

**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 2011-145, § 15.16(c),
as amended by Session Law 2011-391, § 39

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EXECUTIVE SUMMARY

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

While IDS currently has a number of contracts with individual attorneys, consortia of attorneys, and two non-profits in Charlotte, IDS’ current contracts cover a mere 2.7% of the non-capital cases at the trial level that are 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 represent more than 60% of the state’s indigent trial-level caseload, which is currently handled by PAC pursuant to case-by-case appointments. Thus, a large-scale contract system will represent a fundamental shift in the way that indigent defense services are provided in North Carolina.

Currently, IDS relies on volunteer indigent appointment committees to determine the qualifications of roster attorneys and to provide oversight, particularly in non-public defender districts. IDS also relies 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 a large-scale contract system, a significant portion of that work will shift to IDS. For example, by selecting contractors, IDS will become responsible for deciding which attorneys are able to handle indigent cases and which attorneys are not. IDS will also become responsible for providing oversight and for setting compensation and processing the associated paperwork. Those additional responsibilities will necessitate 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 are currently working to develop the necessary infrastructures and to identify staffing needs, *see, e.g.*, “Data Collection and Reporting Systems” and “Staff Expansion,” below, so that IDS will be in a position to meet the General Assembly’s directive in a responsible and cost-effective manner.

Since the special provision was enacted in July 2011, the IDS Commission and IDS Office have been exploring 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 has also formed a Contracts Committee of the IDS Commission to work with the IDS staff. In the coming weeks, the Commission and Office will be developing a work plan and

timeline for drafting and issuing RFPs across the state, for evaluating all proposals that are received, and for implementing contracts that are cost effective and that ensure quality legal services for North Carolina's indigent citizens.

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

REPORT

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

This report summarizes the work that the IDS Commission and IDS Office have undertaken to comply with this special provision, as well as IDS' future plans for drafting and issuing requests for proposals ("RFPs"), evaluating proposals that are received, and entering into cost-effective contracts with qualified attorneys. IDS expects the RFP process to lead to contracts with law firm consortia in which groups of attorneys or law firms join together, as well as non-profits with salaried staff, individual law firms, and individual attorneys. Contracts with legal entities such as non-profits will be more likely to lead to conflicts of interest and to require alternative systems for conflict cases.

The IDS Commission and Office do not believe that the General Assembly intended to direct IDS to issue RFPs in public defender districts to cover the non-conflict cases that are handled by those offices. That conclusion is based, in part, on the fact that it takes a legislative act to abolish a public defender office and the General Assembly did not do so. In addition, the General Assembly gave IDS authority to create 50 new attorney and 25 new support staff positions for the expansion of existing defender offices, for the creation of new public defender offices within existing public defender programs to handle cases in adjacent counties or districts, or for the establishment of regional public defender programs. The General Assembly also directed the money for contracts to be transferred from the private assigned counsel ("PAC") fund.

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 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 [also] 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 ACCOMPLISHED TO DATE:

Review of North Carolina Law Governing RFPs and Legal Services Contracts

While the IDS Commission and IDS Office have experience using contracts as an alternative form of providing indigent defense services, IDS has never utilized the RFP process as a means of identifying contractors and securing contracts. Thus, after the 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 intends to follow the principles in Article 3 when 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.

Effective January 1, 2013, the IDS Office will begin filing the annual report required by this statute.

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.

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

IDS Office staff also 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 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 has formed a Contracts Committee to guide the IDS Office staff in designing and implementing a contract system that will be both cost effective and ensure that the quality of representation will meet applicable constitutional and statutory standards. As of the date of this report, that Committee has met twice. 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 bidders, the IDS Commission and Office have 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 final 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 bids, evaluation of offers including two-step evaluations, basis for awards, negotiations, waiver of competition, record maintenance, and procedures for an unsuccessful bidder to protest an award. 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 generally will not 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.

RFPs and Contracts Page on IDS Website

The IDS Office has created a dedicated page on the IDS website to post information about RFPs and contracts, and has notified the defense bar through all available listservs and IDS' EBlast system. IDS has posted county-by-county case and cost data on that page, and intends to use it to share additional information about the RFP process, such as the policies described above. IDS will also post all RFPs on that page when they are issued, as well as all clarifications and responses to questions received during the question phase described in "Question Period," below.

