of indigent cases in North Carolina, at least until IDS and the defense bar have some experience with a large-scale contract system and IDS can ensure that the system maintains or enhances quality representation. Thus, for most cases, IDS seeks qualifying offers and then sets contractual payments that are cost effective compared to case-by-case PAC payments.

> *The initial savings a jurisdiction can achieve by switching from an assigned counsel system to a contract system can vanish in subsequent years if, as experience has shown, experienced attorneys drop out of the bidding process as the contracts prove to be more time consuming than anticipated. Many contracts do not even cover average hourly overhead. Jurisdictions are then faced with a dilemma: Do they accept the attrition of experienced attorneys and contract with inexperienced attorneys, risking jail, court delays, and ineffectiveness claims, or do they increase the contract payments to maintain system efficiency and stability?*
>
> - Contracting for Indigent Defense Services: A Special Report, at 17 (BJA Apr. 2000).

There are several justifications for this approach. First, not accepting price bids eliminates the risk of bids that are so low that the quality of representation cannot meet applicable constitutional and statutory standards, as required by the special provision. Indeed, allowing price bids would have a particularly problematic impact on quality given the significantly reduced and extremely low hourly rates that IDS now pays to PAC.[2] The IDS Commission and Office have set the contractual rates to be cost-effective compared to those low hourly rates, and do not believe it would be possible to ensure quality services at lower rates. In addition, inadequate compensation and contractual systems that rely on the lowest bidders have been held to violate indigent defendants' constitutional rights in some other jurisdictions. *See, e.g.*, *Arizona v. Smith*, 681 P.2d 1374 (Ariz. 1984) (holding that Mohave County's low-bid contract system violated the constitutional rights of defendants); *New Mexico v. Young*, 172 P.3d 138 (N.M. 2007) (presuming ineffective assistance of counsel due to an inadequate flat fee contract in a capital case and staying the state's ability to seek the death penalty unless and until additional funds were made available); *see also Simmons v. State Public Defender*, 791 N.W.2d 69 (Iowa S. Ct. 2010) (construing a contract for indigent representation as not

[2] Effective for all appointments on or after May 2, 2011, the IDS Commission reduced the standard non-capital PAC rate of $75 per hour and created a variable rate structure. For cases in which the highest charge is a Class A through D felony, the current rate is $70 per hour. For all other cases resolved in superior court, the current rate is $60 per hour. For all other cases resolved in district court, the current rate is $55 per hour.

placing a hard cap on compensation to avoid a construction that would undermine effective assistance of counsel, observing that "the cases see a linkage between compensation and the provision of effective assistance of counsel." *Id.* at 81 (citing *Makemson v. Martin County*, 491 So. 2d 1109, 1114 (Fl. 1986) ("The link between compensation and the quality of the representation remains too clear."); *Jewell v. Maynard*, 383 S.E.2d 536, 544 (W. Va. 1989) (concluding that it is unrealistic to expect appointed counsel to remain "insulated from the economic reality of losing money each hour they work").

As the Justice Policy Institute has noted, "[l]ow rates of compensation and low-bid contracts may keep costs down in the short term, but at the expense of the system providing quality representation for the people requiring public defense services. The impact of under resourced public defense systems is far-reaching and can lead to increasing incarceration, especially incarceration of people with less income and from communities of color, who are most likely to use public defense systems." System Overloaded: The Costs of Under-Resourcing Public Defender, at 9-10 (Just. Pol'y Inst. July 2011). Increased incarceration rates will, in turn, drive up North Carolina's spending on corrections and eliminate any savings associated with the new contract system. The IDS Commission and Office believe that this approach is responsive to concerns expressed by legislators during the 2011 legislative session, which appeared to be directed at the number of hours expended on some cases and grounded in a belief that a system of hourly pay rewards inefficiencies.

Second, setting the contractual payments directly allows IDS to ensure that payments are more uniform within each county and across the state. If IDS allowed price bidding, there could be multiple attorneys in the same county doing the same work for different pay, which would create resistance to the system and be very difficult to administer. Third, implementation is more feasible, in part because IDS does not have to ask judges to apply different rates for recoupment purposes. In addition, the logistical problems associated with paying widely varying amounts to large numbers of contractors could necessitate some expansion of the IDS Financial Services Office. Fourth, a law firm could go out of business because it submitted an unrealistically low bid, which would then have to be fixed at a greater cost than if the compensation had been set appropriately in the first place. This is a particularly strong risk with younger inexperienced attorneys who do not have enough work in this economic climate and who may submit proposals for large volumes of district court work.

Finally, as discussed above, in most other jurisdictions with contract systems, the funding agencies do not seek price bids and instead directly set the contractual prices. The jurisdictions in which funding agencies seek price bids, such as Oregon, tend to rely on contracts with large established non-profits and to require those non-profits to submit budgets that enable the agency to see the resources that will be devoted to the contractual work. In contrast, because there are very few non-profit organizations providing indigent defense services in North Carolina, the vast majority of IDS' contracts are with individual practitioners and small law firms, at least in the early years of a contract system until new organizations are formed.

Traditionally, IDS has treated contractor payments similar to employee payroll—*i.e.*, funds are set aside to continue to pay contractors even if the funds available for case-by-case PAC fee awards have been depleted for the year. The IDS Office has continued that approach with the

current contractors and intends to do so with new contractors to the extent possible. That regularity of payment, combined with a guaranteed volume of cases, should enable contractors to accept payment that is more cost effective than the case-by-case hourly PAC rates.

Price Offers and Two-Step RFPs

The IDS Commission and Office have sought price offers in some low-cost, high-volume categories of cases that are often handled by attorneys for the day or session (*e.g.*, treatment courts), because those case types tend to require less out-of-court work than other case types, the amount of in-court time that is required is more predictable, and it is more difficult for contractors to cut corners on the representation if they submit a price bid that is too low. That process is allowing IDS to gain experience with price bidding and, now that IDS is collecting more detailed data through the online contractor reporting system described below, it may help IDS identify and implement new efficiencies that can then be translated into other case types. In the case types where IDS seeks price bids, the IDS Office has invited per session or per day bids using a two-step RFP process. With two-step RFPs, IDS issues a technical description of the work and the required credentials, evaluates the qualifications of each offeror, and only opens the price bids submitted by the successful offerors.

Contractor Payment Options

There are a number of payment options with contracts that IDS considered and rejected, including:

(1) *Hourly Compensation (with or without caps):* When IDS issues RFPs for capital representation, and potentially appellate representation, the Commission and Office may consider hourly compensation or hourly compensation coupled with some set fee. However, hourly compensation for non-capital cases at the trial level would not make sense in a large-scale contract system. That approach would simply transfer to IDS the responsibility for reviewing fee applications, and IDS does not have the staff or resources to assume that responsibility.

