

**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)

October 1, 2018

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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 and, in cases where a proposed contract would provide cost-effective and quality representation, 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, revised the special provision by including a dispute procedure. § 18B.1(k) of Session Law 2014-100 further revised the special provision by directing 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.

Snapshot of IDS RFP System

To date, IDS has

- issued **six** 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;
- collected data about more than **172,230 adult criminal** cases from contractors in its online case reporting system ; and
- 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 contracts with a total of **214 unique attorneys** for a total of **416 caseload units annually**.

Legislative Requests

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.

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.

TABLE 1: CURRENT DISTRIBUTION OF DEMAND

District	# Unique Contract Attorneys (by district)	Contract Category	# Contract Attorneys (by category)	Current # Caseload Units (annually)
3A: Pitt	5	Misdemeanor	4	4
		Low-Level Felony	5	73.5
		High-Level Felony	1	1.5
8A: Greene Lenoir	5	Misdemeanor	11	8.25
		Low-Level Felony	8	7.5
		High-Level Felony	5	3
8B: Wayne	7	Misdemeanor	8	13
		Low-Level Felony	8	10.5
		High-Level Felony	3	3.5
9: Franklin Granville Vance/Warren	28	Misdemeanor	17	9.5
		Low-Level Felony	17	23
		High-Level Felony	6	4.5
9A: Caswell Person	14	Misdemeanor	7	5.5
		Low-Level Felony	9	6.5
		High-Level Felony	2	2
10: Wake	86	Misdemeanor	40	53
		Low-Level Felony	40	37
		High-Level Felony	9	9
11A: Harnett Lee	22	Misdemeanor	20	20
		Low-Level Felony	18	5
		High-Level Felony	10	5
11B: Johnston	10	Misdemeanor	12	15.5
		Low-Level Felony	11	21
		High-Level Felony	7	8
14: Durham	10	Misdemeanor	8	8
		Low-Level Felony	12	13
		High-Level Felony	5	6
15A: Alamance	27	Misdemeanor	11	16
		Low-Level Felony	11	16.5
		High-Level Felony	5	4.5
15B: Chatham Orange	20	Misdemeanor	3	1
		Low-Level Felony	4	2
		High-Level Felony	1	.5

TABLE 2: Requests for Proposals Issued to Date*

RFP No.	Districts Covered	Counties Covered	Effective/End Date of Contracts
12-0001/ 12-0001R	9, 10, 14	Durham, Franklin, Granville, Vance, Wake, and Warren	12/1/2012 – 11/31/2016
12-0002/ 12-0002R	9A, 15A, 15B	Alamance, Caswell, Chatham, Orange, and Person	6/1/2013 – 6/30/2017
13-0001/ 13-0001R	3A, 8A, 8B, 11A, 11B	Greene, Harnett, Johnston, Lee, Lenoir, Pitt, and Wayne	6/1/2014 – 5/31/2018
16-0001/ 16-0001R	9, 10, 14	Durham, Franklin, Granville, Vance, Wake, and Warren	12/1/2016 – 11/30/2020
16-0002	9A, 15A, 15B	Caswell, Person, Alamance, Chatham, and Orange	6/1/2017
17-0001	3A, 8A, 8B, 11A, 11B	Greene, Harnett, Johnston, Lee, Lenoir, Pitt, and Wayne	6/1/2018

*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.

TABLE 3: Current Volume of Work Covered by RFP Contractors

Contract Category	# Pending Cases in Online System (as of 9/26/17)	# Disposed Cases in Online System (as of 9/26/17)
Misdemeanor	1,883	5,179
Low-Level Felony	12,214	49,172
High-Level Felony	15,304	88,493
Totals	29,405	142,825

TABLE 4: SET MONTHLY FEES

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	\$25,300	\$1,205.00	\$1,012.00

REPORT

I. RFP DESIGN

With the exception of some low-cost, high-volume cases, IDS, like most funding agencies that utilize contract systems for indigent defense, seeks only technical offers about the offerors' qualifications and experience ("qualifying offers"). This approach 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. In addition, inadequate compensation and contractual systems that rely on the lowest bidders have been held to violate indigent defendants' constitutional rights in other jurisdictions. Setting the contractual payments directly also allows IDS to ensure that payments are more uniform within each county and across the state.