II. FUTURE PLANNED INITIATIVES:

Webinar or Virtual CLE for Interested Lawyers

Because most defense attorneys are unfamiliar with the RFP process, IDS and SOG are exploring the possibility of hosting one or more webinars or virtual continuing legal education programs for interested lawyers during the late fall of 2011, prior to the issuance of the first RFPs or the due date for proposals. That will enable 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

The IDS Commission and Office plan to build in a question phase before final proposals are solicited, at least for the initial RFPs, which will allow the IDS staff to respond to common questions and to clarify any ambiguities in the RFPs. This is done in other jurisdictions, such as New Mexico. Any answers to questions from individual attorneys and/or clarifications will be posted on the IDS website. See "RFPs and Contracts Page on IDS Website," above.

Staggering RFPs by Geography and Case Type

Because of the sheer volume of indigent cases across North Carolina (almost 200,000 non-capital trial level cases handled by PAC last fiscal year) and limitations on the IDS staff and resources that can be devoted to this process, the IDS Commission and Office believe that IDS will need to stagger the issuance of RFPs geographically across the state. The current plan is to proceed in one Judicial Division at a time, most likely starting in the Third Judicial Division where the IDS Office is located (or some portion of that division). The IDS Commission and Office will then expand the RFPs into other divisions after learning more about the process

locally. Indeed, the initial RFPs will help the Commission and Office determine how long it will take to issue RFPs, evaluate all proposals, and enter into and implement contracts in a division, as well as the amount of IDS staff time and resources that will be needed to support the process.

When proceeding in a division, IDS plans simultaneously to issue a series of RFPs for all non-capital trial level case types (including public defender conflict cases) in each area. The Commission and Office understand that IDS will ultimately need to issue RFPs for potentially capital cases at the trial level, direct appeals, and capital and non-capital post-conviction cases. However, the Commission and Office plan to exclude those case types from the initial RFPs and to issue RFPs for those cases later after contracts for non-capital trial-level cases have been established. There are a number of reasons to exclude these case types from the initial RFPs. First, potentially capital cases at the trial level, direct appeals, and capital post-conviction cases represent a relatively small percentage of the caseload that is currently handled by PAC—less than 3% of fiscal year's 2010-11 PAC fee applications. In addition, the vast majority of non-capital post-conviction cases are currently handled through IDS' contract with North Carolina Prisoner Legal Services. Second, there will be additional complexities involved with contracting for that level of representation, in part because of the historical difficulties in attracting qualified attorneys to handle those case types. Indeed, many jurisdictions that utilize contract systems exclude capital and appellate cases from the RFP process or seek proposals for those cases through specialized RFPs. Third, with respect to potentially capital cases at the trial level, it can be difficult to predict which cases will actually proceed capitally and to reduce expenditures on cases that are proceeding non-capitally through a contract system. Currently, IDS pays a reduced hourly rate for all time spent on a potentially capital case after the date that it is declared non-capital. Finally, the IDS Commission and Office are currently exploring other ways to enhance the cost effectiveness of capital and appellate representation, including the possibility of expanding the Office of the Capital Defender and the Office of the Appellate Defender.

III. 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 tentatively intend to include the following requirements in all RFPs. Individual offerors will be able to seek a waiver of specific requirements, although an inability to meet all requirements will be material to the evaluation:

- Minimum years of experience depending on the type of case, which will be 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 bids 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;
- Demonstrated financial stability (for the purpose of ensuring that contractors' businesses will remain viable throughout the contract period) and malpractice insurance;
- Writing samples, including substantive motions and/or trial transcripts; and
- A list of three or more professional references.

For further discussion of references, see “Waivers of Confidential References,” below. The RFPs will also notify offerors that, if they are awarded a contract, 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, consortia of attorneys, and small law firms, the IDS Office plans to specify in the RFPs and resulting contracts 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). For 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 opinions of local court system actors, IDS intends to seek references about offerors, both from people identified by the offeror and others not identified by the offeror. However, the Commission and staff are concerned that local actors sometimes may be unwilling to provide candid responses unless IDS can 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 Commission and Office plan to include 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 request that, during the next legislative session, 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 would be 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 plans to seek qualifying offers and then set contractual payments that are cost effective compared to case-by-case PAC payments at the new reduced hourly rates.²

There are several justifications for this approach. First, setting the contractual payments directly will allow IDS to ensure that payments are more uniform within each county and across the state. If IDS allows price bidding, we could end up with multiple attorneys in the same county doing the same work for different pay, which will create resistance and be very difficult to administer. Second, implementation will be more feasible, in part because IDS will 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. 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.