(2) *Flat Per Case Fees:* IDS could determine the average hours currently being spent on each category of case and set flat per case fees. There are benefits and downsides to flat per case fees, and the downsides increase with the seriousness of the cases. Due to concerns that flat per case fees may discourage attorneys from doing the work necessary to represent the clients, and because flat per case fees do not offer administrative advantages over alternative compensation systems, the IDS Commission and Office have not followed this compensation model.

(3) *Flat Fees for Bundles or Groups of Cases:* At least one other jurisdiction has adopted a system in which contractors are paid a set amount for representation in a bundled group of cases. Each bundle is 25 felonies and there is a limit on the number of high-level felonies that can be included. Attorneys can contract to handle one or more bundle. While this approach can still create a disincentive for attorneys to do all of the necessary work, by guaranteeing a volume of cases, attorneys can justify the time on the difficult cases because they also have some easier cases in the mix and the average payments are reasonable.

Based on IDS' research, the Commission and Office have adopted and implemented a fourth model—*i.e.*, *Flat Monthly Payments for Ranges or Percentage of Cases*. This was IDS' approach with the individually negotiated contracts that cover all of the cases of a certain type in a county or district. Generally, each attorney took an equal share of the cases for equal payment, although in one county two of the attorneys took double shares for double payment. One risk with this model is that the contractual payments are based on projections of the workload that could be wrong. To account for that risk, the NLADA's Model Contract, in which attorneys agree to a specific workload but are subject to variations in the number of cases actually assigned, builds in a permissible level of variance. Specifically, an attorney may get 20% variance in the expected number of cases in a given month, but only 5% in a year without triggering a change in payment.

To date, the IDS Commission and Office are paying RFP contractors set monthly fees for a specified range of misdemeanor, low-level felony, or high-level felony cases (called a "caseload unit") in a county or district. Under this approach, IDS solicits offers for one or more caseload units of attorney time based on an assumption that attorneys bill an average of 1,800 hours per year. Based on statewide average hours data, each unit represents 20% of an attorney's billable time (or 360 billable hours). Each county's caseload is evaluated to calculate the number of caseload units that will be required to cover the cases, and the RFPs seek the appropriate number of unit offers for each contract category. Court schedules are also evaluated to determine the number of different attorneys that are needed and, thus, the maximum number of units that can be concentrated in one individual attorney. An individual attorney is free to offer to handle one unit (and spend 20% of his or her time on indigent cases) up to five units (and spend 100% of his or her time on indigent cases), as long as the various court schedules can be covered and there are a sufficient number of contractors to cover conflicts. This approach requires IDS to work with the clerks and judges to develop systems for handling the actual assignments to individual cases, which can be more complicated than rotating case-by-case appointments. *See* "Implementing Contracts at a Local Level," below.

This approach to contracts is resulting in fewer attorneys handling the state's indigent caseload, in part because attorneys who are not willing or able to commit a minimum percentage of their time to appointed cases do not submit proposals. Based on a recent study conducted by IDS Office staff, there is a statistically significant *inverse* relationship between increases in attorneys' caseload and average hours claimed per case. In other words, attorneys with higher caseloads claim fewer hours per case for most case types, which suggests that this aspect of the contract system may generate efficiencies.

Extraordinary Cases and Expenses

Any flat payment system can be coupled with enhanced payments for extraordinary work that is not contemplated by the terms of the contract. For example, in one county in Arizona, attorneys are paid a flat per case fee but, in cases in which the attorneys document that they spent more than a certain number of hours, the county pays the attorneys an hourly rate for the additional hours. Another jurisdiction allows a set additional fee for trials, and some allow the attorneys to negotiate for extra compensation or case credit for complex cases. For example, attorneys who are paid to resolve 100 cases in a year may be able to negotiate a caseload

reduction if they handle an extremely complex case. *See also* Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, Guideline III-11 (NLADA 1984) (providing that contracts "should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation"). Enhanced compensation can be tied to concrete criteria, such as jury trials or jury trials exceeding a certain number of days, or can be for extraordinary work that is subject to IDS approval.

All national reports and recommendations agree that contractors' pay should not be negatively impacted by the need for outside experts, investigators, and support services. *See, e.g.*, Standards for Criminal Justice Providing Defense Services, Standards 5-3.2(c) and 5-3.3(b)(x) (Am. Bar Ass'n 3rd ed. 1992); Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, Guideline III-13 (NLADA 1984); Contracting for Indigent Defense Services: A Special Report, at 24 (BJA Apr. 2000) (describing forcing contractors to choose between paying for investigator, expert, and other services and forgoing those services as a potential conflict of interest).

In accordance with the experiences of other jurisdictions and national recommendations, IDS' standard terms of contract provide that, if a contractor is assigned to an extraordinary case, where the issues presented require extraordinary time and effort for proper representation of the client, the contractor may apply to IDS for additional compensation in that case or for a reduction in the range of cases covered by the contract. They also provide that a contractor may apply to IDS for reimbursement of extraordinary expenses, such as expenses associated with necessary case-related out-of-state travel, expenditures for out-of-county lodging necessitated by case-related travel, and other necessary case-related expenses that cumulatively exceed $100 in one contract case. Finally, the contracts provide that IDS will continue directly funding pre-approved expert and support services.

Issuing and Advertising RFPs

The IDS Commission and Office advertise all RFPs electronically through the IDS website, all available listservs, and IDS' EBlast system. IDS staff also notify local court system actors, including judges and clerks, whenever a RFP is released in their area. IDS intends to issue all RFPs statewide because attorneys in nearby counties or districts may want to submit offers and because it is a statewide learning experience for the defense bar.

Sealed Offers

Because these legal services contracts will not be awarded under Chapter 143 of the General Statutes, the IDS Office cannot claim the protection of G.S. 143-52, which is widely interpreted to provide that proposals do not become public records until after an award has been made. Thus, with the exception of trade secrets under G.S. 132-1.2, everything in connection with the RFP process is a public record, even during the evaluation period and before awards have been made. To help protect against the possibility of a potential offeror seeking access to proposals submitted by other offerors prior to the deadline, the Commission and Office require all offers to be sealed. The IDS Commission and Office respectfully suggest that the General Assembly

consider enacting legislation that would extend some additional confidentiality protections to this process.

