Report of the Commission on Indigent Defense Services to the Chairs of the House Appropriations Committee on Justice and Public Safety, the Senate Appropriations Committee on Justice and Public Safety, and the Joint Legislative Oversight Committee on Justice and Public Safety:

Requests for Proposals and Contracts for Legal Services

Submitted Pursuant to Session Law 2014-100, § 18B.1(k)

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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.

Section 18A.4 of Session Law 2013-360, and § 18B.1(k) of Session Law 2014-100, again directed the IDS Office to issue an 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 also directed IDS to use PAC funds to enter into contracts. The revised provision further provided 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, § 18B.1(k) of Session Law 2014-100 directed IDS to report on the issuance of the RFPs to the Chairs of the House of Representatives Appropriations Subcommittee on Justice and Public Safety and the Senate Appropriations Committee on Justice and Public Safety and to the Chairs of the Joint Legislative Oversight Committee on Justice and Public Safety by October 1 of each year.

Prior to the first directive to issue RFPs in 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 2011-12, 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 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. In the counties in which IDS has implemented the new contract system, a significant portion of that work has been 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' 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 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 could 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 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 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 has staggered the issuance of RFPs by case type and geography. To date, IDS has issued four full competitive 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 11 districts that include 18 counties. In addition, IDS has renewed contracts for second two-year terms for contractors in the first three rounds of counties who exercised their right to renew, and sought offers for additional work that was available due to non-renewal or higher-than-projected caseloads. IDS currently has caseload unit contracts with a total of 211 unique attorneys for a total of 389.5 caseload units. To date, contract attorneys have entered data about more than 101,728 adult criminal cases in a new online case reporting system that was designed for that purpose.

This report describes the actions that the IDS Commission and Office have taken to design and implement an effective contract system.

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 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 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.

Section 18B.1(k) of Session Law 2014-100 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 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 Chairs of the House of Representatives Appropriations Subcommittee on Justice and Public Safety and the Senate Appropriations Committee on Justice and Public Safety and to the Chairs of the Joint Legislative Oversight Committee on Justice and Public Safety by October 1 of each year. 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.

I. DEVELOPING AN RFP AND CONTRACT SYSTEM:

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 service contracts was enacted, IDS staff undertook a

series of initiatives to lay the foundation for this effort, including: 1) reviewing the governing law;[1] 2) reviewing RFPs and contracts in other jurisdictions, as well as national reports and recommendations to identify best practices and pitfalls to avoid in the RFP process; 3) establishing a Contracts Committee of the IDS Commission to guide 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; 4) developing policies to govern the issuance of RFPs and the establishment of legal services contracts, which are available at www.ncids.org; 5) releasing a virtual continuing legal education program for interested lawyers that explains the process and responds to common questions; 6) establishing a dedicated page on the IDS website to post information about RFPs and contracts, including but not limited to the governing policies described above, IDS' standard terms and conditions of contract, any current RFPs and fillable offer forms, and forms and resources for contractors; and 7) issuing a preliminary RFP with a built-in question phase, which allowed the IDS staff to respond to common questions and to clarify ambiguities in the preliminary RFP. All of these initiatives are described in detail in IDS' first two "Reports to the Joint Legislative Commission on Governmental Operations: Requests for Proposals and Contracts for Legal Services," which were submitted on October 1, 2011 and September 25, 2013, respectively, and are available at www.ncids.org.

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 contract attorneys 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, 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;

[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.

- 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, or 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 did 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 a provision in all RFPs stating that, by submitting a proposal, offerors waive their right to access any confidential references that IDS obtains.

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 sets a cost-effective contractual price without seeking price offers. For example, New Mexico seeks qualifying offers and 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. Thus, for most cases, IDS seeks qualifying offers and then sets contractual payments that are cost effective compared to case-by-case PAC payments.

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 provisions. 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. Indeed, the Commission and Office believe that both the PAC hourly rates and contract pay need to be increased to enable IDS to attract and retain qualified attorneys and to ensure that the services indigent defendants and respondents receive meet constitutional standards. *See* PAC Survey Results: Impact of May 2011 Rate Reductions (IDS Mar. 2015), available at www.ncids.org.