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 new variable rate structure. For cases in which the highest charge is a Class A through D felony, the new rate is \$70 per hour. For all other cases resolved in superior court, the rate is \$60 per hour. For all other cases resolved in district court, the new rate is \$55 per hour.

Fourth, 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, IDS will be more likely to enter into contracts with individual practitioners and small law firms, at least in the early years of a contract system before new organizations are formed.

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).

Finally, not accepting price bids will eliminate 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 could have a particularly problematic impact on quality given the new reduced hourly rates for PAC, which are set forth in footnote 2. 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., State v. Smith*, 681 P.2d 1374 (Ariz. 1984) (holding that Mohave County's low-bid contract system violated the constitutional rights of defendants); *State 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).

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 a contract system.

This approach will be 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 the current system of hourly pay rewards inefficiencies. Furthermore, the money report that accompanied the 2011 Appropriations Act directed IDS to use its statutory authorization to set PAC compensation rates based on projected utilization to minimize the shortfall in the fund, which suggests that the General Assembly did not necessarily intend for IDS to seek price bids in the RFPs required by § 15.16(c) of Session Law 2011-145, as amended by § 39 of Session Law 2011-391.

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 Commission and Office intend to continue that approach 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 plan to seek price offers in some low-cost, high-volume categories of cases that are often handled by attorneys for the day or session and that tend to require less out-of-court work than other types of cases (*e.g.*, child support contempt, commitments, and treatment courts). That process will allow IDS to gain 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 plans to seek price bids, the IDS Office likely will invite per session or per day bids using a two-step RFP process. With two-step RFPs, IDS will issue a technical description of the work and the required credentials, evaluate the qualifications of each offeror, and only open the financial proposals of the successful offerors. In these low-cost, high-volume case types, the contracts likely will allow attorneys to seek additional compensation for extraordinary cases.

Contractor Payment Options

There are a number of payment options with contracts, 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 type 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 case. 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 do not intend to follow 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 higher-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.

(4) *Flat Monthly Payment for Percentage of Cases*: This is IDS' approach with its existing contracts that cover all of the cases of a certain type in a county or district. Generally, each attorney takes an equal share of the cases for equal payment, although in one county two of the attorneys have taken 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. IDS may implement a similar system or may rely on a less specific provision for renegotiating payment in the event of significant increases or decreases in the long-term average number of cases handled by a contractor.

Tentatively, the IDS Commission and Office plan to pay set monthly fees for a certain percentage of the caseload by case type in a county or district. Under this approach, IDS will solicit bids in percentage units of attorney time based on an assumption that attorneys bill an average of 1,800 hours per year. If each unit represents 20% of an attorney's billable time, that would amount to 360 billable hours. Based on statewide hours data (possibly adjusted for extreme differences in travel requirements in the eastern and western parts of the state), each county's caseload will then be evaluated to calculate the number of units that will be required to cover the cases, and the RFPs will seek the appropriate number of unit bids for each case type. Court schedules will also be evaluated to determine the number of different attorneys that will be needed and, thus, the maximum number of units that can be concentrated in one individual attorney. Under this system, an individual attorney will be free to bid on 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. This approach will also require IDS to work with the clerks and judges to develop systems for handling the actual assignments to individual cases, which will be more complicated than rotating case-by-case appointments. See "Implementing Contracts at a Local Level," below.

The IDS Commission and Office expect this approach to contracts to result in fewer attorneys handling the state's indigent caseload, in large part because attorneys who are not willing or able to commit at least 20% of their time to appointed cases will not submit proposals. A preliminary analysis of the caseload in two non-public defender districts in the Third Judicial Division suggests that IDS would need seven 20% units to cover the high-level felony caseload and 30 20% units to cover the low-level felony caseload. In contrast, IDS paid 57 different PAC to handle the high-level felonies in those districts during fiscal year 2010-11 and 78 different PAC to handle the low-level felonies in those districts during fiscal year 2010-11, with a wide range in individual earnings.