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.

In an effort to ensure that the quality of representation provided by contract attorneys is sufficient and to provide the attorneys sufficient support, the IDS includes quality and evaluation criteria in all RFPs. The quality criteria are designed to ensure that the offeror has sufficient experience both in terms of years and substance; strong ethical track record; sufficient infrastructure, including access to legal research tool, to support his or her practice; and sufficient organizational structure to enable quality data entry. Individual offerors are able to seek a waiver of specific requirements, although an inability to meet all requirements is material to the evaluation.

In addition to quality components, all RFPs include key personnel requirements. Key personnel requirements ensure continuity of representation by eliminating the risk that IDS will 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. Given the invaluable input local court actors can offer, IDS seeks references about offerors, both from people identified by the offeror and others not identified by the offeror. However, because 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.

The IDS Commission and Office pay a flat monthly payments for ranges of cases. The flat monthly fee provides predictability in spending. 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). Using "Case Load Units" the IDS Commission and Office are able to meet local demand while minimizing conflicts and fostering efficiency. Individual attorneys are 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 has resulted in fewer attorneys handling the state's indigent caseload. 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.

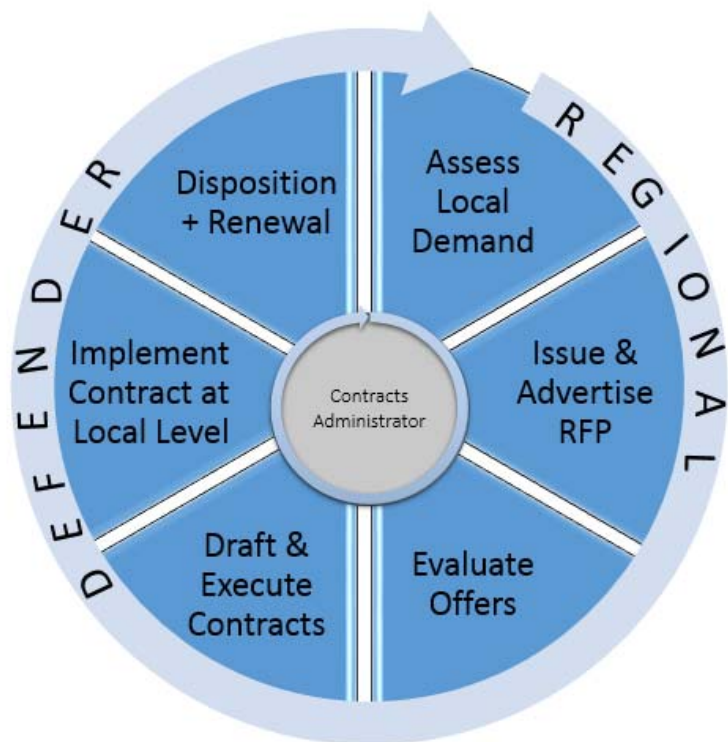
The standard terms of contract provide that, if a contractor is assigned to an extraordinary case, where the issues presented require extraordinary time and effort for proper representation of the client, the contractor may apply to IDS for additional compensation in that case or for a reduction in the range of cases covered by the contract. For high level felonies, 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 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 set far enough in the future to allow time for the protest procedures. To date, IDS has received relatively few protests from unsuccessful offerors (a total of five protests to the Contracts Committee), and no offerors have sought review from a local senior resident superior court judge.

II. LIFECYCLE OF THE RFP PROCESS

The IDS RFP process begins with a thorough assessment of how many case units will be available in a given district. IDS conducts demand assessments during the disposition renewal phase while also monitoring demand during the contract term. Both the end of term assessments and continuous monitoring allow IDS to forecast how many unique attorneys each district needs to meet demand and account for conflicts.