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, 81 (Iowa S. Ct. 2010) (construing a contract for indigent representation as not 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" (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

[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 non-potentially capital 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.

to expect appointed counsel to remain "insulated from the economic reality of losing money each hour they work").

> *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).

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 Defense, 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 contract system. The IDS Commission and Office believe that this approach is responsive to concerns expressed by legislators during the 2011 legislative session when the special provision directing IDS to issue RFPs was first enacted, 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 even more resistance to the system and be very difficult to administer. Third, 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.

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 and enhanced efficiencies, has enabled contractors to accept payments that are 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 has allowed IDS to gain some experience with price bidding and 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 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 offerors who have been deemed qualified.

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):* With the exception of the limited hourly pay for extraordinary high-level felony cases described below, hourly compensation for non-capital and non-criminal 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. The IDS Commission and Office have not followed this compensation model due to concerns that flat per case fees, especially those that are not coupled with a guaranteed caseload or timely payment, may discourage attorneys from doing the work necessary to represent the clients. In addition, flat per case fees would not increase IDS' ability to predict demand on the fund more than the contract system that IDS developed, because overall demand is driven more by the volume and type of cases funded through IDS than individual per case costs. Finally, it is much more complicated than it may appear to develop appropriate flat per case fees for a variety of reasons, including that it can be difficult to define one "case" for flat fee purposes, clients with pending charges often pick up additional charges, and attorneys sometimes have to withdraw.

(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 better 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 of Cases*. This has been IDS' approach with the individually negotiated contracts that covered all of the cases of a certain type in a county or district. Generally, each attorney has taken 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 dispositions (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 approximately 20% of an attorney's billable time (or 360 billable hours).

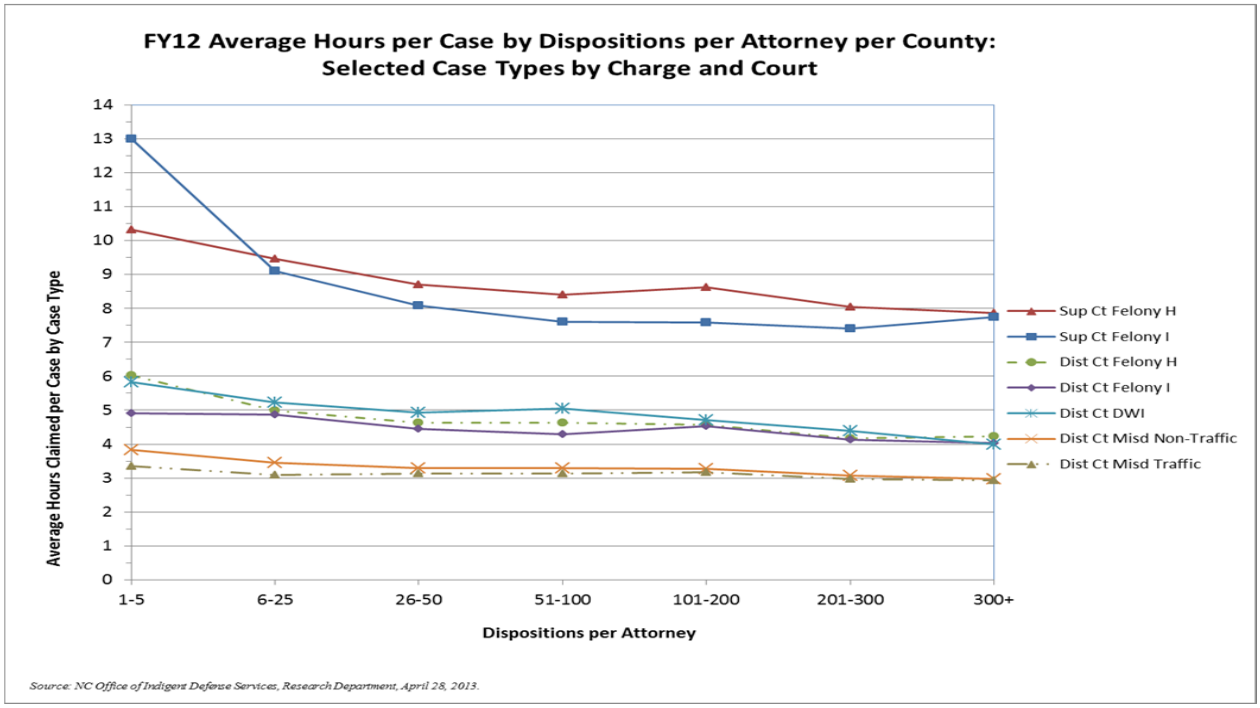
Contract Category	**Expected Range of Annual Disps.**	**Annual Pay (issued in monthly increments)**	**Per Case Pay @ Min. Disps.**	**Per Case Pay @ Max. Disps.**
Adult Misdemeanor	102-124	$17,500	$171.56	$141.13
Adult Low-Level Felony	56-68	$19,500	$348.21	$286.76
Adult High-Level Felony	21-25	$23,500 (plus hourly pay for pre-approved hours in excess of 50 in one extraordinary case)	$1,119.05	$940.00