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 count an extremely complex case as two cases. *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.

The IDS Commission and Office are in the process of developing guidelines for what may constitute an extraordinary expense that can be compensated or reimbursed outside of the contract. 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). With respect to contractor expenses, routine expenses such as mileage will likely be included within the contractual amount, but contractors may be allowed to seek reimbursement for extraordinary expenses incurred as a result of the contract. The parameters will be spelled out in the RFPs and resulting contracts.

Issuing and Advertising RFPs

The IDS Commission and Office intend to advertise all RFPs electronically through the IDS website, all available listservs, and IDS’ EBlast system. IDS staff can also ask the clerks to post notices for the few attorneys who are not electronically accessible to IDS. IDS intends to issue all RFPs statewide because attorneys near a division line may want to submit offers and because it will be 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 will be 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 intend to require all offers to be sealed. The IDS Commission and Office respectfully request that the General Assembly consider enacting legislation that would extend some additional confidentiality protections to this process.

Evaluating Proposals

Before issuing RFPs, the IDS Commission and Office will need to develop processes for evaluating all proposals that are received, including the qualifying proposals and any cost proposals that are solicited. The RFPs will put potential offerors on notice about the factors and criteria that will be material to the evaluation. At this time, the Commission and Office tentatively plan to form evaluation committees to review all proposals that are received. The committees likely will be comprised of one or two members of the central IDS staff, one chief public defender from the area, the Regional Defender from the area (*see* “Staff Expansion,” below) and, in specialized case types, the appropriate statewide defender (*e.g.*, the Juvenile Defender, Parent Representation Coordinator, or Special Counsel Supervising Attorney). The Commission and Office believe that local input from judges and other system actors is extremely important, and will work to obtain that input through the reference process described above.

Drafting Contracts for Successful Offerors

The contracts that IDS develops will include provisions addressing experts and support costs, caseload and workload standards, guidelines on client contact and notification of appointments, any appropriate limitations on the practice of law outside of the contract, 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 will also require contractors to track and report their time on contract cases, as well as data about those cases, in a format and timeframe required by IDS, and to report client and bar complaints in a timely fashion. In addition, the contracts will clearly specify the scope of representation required by the contractors. For example, the contracts will specify whether contractors are expected to seek a limited driver’s privilege for a client and to resolve the issues underlying a charge of driving while license revoked. 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.

The IDS Commission and Office will need to make decisions about the duration of contracts that are consistent with the staff and resources that will be available to rebid or renegotiate contracts as they expire. The NLADA recommends that contracts should be for at least two-year terms, *see Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, Guideline III-4 (NLADA 1984), and the Commission and Office are inclined to utilize two-year contracts. IDS will also need to develop some processes and procedures for terminating 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).

Implementing Contracts at a Local Level

The contracts will need to address how contractors will receive individual assignments, and the role of the clerks and judges in making those assignments. As discussed in “Contractor Payment Options,” above, the assignment of cases will be more complicated for clerks and judges if the caseload in a county or district is not divided equally among all contractors. The IDS Office is currently exploring technological aids that IDS could provide to clerks and judges to simplify that process, such as Excel spreadsheets with the names of all contractors and counters by each name that allow the user to click an arrow to increase or decrease the number of assignments. The IDS Commission and Office will also 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, if 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.

Protest Procedures for Unsuccessful Offerors

The IDS Commission and Office expect that some unsuccessful offerors will 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 a procedure for handling any such protests. The RFPs will 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. The IDS Commission and Office intend to set the effective date of contracts far enough in the future to allow time for the protest procedure.

IV. INFRASTRUCTURE:

The widespread use of RFPs and contracts will require IDS to develop new systems and infrastructures, including new data collection and reporting systems. It will also necessitate 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 will need to develop new systems for collecting and reporting data from contractors. With IDS’ current contracts, which cover a mere 2.7% of the non-capital cases at the trial level that are handled by PAC, IDS has fairly simple data reporting requirements. Contractors report the number of cases opened and disposed pursuant to the contract and total hours broken down into time in court, time out of court, and time in court waiting, but do not report data on individual cases, such as client names, file numbers, highest

charges, and case outcomes. However, with a large-scale contract system, IDS will need to develop new systems to ensure that the quality and quantity of IDS' case and cost data is not diminished compared to the current system of case-by-case payments.