- **ASSESS LOCAL DEMAND.** In addition to constant evaluation of district demand and coverage through the life of the contract, IDS staff evaluates district demand and issues RFPs every four years. (See Table 2 above.) Using that data as well as data compiled through the course of the preceding contract term, if there was one, staff determines how many case units to make available and how many unique attorneys are necessary to cover demand.
- **ISSUE & ADVERTISE RFPs:** The IDS Commission and Office advertise all RFPs electronically through the IDS website, all available listservs, and IDS' EBlas system. IDS staff also notify local court system actors, including judges and clerks, whenever an RFP is released in their area.
- **EVALUATE OFFERS.** The IDS Commission and Office 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 & EXECUTE CONTRACTS.** 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. 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.



- **IMPLEMENT 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.
- **DISPOSITION & RENEWAL.** 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. The system, along with a standard contract term that requires contractors to enter data about new cases into the online system by the seventh day of each month data, enhances the quality of IDS' case and cost data. It enables IDS to analyze data by type and class of case. 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. 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."

III. CONCLUSION: MEETING OLD & NEW CHALLENGES THROUGH THE RFP 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 is cost effective and ensures that court appointed counsel provide quality legal representation to the people they defend. Planned, well run, and properly resourced and supported contract system can lead to quality improvements while also containing costs.

The IDS Commission and Office now have almost six 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 appear to 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.

A. SUPPORTING AND RECRUITING DEFENDERS. To date, IDS has hired two regional defenders and one full time contracts administrator. 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. 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. Whether or not the contract system continues to expand, the IDS Commission and Office strongly recommend continuing those positions in the field. The IDS Commission and office also recommend expanding staffing to include at least one additional regional defender to provide support in the western region of the state.

The Regional Defenders also work 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 the IDS Commission and Office have expanded the contract system, additional regional training resources have been devoted to the contractors.

The Commission and Office also strive to identify innovative ways to include more newer, less experienced 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. IDS recently began providing scholarships to attorneys to attend non-contractor specific training. Using scholarships in conjunction with monitored qualification waivers also has allowed IDS to contract with newer, less experienced attorneys.

B. TECHNOLOGICAL ADVANCES. On June 1, 2018, IDS launched its sixth renewal RFP using an online RFP web application designed by FluidReview. Fluid Review is a review system designed to help manage and review various types of applications such as grants and scholarships. Using a web application increased the number of applications received by IDS during a renewal RFP, as well as decreased the amount of time it takes to issue, evaluate, and draft contracts awarded from the RFP. Applicants are able to access and complete the offer form using any web browser. The Contract Administrator receives notifications as applicants are completing the various stages of their offer form, and can instantly notify the applicants of any deficiencies. The Regional Defenders are assigned offers to review and evaluate within the web application.

C. SHIFTING DEMAND AND RAISE THE AGE. Section 16D of Session Law 2017-57 included the Juvenile Justice Reinvestment Act in the State's budget. As a result of the Juvenile Justice Reinvestment Act, also referred to as Raise the Age or RTA, most 16 and 17-year-olds will be prosecuted in juvenile court beginning December 1, 2019. In preparation for this change, on May 29, 2018, the IDS office, in partnership with the North Carolina Administrative Office of the Courts (AOC), and the North Carolina Office of Juvenile Defender (OJD), applied for the Office of Juvenile Justice and Delinquency Prevention (OJJDP) FY 2018 State System Enhancements for Youth Offenders grant. IDS requested and was awarded \$450,000.00 to be distributed over a two year period.

Under the State Enhancement for Youth Offenders Program, the IDS Commission and Office, along with OJD will focus on the following three areas: 1) analyze the current juvenile defense delivery system(s) within the state of North Carolina, with respect to juvenile offenders' access to services; 2) develop and implement a specialized training program for staff and stakeholders; and 3) work to improve the states courts' data collection and reporting capacity, specifically relating to youth and their legal representation, and access to services pre-and-post adjudication. IDS will use funding from this project to enhance our contractor data reporting system for use as the electronic repository for juvenile contract attorneys and juvenile defense data. Data collected, will include the point at which counsel is appointed, whether juvenile defense counsel is present at each stage of the case, whether counsel was waived or withdrew, and the case outcomes.