Evaluating Proposals

The IDS Commission and Office have developed processes for evaluating all proposals that are received, including the qualifying proposals and any cost proposals that are solicited. In each county or district, IDS forms evaluation committees that are generally comprised of three or four people, including IDS staff attorneys, the applicable Regional Defender (*see* "Staff Expansion" in Section III, below), and the chief public defender in public defender districts. For specialized case types, IDS also plans to include the appropriate statewide defender (*e.g.*, the Juvenile Defender, Parent Representation Coordinator, or Special Counsel Supervising Attorney). The members of the evaluation committee review all of the offers that are received, as well as all references that are obtained from local court system actors, and rate the offers according to the evaluation factors and criteria that are specified in the RFP. Based on the overall committee ratings, contract awards are then allocated among the most highly rated offerors.

Drafting Contracts for Successful Offerors

IDS' standard terms and conditions of contract provide that contracts generally are for a period of two years, with an option to renew for one additional two-year term without soliciting competition or public advertising. *See* Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, Guideline III-4 (NLADA 1984) (recommending that contracts be for at least two-year terms). The contracts also provide mechanisms for contractors to terminate their contracts by giving 30 days written notice and for IDS to terminate contracts due to inadequate performance, breach of contract, and other good cause. *See id.*, Guideline III-5 (defining good cause for purposes of terminating indigent defense contracts). A number of contractors in the first two waves of contract counties have already elected to terminate their contracts because experience revealed that they required too much work for too little compensation; to date, IDS has been able to identify replacement contractors.

The contracts include provisions addressing experts and support costs, caseload and workload standards, guidelines on client contact, limitations on the practice of law outside of the contract for full-time contractors, provisions for completing cases if the contract is breached or not renewed, and mechanisms for oversight and evaluation. *See* Contracting for Indigent Defense Services: A Special Report, at 16 (BJA Apr. 2000). The contracts also require contractors to track and report their time on contract cases, as well as data about those cases, in an online system and pursuant to a timeframe required by IDS, and to report client and bar complaints in a timely fashion. In addition, the contracts clearly specify the scope of contractors' representation. In an effort to monitor quality, contractors will also be subject to courtroom observations, file reviews, and peer review and input from judges and other local actors.

Implementing Contracts at a Local Level

After contracts have been executed in a county or district, IDS staff provide local court system actors with instructions for assigning individual cases that are designed to ensure that each contractor receives the agreed-upon caseload. As discussed in "Contractor Payment Options," above, the assignment of cases is more complicated for clerks and judges when the caseload in a county or district is not divided equally among all contractors. The IDS Commission and Office also plan to identify ways to obtain input from the local bar and bench, as well as the clients, about how the contracts are working and any systemic issues that may arise.

Client Recoupment in Contract Cases

Once a more large-scale contract system is established, the IDS Commission and Office may need to evaluate how recoupment should be handled in contract cases. Currently, contractors keep track of their hours and file fee applications with the court solely for recoupment purposes, much like public defender offices. However, as IDS moves toward a more widespread use of contracts, the Commission and Office may need to explore the development of a flat fee schedule by case type for recoupment purposes. This approach is utilized in Oregon.

The IDS Commission and Office are concerned that recoupment revenues may decrease with a shift to a large-scale contract system because contractors who are not being paid by the hour or the case do not have a financial incentive to submit fee applications for recoupment purposes. For some steps the IDS Office has taken to minimize that risk, see "Data Collection and Reporting Systems" in Section III, below.

Protest Procedures for Unsuccessful Offerors

The IDS Commission and Office expected that some unsuccessful offerors would want a process to file a protest and to seek review of IDS' decision not to award them a contract. Section .0800 of the policies that are attached as Appendix A sets forth procedures for handling any such protests. The RFPs also provide that, by submitting a proposal, all offerors agree to follow the protest procedures and that venue for any litigation shall be in Durham County, where the central IDS Office is located. The effective date of contracts are then set far enough in the future to allow time for the protest procedures.

In September 2013, the IDS Commission revised the previously adopted protest procedures to implement the new language in § 18A.4 of Session Law 2013-360 providing that disputes about the ability of potential contractors to provide effective representation shall be determined by the senior resident superior court judge for the district. Thus, the policies now provide a procedure to seek review by the senior resident superior court judge if caseload units or sessions that were included in a RFP remain available, but IDS has declined to award a contract to an offeror on the ground that the offeror is unable to provide effective representation.

III. INFRASTRUCTURE:

The widespread use of RFPs and contracts has required IDS to develop new systems and infrastructures, including new data collection and reporting systems. It has also necessitated a modest expansion of IDS staff, both in the central office and around the state.

Data Collection and Reporting Systems

The IDS Commission and Office have developed a new online Contractor Case Reporting System for contractors to report their case-related data on a monthly basis. For the most part, the system requires contractors to report the same data they currently report on case-by-case fee applications, but it includes a number of features that will enhance the quality of IDS' case and cost data.

Currently, IDS' PAC data for research and analysis is derived from the North Carolina Accounting System ("NCAS"). When PAC complete a case, they prepare a fee application for review by the judge. After a judge authorizes an award, the fee award is forwarded to IDS' Financial Services Office, where staff enter case and cost data into NCAS and then issue payment. A large-scale expansion of contracts necessitated new data collection systems so that Office staff will continue to have access to case and cost data for research and analysis, and the Commission and Office will be in a position to evaluate the fiscal impact of contracts and to continue making informed decisions about resource allocation.

IDS' standard terms and conditions of contract require contractors to enter into the online system by the seventh day of each month data about newly assigned contract cases from the prior month and disposed cases from the month preceding the prior month, and to then certify in the system that their reporting obligations are complete. Thus, the system provides a way for IDS staff to monitor contractors' pending and disposed caseloads, to ensure that available cases are being assigned appropriately among contractors, and to gauge contractors' progress toward their contractual obligations. The monthly certification also prompts IDS staff to release contractors' monthly payment. If a contractor fails to submit timely data, IDS' standard terms and conditions of contract allow IDS to impose escalating financial penalties. If a contractor fails three or more times during the course of a contract to report timely data, those terms and conditions allow IDS to terminate the contract for cause.

The online system will enable IDS to analyze data by type and class of case, so that IDS' future case and cost data will be richer and more nuanced. In addition, in recoupment-eligible cases, contractors are able to print prefilled recoupment applications from the online system to submit to the presiding judge for entry of judgment, and the system tracks when those applications have been printed so that IDS staff can do some basic monitoring to ensure that contractors fulfill that contractual requirement.

Contractors have had access to the online reporting system since the end of June and, as of the date of this report, have entered data about more than 14,300 adult criminal cases into the system. A user guide for the system is available on the IDS website. To access that guide, go to

www.ncids.org and click on "Information for Counsel," "RFPs & Contracts," "Contractor Forms & Resources," and then "User Guide: Online Contractor Case Reporting System."