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. While contractors are still required to complete and submit fee applications to a judge for recoupment purposes, the fee awards are not forwarded to IDS or entered into NCAS because the individual cases do not serve as the basis for payment. With a large-scale expansion of contracts, IDS will need to develop 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.

The IDS Office previously began work on a web-based case reporting and fee filing system that was intended to replace the current paper-based payment system and that would allow the Office to receive and process PAC fee applications electronically via the Internet. While that system was never completed due to budgetary constraints, the IDS Office is hoping to complete and utilize a simplified version of the electronic fee application system to collect data from contractors. This electronic system should enable IDS to collect all of the data that is currently collected through fee applications, plus several new items that will assist IDS in measuring and ensuring quality. However, there will be programming costs associated with designing and implementing this new 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 plans to expand IDS' existing half-time Contracts Administrator position into a full-time position. The Office then intends to recruit and hire a new Contracts Administrator who will be an attorney with a background in business and preferably some experience with RFPs and contracts for services. While it would be helpful for the person in this position to have some experience with criminal defense or other indigent cases, as well as experience with the public sector, the Commission and Office believe that a business/contracts background will be more important for this position.

As RFPs are issued across the state, IDS also plans to use its authority to create up to 50 new attorney positions to hire four Regional Defenders who will be responsible for providing 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 intends to recruit and hire the first Regional Defender in the First and Third Judicial Divisions in early 2012, so that person can be involved in the selection of contractors in that region. Additional Regional Defenders will not be hired until IDS is ready to

issue RFPs in the covered regions. The Regional Defenders will be full-time IDS employees. A background in criminal defense will be required and a background in other indigent case types (such as civil cases with a right to counsel and juvenile delinquency) will be a plus. 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.

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 will require significant planning and work to identify best practices, to design and develop the necessary infrastructures, and to recruit and hire the staff that will be necessary to administer and support the system. Since the 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. Once the necessary systems are in place, the Commission and Office will begin the process of issuing RFPs in stages across the state, evaluating all 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, as well as 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 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 legal services contracts with IDS that conform to those basic requirements and principles.

This policy was adopted September 16, 2011 by the IDS Commission.

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. 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.

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 who reports directly to the IDS Director.

.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, a consortium of attorneys, a law firm, or a 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.

.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. An offer submitted by a consortium of attorneys shall not constitute collusion.

.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 date, time, and place of the opening shall be furnished to all offerors whose cost/price proposals will be opened at least two working days prior to the opening. In the event that all of the offerors whose cost/price offers are to be opened

waive their right to be present for the opening, the cost/price offers may be immediately opened, the results tabulated, and at that time become a public record.

.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.

(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.

.0313 Basis for Award

(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 both the cost-effectiveness of proposed contracts and the ability of potential contractors to provide effective representation that meets applicable constitutional and statutory standards, cost/price shall not be the sole factor in determining awards.

.0314 Notification of Award

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 contract shall be posted on that website once the contract is executed.

.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

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; 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.

.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, IDS may negotiate agreements for the transfer of contractual obligations and the continuance of contracts within the framework of the new corporate structure or law firm but with the understanding that the State’s contracts shall not be assigned.

.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 negotiation of complaints.

.0802 Procedure

When an offeror believes that an incorrect decision has been made with regard to any contract awarded by IDS, that 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 offeror.
- (b) The letter must be received at IDS within fifteen (15) calendar days of notification of award pursuant to section .0314 of this policy.
- (c) Within thirty (30) calendar days of receipt of the letter, 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, any action taken by the Committee shall not go into effect until the procedure set forth in subsection (f), below, has been completed.

(e) Within fifteen (15) 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. All Commissioners shall have ten (10) days from the date that the email was sent to respond with any objections and the reasons for those objections. If any Commissioner objects within that time period and calls for a vote of the full Commission, the IDS Director or the Director's designee shall schedule a special in-person or telephone meeting that shall be held within ten (10) days of the objection. By majority vote of the Commission members who are present at the in-person or telephone meeting, the 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.