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. If contractors' actual caseloads exceed projections and they continue to accept cases beyond the maximum specified in their caseload range, there is a payment "overage" schedule that provides for additional compensation for those additional cases.

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 study conducted by IDS Office staff, there is a statistically significant *inverse* relationship between increases in attorneys' caseloads 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 is generating 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) (stating 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"); *Order: In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases* (Nevada Supreme Court ADKT 0411) (prohibiting

the use of flat fee contracts and requiring contracts that allow for modified fees for extraordinary cases). 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. In response to concerns expressed by some legislators during the 2013 legislative session about the per unit pay for serious felonies, IDS made the existing extraordinary pay provision more concrete for high-level felony cases. In those cases, the standard terms of contract now provide that a contractor who believes he or she will need to spend more than 50 hours on one case should schedule a consultation with the IDS Director's designee and, after that consultation, the designee may approve additional hourly compensation for time in excess of 50 hours.

The standard terms of contract 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 an RFP is released in their area.

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.

Evaluating Offers

The IDS Commission and Office have developed processes for evaluating all offers that are received, including the qualifying offers and any cost offers that are solicited. In each county or district, IDS forms evaluation committees that are generally comprised of two or three 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. 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 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).

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 are 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. Assuming the contract system continues, the IDS Commission and Office 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

If a more large-scale contract system is established, the IDS Commission and Office may want to evaluate how recoupment is handled in contract cases. Currently, IDS' standard terms of contract require contractors to keep track of their time and file fee applications with the court solely for recoupment purposes, much like public defender offices. However, 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 or to report their time accurately. 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 governing policies, which are available at www.ncids.org, sets forth procedures for handling any such protests to the Contracts Committee of the IDS Commission when IDS has issued a full competitive RFP. 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 is 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 an 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. To date, IDS has received relatively few protests from unsuccessful offerors (a total of five protests to the Contracts Committee), and no offerers have sought review from a local senior resident superior court judge.

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 an 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 are enhancing 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 the 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 would continue to have access to case and cost data for research and analysis, and the Commission and Office would 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 all newly assigned contract cases from the prior month and all 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 payments. If a contractor fails to submit complete and 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 complete and timely data, those terms and conditions allow IDS to terminate the contract for cause.

The online system enables IDS to analyze data by type and class of case, so IDS' future case and cost data should 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 2013 and, as of July 28, 2016, they had entered data about more than 101,728 adult criminal cases, including pending and disposed cases and excluding cases from which the contractors withdrew before doing any substantive work and did not receive any case credit. A user guide for the online 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 planned to handle the RFP process, as well as the administration and oversight of contracts, through a combination of the central IDS Office and four Regional Defenders. Initially, IDS expanded its existing 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. Given IDS' experience to date, a second full-time Contracts Administrator position will need to be created if the system is significantly expanded.