Staff Expansion

The Commission and Office intend to handle the RFP process, as well as the administration and oversight of contracts, through a combination of the central IDS Office and four new Regional Defenders. Initially, IDS expanded its preexisting half-time Contracts Administrator position into a full-time position. The Office then recruited and hired a new Contracts Administrator with experience with RFPs and contracts for services to handle the business end of the system.

As RFPs are issued across the state, IDS also plans to use its authority to create new attorney positions to hire four Regional Defenders who will be responsible for providing training, support, and quality oversight and for evaluating the contractors in four regions of the state: 1) the First and Third Judicial Divisions; 2) the Second and Fourth Judicial Divisions; 3) the Fifth and Sixth Judicial Divisions; and 4) the Seventh and Eighth Judicial Divisions. (*See* Appendix B for a map outlining these regions.) IDS recruited and hired the first Regional Defender for the First and Third Judicial Divisions in early 2012, so that she was able to be involved in the selection of contractors in the Third Judicial Division. IDS has hired the second Regional Defender for the Second and Fourth Judicial Divisions, and she will begin work on October 1, 2013 so that she can participate in the selection of contractors pursuant to the third RFP that IDS plans to release in November 2013. Additional Regional Defenders will not be hired until IDS is ready to issue RFPs in the covered regions.

The Regional Defenders are full-time IDS employees. A background in criminal defense is required and a background in other indigent case types (such as civil cases with a right to counsel and juvenile delinquency) is a plus. The Regional Defenders provide a resource for judges, clerks, other local court system actors, and clients who encounter problems or have concerns, and they are available to consult with and assist attorneys upon request. Whenever possible, the IDS Office will attempt to house the Regional Defenders in existing office space, such as public defender or regional capital defender offices, so that IDS will not incur unnecessary expenses.

Training

The IDS Office has begun working with SOG to identify the additional training programs that will need to be developed and provided in a large-scale contract system. Currently, IDS and SOG provide extensive training for public defenders and assistant public defenders, but fewer programs are available to individual PAC because of the sheer number of attorneys who handle indigent cases on an appointed basis. As IDS shifts toward a contract system, additional training resources will need to be devoted to the contractors. SOG is in the process of recruiting and hiring staff to develop and implement regional programs for contractors.

IV. RFPS AND CONTRACTS TO DATE AND NEXT STEPS:

Because of the sheer volume of indigent cases across North Carolina (almost 200,000 non-capital trial level cases handled by PAC each year) and limitations on the IDS staff and resources that can be devoted to this process, the IDS Commission and Office are staggering the issuance of RFPs by case type and geography. IDS' current plan is to limit the initial RFPs to adult non-capital criminal cases and some per session court types, such as drug treatment court, before developing RFPs for the specialized case types that IDS funds, such as delinquency cases and special proceedings.

Since the original special provision was enacted, IDS has issued two RFPs for offers to handle all of the adult criminal cases and a number of per session courts, such as drug treatment courts, in Judicial Division III, which includes the following districts and counties: Districts 9 (Franklin, Granville, Vance, and Warren), 9A (Caswell and Person), 10 (Wake County), 14 (Durham), 15A (Alamance), and 15B (Chatham and Orange). As of the date of this report, IDS has entered into more than 150 contracts based on the first two RFPs.

The IDS Office is in the process of preparing to issue a third RFP in November 2013 for the same case types in Districts 3A (Pitt), 8 (Greene, Lenoir, and Wayne), and 11 (Harnett, Johnston, and Lee). The Commission and Office are considering innovative ways to include more young attorneys in the contract system, such as asking attorneys with less than one year of experience who are not part of a law firm with more experienced supervisors to arrange for a designated mentor from the local bar. The Commission and Office are also reviewing IDS' case and cost data, as well as the existing contract categories and terms, with the goal of pilot testing a specialized impaired driving contract. However, it is challenging to define the cases that would be covered by such a specialized contract category, which could range from impaired driving to habitual impaired driving to felony death by vehicle. It is also complicated to determine how to handle cases in which a defendant with a pending impaired driving charge picks up subsequent unrelated misdemeanor or felony charges. Finally, it may be difficult to sustain narrow specialized contracts in many counties because of the relatively small number of cases.

CONCLUSION

While a planned, well run, and properly resourced and supported contract system could lead to quality improvements and also contain costs, the establishment of a large-scale contract system represents a fundamental shift in the way that indigent defense services are provided in North Carolina. Such a shift has required significant planning and work to identify best practices, to design and develop the necessary infrastructures, and to recruit and hire the staff to administer and support the system. Since the original special provision was enacted in July 2011, the IDS Commission and Office have made great strides in laying the groundwork for a contract system that will be cost effective and ensure that North Carolina's indigent citizens receive quality legal representation. The Commission and Office have also begun the process of issuing RFPs in phases across the state, evaluating proposals that are received, and entering into cost-effective, high quality contracts.

APPENDIX A

NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES:

POLICY FOR THE ISSUANCE OF REQUESTS FOR PROPOSALS AND ESTABLISHMENT OF LEGAL SERVICES CONTRACTS

Pursuant to the authority in Section 15.16(c) of Session Law 2011-145 as amended by Section 39 of Session Law 2011-391, Section 18A.4 of Session Law 2013-360, and G.S. 7A-498.2(b), 7A-498.5(d), and 7A-498.6, the following policy governs requests for proposals (RFPs) for legal services and the establishment of contracts for legal services in all classes of cases with the North Carolina Office of Indigent Defense Services (IDS).

It is deemed by the IDS Commission to be in the best interest of IDS to contract for legal services without the assistance of the Division of Purchase and Contract of the Department of Administration. The procedures outlined herein shall be followed in lieu of the laws and rules governing purchases by the Division of Purchase and Contract.

While contracts with Judicial Branch agencies for legal services are not subject to the competitive procurement requirements of Chapter 143 of the North Carolina General Statutes, it is the intent of this policy to provide procedures for the issuance of RFPs and the establishment of contracts with IDS for all classes of legal cases that conform to those basic requirements and principles.

This policy was originally adopted by the IDS Commission on September 16, 2011, and was amended effective December 9, 2011, September 14, 2012, and September 13, 2013.

SECTION .0100: SCOPE AND DEFINITIONS

.0101 Scope and Application

(a) This policy applies to all IDS contracts for legal representation of indigent persons, including contracts that are generated as a result of the request for proposals (RFP) required by Section 15.16(c) of Session Law 2011-145, as amended by Section 39 of Session Law 2011-391, and Section 18A.4 of Session Law 2013-360. The policy does not apply to any other types of contracts with IDS.

(b) For purposes of this policy, IDS is defined as all entities that fall within the budget of the Office of Indigent Defense Services.