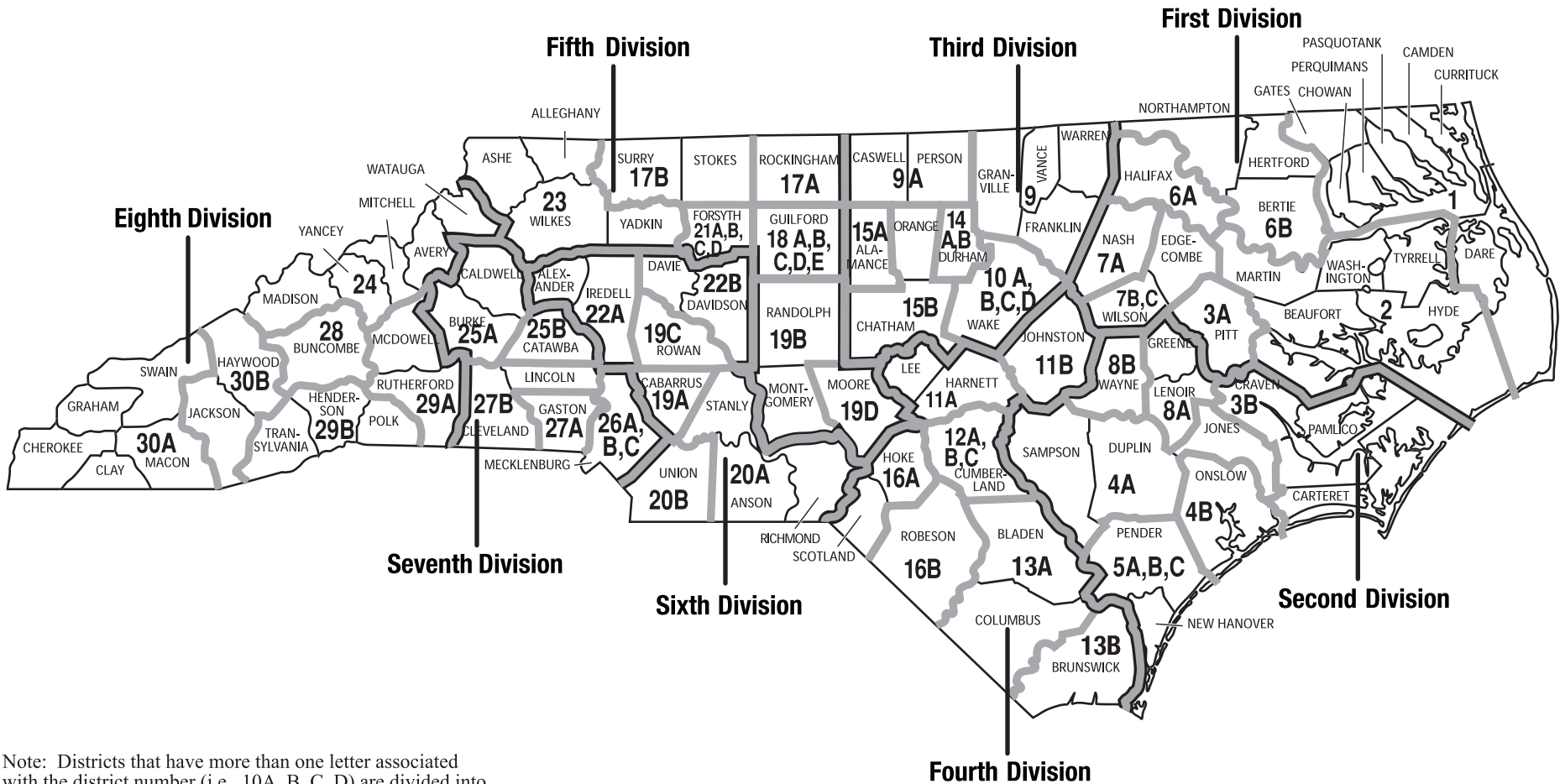
(f) If a timely protest is received, the contract award that is the subject of the protest shall not be executed until the procedure set forth in this section has been completed.

.0803 Appeals and Legal Challenges

The protest process is informal, and there is no right of appeal from the decision of the Committee of the IDS Commission or the decision of the full IDS Commission. 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.

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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