As RFPs are issued around the state, IDS had also planned to use its prior authority to create new attorney positions to hire four Regional Defenders who would 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 A 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 her region. The second Regional Defender for the Second and Fourth Judicial Divisions began work on October 1, 2013 so that she could participate in the selection of contractors pursuant to the third RFP that IDS released in November 2013. Additional Regional Defenders will not be hired unless and until IDS is ready to issue RFPs in the covered regions and the General Assembly restores IDS' authority to create new positions.

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. The IDS Office has attempted to house the Regional Defenders in existing office space so that IDS would not incur unnecessary expenses.

Training

The Regional Defenders have been working with SOG to identify the additional training programs that 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 has expanded the contract system, additional regional training resources have been devoted to the contractors.

In 2014, IDS and SOG held four regional training programs for contractors—in Alamance, Johnston, Orange, and Vance counties. Those trainings focused on district court motions, traffic stops, DWIs, discovery, a theory of defense, direct and cross-examinations, and client-centered practice. IDS and SOG held another regional training program for all contractors in January 2015 in Pitt County, which included plenary sessions on a theory of defense and direct and cross-

examinations, as well as opportunities in small groups for participants to practice cross-examination. At the suggestion of a local judge, IDS conducted a four-part lunch-and-learn series in Lenoir County in April 2015, which covered topics such as reviewing discovery, using investigators and experts, interviewing and counseling clients, preparing a trial notebook, and practical strategies for furthering the theory of defense in court.

In June 2015, IDS and SOG held a day-long training program that contained plenary sessions for case law updates, expunctions and certificates of relief, and ethics. It also offered sessions on DWIs, including challenging probable cause and blood evidence, and experts, including Rule 702(a), how to use and obtain experts, and how to challenge the state's expert testimony. Also during June 2015, IDS held a program in Johnston County on methamphetamine cases, which included presentations by local attorneys, IDS' Forensic Resource Counsel, and an expert professor in chemistry. In August 2015, the National College for DUI Defense and IDS presented a day-long program on DWIs that included sessions led by three nationally recognized lawyers covering field sobriety, breath, and blood tests. In February 2016, IDS and SOG sponsored a regional jury selection program for contract attorneys in Durham. And, in June 2016, IDS and SOG held another day-long training program that contained sessions for case law updates, effective jail visits, science in drug cases, and the ethical boundaries of social media investigations, among other topics. In addition, some slots have been offered to contract attorneys in other training programs that are generally only available to public defenders, and IDS paid the registration fee for two contract attorneys to attend SOG's five-day trial school in July 2016.

IV. RFPS AND CONTRACTS TO DATE:

Because of the sheer volume of indigent cases across North Carolina (approximately 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 have staggered the issuance of RFPs by case type and geography. Again, assuming there is additional contract expansion, IDS' 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 issuing RFPs for the specialized case types that IDS funds, such as delinquency cases and special proceedings.

The Commission and Office will also strive to identify innovative ways to include more young attorneys in the contract system, including 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 and reserving some misdemeanor units for newly licensed attorneys.

Requests for Proposals Issued to Date

Since the original special provision was enacted, IDS has issued four full competitive RFPs for offers to handle all of the adult criminal cases and a number of per session courts, such as drug treatment courts, in the following districts and counties:

RFP No.	Districts Covered	Counties Covered	Effective Date of Contracts
12-0001	9, 10, 14	Durham, Franklin, Granville, Vance, Wake, and Warren	12/1/2012
12-0002	9A, 15A, 15B	Alamance, Caswell, Chatham, Orange, and Person	6/1/2013
13-0001	3A, 8A, 8B, 11A, 11B	Greene, Harnett, Johnston, Lee, Lenoir, Pitt, and Wayne	6/1/2014
16-0001	9, 10, 14	Durham, Franklin, Granville, Vance, Wake, and Warren	12/1/2016

In addition, effective December 1, 2014, June 1, 2015, and June 1, 2016, IDS executed additional two-year contracts with the contractors from the first three rounds of RFP counties who exercised their right to renew for one more two-year term, and received and evaluated proposals for caseload units that contractors elected not to renew plus some additional units that were added to accommodate higher-than-projected caseloads.