[Section (a) amended effective September 13, 2013]

.0102 Responsibility

The IDS Director or the Director's designee is responsible for executing all IDS legal services contracts. The administration of RFPs and contracts may be delegated to any IDS staff member.

[Section amended effective September 13, 2013]

.0103 Location

The principal IDS Office is located at 123 West Main Street, Suite 400, Durham, NC 27701.

.0104 Procedures, Forms, and Terms and Conditions

The IDS Director or the Director's designee shall establish procedures, and prescribe forms and terms and conditions for contracts governed by this policy. The procedures, forms, and terms and conditions shall be established taking into consideration market conditions and trends, legal requirements, and other factors determined to be in the best interests of IDS and its clients.

.0105 Definitions

(a) "Solicitation document" means a written RFP for legal services.

(b) "Offer" means a bid, proposal, or offer submitted in response to a RFP for legal services.

(1) "Qualifying offer" means a bid, proposal, or offer that seeks to demonstrate the qualifications required by the RFP.

(2) "Cost/price offer" means a bid, proposal, or offer that proposes a cost or price for the services required by the RFP.

(c) "Offeror" means the person, firm, or other entity submitting a bid, proposal, or offer in response to a RFP for legal services.

(d) "Evaluation committee" means a committee that may be appointed by the IDS Director to evaluate proposals submitted in response to one or more RFPs.

(e) "Two-step solicitation" means qualifying offers shall be opened and reviewed first, and cost/price offers shall only be opened from offerors who meet the qualifications and who are

placed in the range of all of the most highly rated offers by the IDS Director or the evaluation committee.

(f) "Public funds" are funds from any source including, but not limited to, state, federal, or local funds, grants, donations, or gifts that are deposited in accounts controlled by IDS for the general support of IDS.

(g) "Legal services contract" means an annual contract for legal representation and related services that IDS enters into with an individual attorney, law firm, or non-profit organization. Pursuant to legal services contracts, independent contractors perform services for IDS that require specialized legal or other knowledge, experience, expertise, or similar capabilities for the provision of legal representation and related services to indigent defendants and respondents who are entitled to representation at state expense. Case-by-case attorney appointments, as well as case-by-case authorizations for experts or other support services that are issued by the IDS Director, the Director's designee, or a judge do not constitute legal services contracts for purposes of this policy.

[Subsection (g) amended effective December 9, 2011]

.0106 Public Records and Confidentiality

All information and documentation relative to the development of a RFP shall be subject to public access as required under the state public records laws. Information that constitutes a trade secret as defined in G.S. 132-1.2 or that is otherwise exempt from the public records law shall be withheld from public access to the extent allowed by law.

SECTION .0200: OFFEROR QUALIFICATIONS

.0201 Types of Qualifications

Qualifications for providing legal services in various types of legal proceedings shall be developed by the IDS Director in consultation with the IDS Commission. Qualifications may vary by case type. Qualifications will be designed to satisfy the needs of IDS and its clients without being unduly restrictive, to encourage competition with respect to quality of services and other non-price factors, and to result in contracts with the most qualified offerors. Qualifications shall be comprehensive in nature and intended for repeated use, but may be modified as necessary to ensure that the quality and effectiveness of representation will be sufficient to meet applicable constitutional and statutory standards, to suit local needs, and to accomplish the intent of these procedures.

.0202 Development of Qualifications

(a) In formulating qualifications, the IDS Director shall rely on the IDS Rules, the "Model Regulations for Appointment of Counsel in Cases Under the Indigent Defense Services Act" approved by the IDS Commission, any applicable IDS policies, and any other standards and materials deemed relevant by the IDS Director. The IDS Director may rely on an advisory committee for advice and assistance and may seek review of proposed qualifications by potential

offerors. Such review does not disqualify those potential offerors from participating in future solicitations for legal services contracts.

(b) Upon completion of all necessary studies, reviews, and drafts, qualifications shall be adopted by the IDS Director. After qualifications are adopted as a standard, they may be modified by the IDS Director in consultation with the IDS Commission.

.0203 Adopted Qualifications

Adopted qualifications that are relevant to the services sought shall be included in any RFP.

SECTION .0300: SOLICITATION AND CONTRACT PROCEDURES

.0301 General Contracting Requirements

Unless a waiver or exemption under section .0500 of this policy applies, for all legal services contracts with IDS involving an annual expenditure of public funds of $25,000 or more:

(a) Competition shall be solicited;

(b) RFPs that include standard language, including standard terms and conditions prepared by IDS, shall be issued;

(c) Public advertising shall be required in accordance with section .0303 of this policy;

(d) Offers shall be sealed in accordance with section .0306 of this policy; and

(e) Offers shall be publicly opened in accordance with section .0308 of this policy.

.0302 Requests for Proposals (RFPs)/One and Two-Step Solicitations

(a) If a RFP solicits qualifying offers only and does not solicit cost/price offers, a one-step solicitation shall be used, evaluation shall be of qualifications only, and the rate of compensation pursuant to any contract that results from the RFP shall be determined by IDS and set forth in the RFP.

(b) If a RFP solicits both qualifying and cost/price offers, a two-step solicitation shall be used.

(c) All RFPs shall require the offerors to certify that each offer is submitted competitively and without collusion.

[Subsection (c) amended effective December 9, 2011]

.0303 Advertising Requirements

(a) All RFPs shall be advertised at least once, at least ten (10) calendar days prior to the designated opening date. RFPs may be advertised more than once and for more than ten (10) calendar days.

(b) IDS shall advertise using the IDS website, all established IDS listservs, and IDS' EBlast system. IDS may also advertise in other ways that are intended to reach the vendors that IDS has reason to believe may be interested in the particular solicitation document including, but not

limited to, newspaper advertisement. The determination as to the method of additional advertising is at the discretion of the IDS Director or the Director's designee.

(c) If there is an attachment to a RFP that the IDS Director or the Director's designee determines will not be transmitted electronically, the solicitation document shall contain instructions that potential offerors may follow to obtain the attachment.

.0304 Pre-Bid Conference

(a) When a RFP requires potential offerors to attend a pre-bid conference, the date, time, location, and other pertinent details of the conference shall be provided in the RFP and the advertisement.

(b) If only one potential offeror attends the conference, the conference may continue as planned, but the solicitation shall be cancelled immediately following the conference. If this happens, IDS shall investigate immediately to determine whether there is sufficient competition available. If it is determined that competition is available, IDS shall repeat the solicitation unless otherwise permitted by this policy. If it is determined that there is no competition available, the procurement may be handled as a waiver under section .0501 of this policy.

.0305 Question Period

(a) A RFP may provide for a question period before final proposals are advertised to allow potential offerors to submit written questions as to the intent of or to clarify the solicitation.

(b) All questions submitted by potential offerors during this process shall be addressed to the IDS Director or a designee named in the RFP. Copies of all questions received and written responses shall be provided to all known potential offerors. Verbal communications from whatever source are not binding on IDS and shall not be considered part of the solicitation process.

(c) Revisions to a RFP shall be made only by written addendum from the IDS Director or named designee, and any such addendum shall be advertised in the manner provided in section .0303.

.0306 Sealed Offers

All offers submitted in response to a RFP shall be sealed. Telephone, facsimile, and electronically transmitted offers shall not be accepted.

.0307 Withdrawal of Offers

Offers may be withdrawn prior to the deadline for receipt of offers, upon signed, written request from an authorized agent of the offeror.

.0308 Public Opening/Two-Step Solicitation

(a) Offers on advertised RFPs shall be publicly opened at the date, time, and place identified in the RFP. At the time of opening, the names of the offerors and the prices and payment terms they have submitted, if such terms are solicited and opened, shall be tabulated. Offers shall become public records at the time of opening.

(b) Under a two-step solicitation, the cost/price offers shall not be opened until the qualifying offers have been evaluated and then only those offerors determined by IDS to have acceptable qualifying offers shall have their cost/price offers opened. The cost/price offers from offerors whose qualifying offers were deemed unacceptable shall remain unopened. The remaining cost/price offers shall be publicly opened, the results tabulated, and at that time become a public record.

[Subsection (b) amended effective December 9, 2011]

.0309 Late Offers and Modifications

All offers shall be delivered on time, regardless of the mode of delivery. Offers or requests for modification that are late may be considered only if the delay is caused by IDS personnel and is not the fault of the offeror.

.0310 Errors and Clarifications

Offers must substantially comply with the requirements in the RFP. IDS may investigate and seek clarification of apparent errors or ambiguities, but shall not conduct such investigation or clarification if it will allow an improvement in the offeror's competitive position. Any communication with an offeror that may be necessary for the purpose of clarification of its offer shall be conducted by the IDS Director or the Director's designee.

.0311 Extension of Acceptance Time

When in the public interest, IDS may ask offerors to extend the time offered for acceptance of offers by IDS.

.0312 Evaluation

(a) Offers shall be evaluated based on the evaluation criteria adopted by IDS and identified in the RFP.

(b) An unexecuted offer shall not be evaluated and shall be rejected, unless the error is cured in accordance with the terms of the RFP.

(c) Possession of original offers, including any accompanying information submitted with the offers, shall be limited to persons who are responsible for handling the offers and accompanying information and others deemed necessary by IDS for the purpose of evaluation and award of contract. Offeror participation in the evaluation shall not be permitted.

[Subsection (b) amended effective September 13, 2013]

.0313 Basis for Awards

(a) Contracts shall be awarded based on the best overall value as determined by the IDS Director or an evaluation committee appointed by the Director. Best value evaluation factors may include, but are not limited to, quality factors, prior record of performance, expertise with similar services, financial stability, and cost (if cost/price offers are solicited). Award shall be made to the responsive and responsible offeror whose offer is determined in writing to be the most advantageous to IDS and its clients, using all of the evaluation factors set forth in the RFP.

(b) The IDS Director or evaluation committee shall evaluate the offers in accordance with the evaluation factors stated in the solicitation document, including an assessment of the relative strengths, weaknesses, and deficiencies of the offers.

(c) The IDS Director or evaluation committee shall determine a final ranking of all offers under consideration using the criteria set forth in the solicitation document, and shall provide a brief written justification for the ranking.

(d) In recognition of the General Assembly's directive that IDS consider the cost-effectiveness of proposed contracts and ensure that the quality of representation is sufficient to meet applicable constitutional and statutory standards, cost/price shall not be the sole factor in determining awards.

[Subsection (d) amended effective September 13, 2013]

.0314 Notification of Awards

After contracts are awarded, all offerors shall be notified in writing or electronically by IDS. In addition, if a solicitation is advertised through the IDS website, notice of the resulting contracts shall be posted on that website once the contracts are executed.

[Section amended effective September 13, 2013.]

.0315 Public Records

Records of solicitations shall be made available during normal business hours and after reasonable notice to IDS, with the exception of trade secrets and other confidential items under state law.

.0316 Lack of Competition

The purpose of soliciting offers is to seek and obtain competition. If only a single offer is received or if reasonable and available competition is not obtained, the reason shall be ascertained and made a matter of record.

SECTION .0400: REJECTION OF OFFERS/NEGOTIATIONS

.0401 Basis for Rejection and Notification

(a) Any and all offers received may be rejected in whole or in part. Basis for rejection may include, but is not limited to, failure to meet specifications or qualifications in the RFP; receipt of more qualified offers than available caseload units or sessions; lack of competitiveness by reason of collusion or otherwise; determination that reasonably available competition was not received; error(s) in the solicitation document or indications that revisions would be to the advantage of IDS and its clients; cancellation of or changes in the intended service or other determination that the proposed contract is no longer needed; limitation or lack of available funds; circumstances that prevent the determination of the most advantageous offer; or determination that rejection would be in the best interests of IDS and its clients.

(b) If caseload units or sessions that were included in the RFP remain available and post-RFP projections do not suggest that fewer caseload units or sessions will actually be available during the term of the resulting contracts, but IDS has declined to award a contract to an offeror on the ground that IDS has determined the offeror is unable to provide effective representation for the clients who would be served by the contract, IDS shall notify that offerer of IDS' determination in writing or electronically.

[Subsection (a) amended effective September 13, 2013. New subsection (b) added effective September 13, 2013]

.0402 Public Record

Action in rejecting offers in whole or in part shall be a matter of public record.

.0403 Negotiations

(a) If IDS does not receive a satisfactory response to a solicitation, all offers are rejected, and IDS determines that soliciting offers again would serve no purpose, negotiations may be conducted with all known offerors who may be capable of satisfying the requirements. If the negotiations are conducted with only one party, or if only one offeror responds to the negotiations, the reason for the lack of competition shall be documented in writing for the public record.

(b) Negotiations, including competitive negotiations, may also be conducted under conditions that merit a waiver of competition, or in other situations that the IDS Director determines are advantageous.

(c) Negotiations may be conducted with offerors after proposals are opened. Final price adjustments or best and final offers may be allowed.

(d) Negotiations shall be conducted in writing and shall include standard terms and conditions used by IDS.