Current Volume of Work Covered by RFP Contractors

As of July 28, 2016, IDS had caseload unit contracts with a total of 211 unique attorneys[3] for a total of 389.5 caseload units annually, across all covered counties and contract categories but excluding per session courts:

District	# Unique Contract Attorneys *(by district)*	Contract Category	# Contract Attorneys *(by category)*	Current # Caseload Units *(annually)*
3A: Pitt	6	Misdemeanor	4	3.5
		Low-Level Felony	3	2.5
		High-Level Felony	3	2
8A: Greene Lenoir	8	Misdemeanor	7	9.25
		Low-Level Felony	6	9.75
		High-Level Felony	2	.75
8B: Wayne	12	Misdemeanor	9	14.25
		Low-Level Felony	5	11.5
		High-Level Felony	4	4
9: Franklin Granville Vance/Warren	22	Misdemeanor	18	21
		Low-Level Felony	20	23
		High-Level Felony	8	5.75
9A: Caswell Person	12	Misdemeanor	7	7
		Low-Level Felony	10	8.5
		High-Level Felony	2	1.75

[3] The total number of unique contractors double-counts a few contractors who work in multiple districts.

District	# Unique Contract Attorneys *(by district)*	Contract Category	# Contract Attorneys *(by category)*	Current # Caseload Units *(annually)*
10: Wake	61	Misdemeanor	48	53.5
		Low-Level Felony	34	35.5
		High-Level Felony	10	10
11A: Harnett Lee	25	Misdemeanor	16	19.75
		Low-Level Felony	17	22.5
		High-Level Felony	9	5.25
11B: Johnston	17	Misdemeanor	15	15.75
		Low-Level Felony	10	18.5
		High-Level Felony	6	8.75
14: Durham	23	Misdemeanor	15	12.5
		Low-Level Felony	15	16.75
		High-Level Felony	7	6
15A: Alamance	19	Misdemeanor	12	17
		Low-Level Felony	11	16
		High-Level Felony	7	3.5
15B: Chatham Orange	6	Misdemeanor	4	1.75
		Low-Level Felony	3	1.5
		High-Level Felony	1	.5

As of July 28, 2016, contract attorneys (current and prior) had entered data about more than 101,728 adult criminal cases, including pending and disposed cases and excluding cases from which the contractors withdrew before doing any substantive work and did not receive any case credit:

Contract Category	# Pending Cases in Online System (as of 7/28/16)	# Disposed Cases in Online System (as of 7/28/16)
Misdemeanor	11,752	51,437
Low-Level Felony	7,413	27,157
High-Level Felony	1,246	2,723
Totals	**20,411**	**81,317**

V. LEGISLATIVE RECOMMENDATIONS:

The IDS Commission and Office now have almost four years of experience with the RFP and contract system. The system works best with higher-volume case categories, such a misdemeanors, where there is more uniformity among the actual cases. In addition, because IDS set cost-effective per unit pay rates and because the misdemeanor contract attorneys are able to generate the most efficiencies, those contracts have generated significant savings. The system also works reasonably well with lower-level felonies, particularly in counties with a higher volume of cases. While the system does not work as well in rural counties with fewer attorneys and less predictable caseloads, many of the same problems that IDS is encountering in those

rural counties would likely exist with flat per case fees because the local attorneys may be as reluctant to accept appointments for low per case fees as they are to enter into contracts. However, the Commission and Office also recognize the challenges associated with having different compensation systems in adjacent counties.

By offering training, support, and case consultations to the attorneys and by providing services to the courts and clients at a local level, the Regional Defenders have proven to be an invaluable resource for the attorneys, judges, clerks, and clients. If the contract system continues to expand, even if on a more limited basis, the IDS Commission and Office strongly recommend continuing those positions in the field.