SECTION .0500: WAIVER OF COMPETITION/EMERGENCIES

.0501 Waiver of Competition

(a) Under conditions listed in this policy, and for other reasons deemed to be in the public interest by the IDS Director or the Director's designee, competition may be waived. Conditions permitting waiver include cases where performance or price competition is not available, a needed service is available from only one provider, emergency or pressing need action is indicated, competition has been solicited but no satisfactory offer is received, additional services are needed to complete an ongoing job or task, and there is evidence of collusion on the part of offerors that thwarts normal competitive procedure.

(b) When a satisfactory price is available from a previous contract and the IDS Director or the Director's designee determines that market conditions have not significantly changed, service contracts may be renewed without soliciting competition or public advertising. However, in no event shall a contract, other than small service contracts as defined in section .0502 of this policy, be renewed for a total duration of more than four years without competitive bidding.

.0502 Small Service Contracts

Annual service contracts under $25,000, where the amount of the contract is generally too small to justify the cost and time associated with soliciting competition, generally shall not be subject to competitive bidding, unless the IDS Director deems it advantageous to IDS and its clients to solicit competitive bids.

.0503 Exemptions/Emergencies and Pressing Need

(a) IDS may contract for legal services without competition in the case of emergency or pressing need. For this purpose, an emergency is defined as a situation that endangers lives, property, or the continuation of a vital program and that can only be rectified by immediate procurement of services. A pressing need is one arising from unforeseen causes including, but not limited to, delay by contractors and an unanticipated volume of work.

(b) IDS may negotiate with a potential offeror in an effort to acquire the quality of services needed at the best possible price, terms, and conditions. A solicitation document requesting or inviting offers may be issued, if circumstances permit.

(c) When emergency or pressing need action is necessary, the circumstances shall be recorded in writing for the public record.

.0504 Competition and Negotiation

Although competition may be waived pursuant to this section, it is required whenever practicable. Where waiver is contemplated, IDS may negotiate with a potential vendor(s) in an effort to acquire the quality of services needed at the best possible price and terms and conditions.

SECTION .0600: MISCELLANEOUS PROVISIONS

.0601 Confidential Trade Secrets

Trade secrets that satisfy the requirements of G.S. 132-1.2 shall be identified by the offeror and marked as “confidential.”

.0602 Funds from Different Sources

All public funds irrespective of source, whether special, federal, state, local, gifts, bequests, receipts, or fees, that are used for the purchase of legal and related services shall be handled under the provisions of this policy.

.0603 Key Personnel

Absent language to the contrary in the solicitation document or contract, contractors shall not be permitted to utilize substitute service providers without the advance written approval of the IDS Director or the Director’s designee.

.0604 Change in Corporate Structure

In cases where contractors are involved in corporate consolidations, acquisitions, or mergers, or change law firms, the continuance of contracts within the framework of the new corporate structure or law firm shall be governed by the terms of the contract. In no event may the State's contracts be assigned.

[Section amended effective September 13, 2013]

.0605 Use of Contracting Power for Private Gain

The contracting power of the State or IDS shall not be used for private gain or advantage. Services procured through contracts with the State or IDS, except those in accordance with G.S. 143-58.1, shall not be for personal use.

.0606 Default Proceedings

IDS may find a contractor in default of contract for failing to perform in accordance with the contract requirements, terms, and conditions, or for other good cause. If a contractor is found in default of contract, the IDS Director or the Director's designee may take action to procure the services on the open market and may charge the defaulting contractor any additional service costs for which the defaulting contractor has already been paid. If IDS finds a contractor in default, such action and the circumstances shall be recorded in writing for the public record. This section does not limit any other remedy available to IDS.

SECTION .0700: RECORDS AND FILES

.0701 Record Maintenance

Except where state law provides to the contrary, the contracting records of IDS are public documents and shall be maintained for a period of five years after the expiration date of the contract.

.0702 Files

(a) Each contract file shall be identified so that it can be readily located.

(b) Each contract file shall include:
   (1) Original written offers;
   (2) Reason for award or cancellation;
   (3) Worksheets/evaluations;
   (4) Mailing list, if used;
   (5) Written justification for waiver or emergency purchase, if applicable;
   (6) Tabulation of offers received;
   (7) Related correspondence;
   (8) Reason(s) for receiving only one offer in response to a solicitation, if applicable; and
   (9) Negotiated contracts.

(c) Except where state law provides to the contrary, all materials in the file, except confidential information, shall be open to interested persons during normal office hours, or copies shall be furnished in accordance with the state public records laws.

SECTION .0800: PROTEST PROCEDURES

.0801 General

IDS recognizes the right of offerors who believe that an incorrect decision was made with regard to the award of a contract to have their grievances heard. This section is intended to create an informal method for the resolution of complaints when all caseload units or sessions that were covered by an RFP were awarded to other offerors. This section is also intended to implement the right to seek review by the senior resident superior court judge for the district pursuant to Section 18A.4 of Session Law 2013-360 when caseload units or sessions remain available but IDS has declined to award a contract to an offeror because IDS has determined the offeror is unable to provide effective representation for the clients who would be served by the contract.

[Section amended effective September 13, 2013]

.0802 Protest Procedure when all Caseload Units and Sessions were Awarded

When all caseload units or sessions that were included in an RFP were awarded to other offerors or post-RFP projections suggest that fewer caseload units or sessions will actually be available during the term of the resulting contracts, but an offeror believes that an incorrect decision has been made with regard to any contract awarded or not awarded by IDS, the offeror should proceed as described in this section:

(a) The offeror shall prepare a letter addressed to the IDS Director stating in detail the act or omission or other circumstance that allegedly harmed the offerer.

(b) The letter must be received at IDS within fifteen (15) calendar days of notification of awards pursuant to section .0314 of this policy.

(c) Within thirty (30) calendar days of the deadline for written protests pursuant to subsection (b), above, a Committee of the IDS Commission appointed by the Chair shall hold an informal in-person or telephone meeting to review the offeror's letter. The offeror shall not appear in person and address the Committee, unless requested to do so by the Committee.

(d) By majority vote of the Committee members who are present at the informal meeting, the Committee of the IDS Commission is authorized to take whatever action it deems appropriate to resolve the protest, including but not limited to denying the claim, overturning the award in favor of a different award, or rescinding the initial award and ordering a rebid. However, the Committee shall not overturn or rescind a decision regarding an award unless it is fully satisfied that the initial decision was arbitrary, capricious, or an abuse of discretion under the totality of the circumstances.

(e) Within ten (10) calendar days of the close of the informal meeting, the Committee Chair shall render a written summary of the Committee's findings and a decision regarding the offeror's claims, and shall send that summary to all members of the IDS Commission by email.

(f) If a timely protest is received, the contract award that is the subject of the protest shall not be executed until the procedure set forth in this section has been completed.

[Subsections (d) and (e) amended effective December 9, 2011. Subsections (c) and (d) amended effective September 14, 2012. Section amended effective September 13, 2013.]

.0803 Protest Procedure when Caseload Units or Sessions Remain Available but IDS has Determined an Offeror is Unable to Provide Effective Representation

When caseload units or sessions that were included in an RFP remain available and post-RFP projections do not suggest that fewer caseload units or sessions will actually be available during the term of the resulting contracts, but IDS has declined to award a contract to an offeror on the ground that IDS determined the offeror is unable to provide effective representation for the clients who would be served by the contract, the offeror should proceed as described in this section:

(a) The offeror shall prepare a letter addressed to the senior resident superior court judge for the district and copied to the IDS Director stating that a dispute has arisen about the offeror's ability to provide effective representation to the clients who would be served by the contract and specifying the remaining available case or session types for which the offeror believes he or she is able to provide effective representation.

(b) The letter to the judge and IDS Director must be postmarked within twelve (12) calendar days of IDS' notification that the offeror has been determined to be unable to provide effective representation pursuant to section .0401(b) of this policy.

(c) Within ten (10) calendar days of the deadline for written protests pursuant to subsection (b), above, the IDS Director or the Director's designee shall provide a copy of the offeror's offer to the senior resident superior court judge for the district. Upon request, the IDS Director or the Director's designee shall also provide to the senior resident superior court judge of the district copies of additional materials that are subject to public access under the state public records laws.

(d) Within forty (40) calendar days of the deadline for written protests pursuant to subsection (b), above, the senior resident superior court judge shall review the offeror's protest *de novo* and shall deny or uphold the protest in full or in part. The senior resident superior court judge shall record the judge's decision regarding the offeror's protest on a form provided by the IDS Director or the Director's designee and shall send that form to the IDS Director or the Director's designee by email or facsimile.

(e) If the senior resident superior court judge of the district upholds the protest in full or in part, the IDS Director or the Director's designee shall award some or all remaining caseload units or sessions to the offeror in a manner that is consistent with the judge's decision.

[New section added effective September 13, 2013]

.0804 Appeals and Legal Challenges

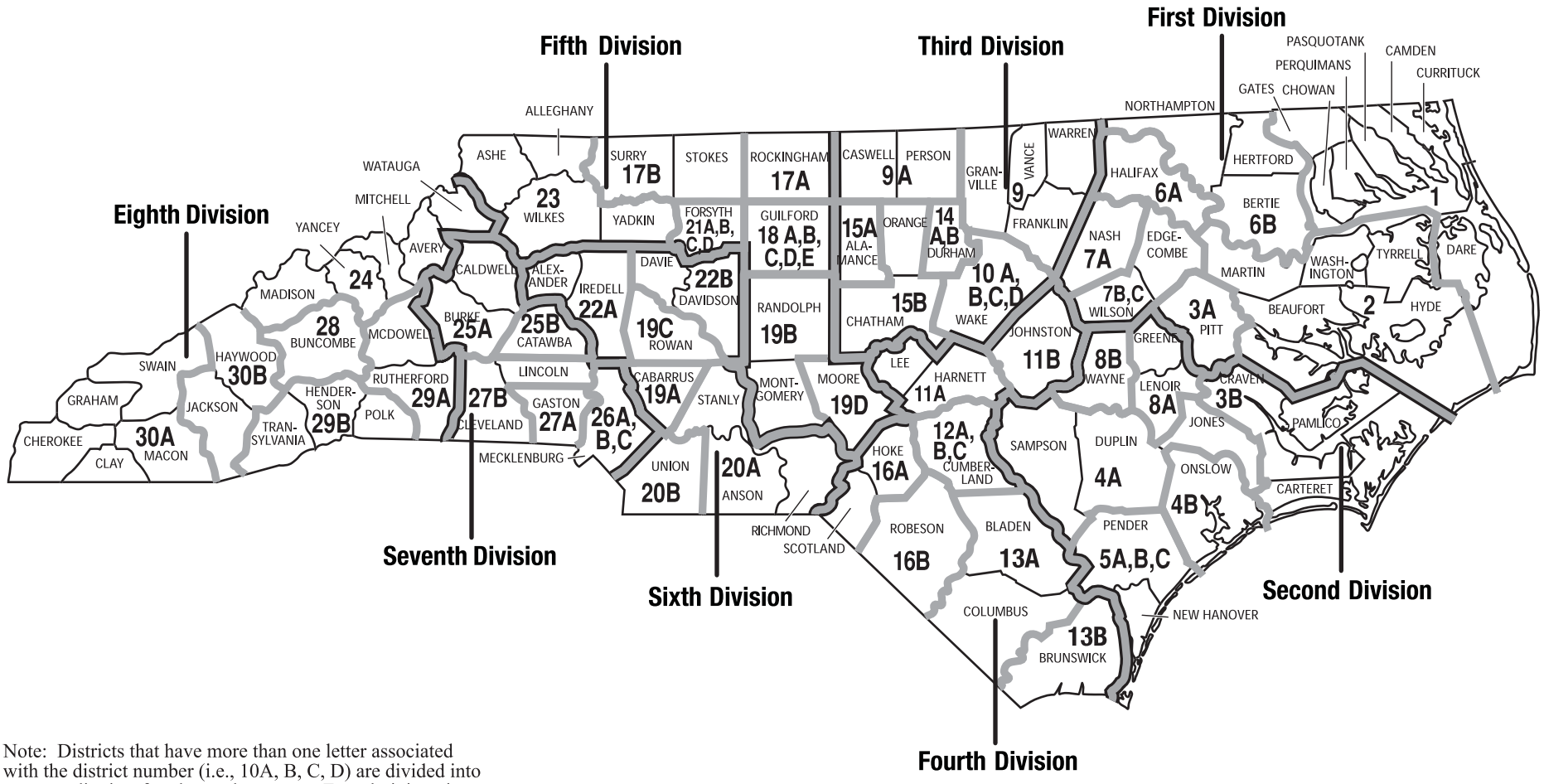
There is no right of appeal from the decision of the Committee of the IDS Commission or the senior resident superior court judge of the district. Nothing in these policies and procedures shall create a right of action in favor of any offeror. If a protest has been denied and an offeror believes he or she has a valid legal claim, venue for any legal challenges shall lie in Durham County, North Carolina.

[Section amended effective December 9, 2011 and September 13, 2013]

APPENDIX B

North Carolina Superior Court

Effective January 15, 2009



Note: Districts that have more than one letter associated with the district number (i.e., 10A, B, C, D) are divided into separate districts for electoral purposes. For administrative purposes, they are combined into a single district.

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