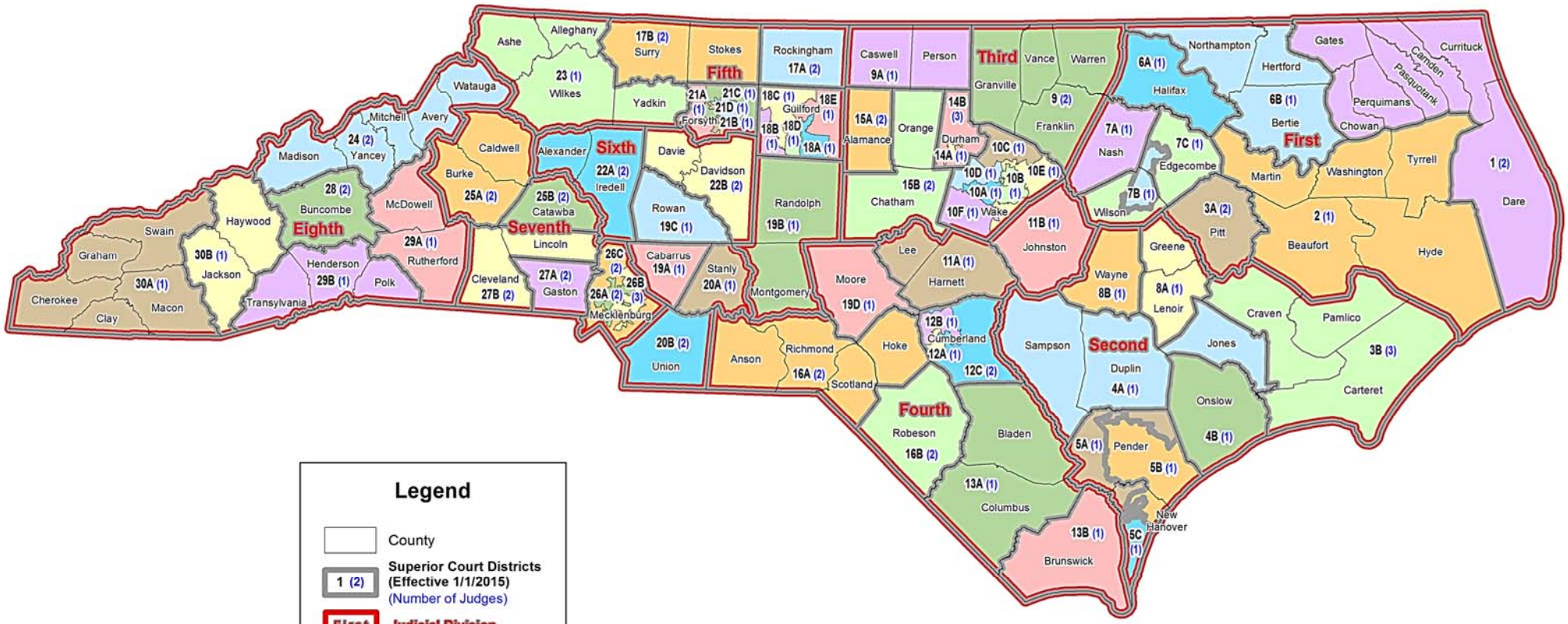
Currently, the IDS Commission and Office intend to maintain the contract system in the counties and case types where it is already in place, but not to expand the system to additional counties or case types in the near future. That should put the General Assembly and the Commission in a position to compare the costs and case outcomes in RFP contract counties to the costs and case outcomes in the counties that are selected for the pilot test of flat fee schedules that is mandated by § 19A.4(a) of Session Law 2016-94. If the General Assembly decides that IDS should expand the contract system, the IDS Commission and Office respectfully suggest that the most serious and complex case types—*i.e.*, potentially capital cases, direct appeals, capital and non-capital post-conviction cases, and perhaps high-level felonies—should be excluded from the system. As discussed in "Waivers of Confidential References," and "Sealed Offers," in Section II, above, the Commission and Office also recommend that the General Assembly extend some confidentiality protections to the process, such as an exemption from the public records laws for the offers and reference information that IDS obtains during the RFP process.

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

Superior Court Districts and Judicial Divisions (Effective 1/1/2015)



Map based on G.S. 7A-41

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