

GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES

Introduction

These Guidelines represent the combined efforts of defender members of the National Legal Aid and Defender Association, the Defender Committee and the Defender Division staff to address the problems of providing by competitively bid contract legal representation for poor persons accused of criminal offenses. Some competitively bid contract defense programs have proven neither as economical as hoped nor as satisfactory in providing good representation as the federal and state constitutions may require. Nevertheless some state and local governments are establishing competitively bid contract defense programs, in some instances as the sole means of providing representation to poor defendants. These Guidelines are intended to help local and state governments and agencies which choose to establish contract defense programs and which choose to award contracts on a competitive basis to do so constitutionally, and to help insure that efficient contract programs operate well for the government, the courts and the citizens they serve.

These Guidelines focus on the contracting process. Contracts written, negotiated and entered into in accordance with these Guidelines and with consideration of the issues these Guidelines raise should, by their terms, help ensure that high quality service will be provided to those defendants unable to afford counsel. Such contracts should also provide to the criminal justice system effective defense services which comport with government's other interests in efficiency, economy and accountability. The Guidelines are intended to be a practical document. Public agencies or officials charged with designing contract programs for indigent criminal defense may use these Guidelines to help avoid problems frequently encountered and to design, negotiate and award contracts which will encourage, rather than discourage, zealous, effective and efficient representation of indigent accused.

There are now several published standards which spell out the objectives and minimum requirements for public defender and assigned counsel programs and for attorneys engaged in private criminal justice. These include the American Bar Association's Standards for Criminal Justice (Second Edition 1980), NLADA's Standards for Defense Services Justice (1976), the Report of the National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976), and the volume of standards published by the National Advisory Commission On Criminal Justice Standards and Goals titled Courts (1973). These standards do not directly address the unique characteristics or special problems of competitively bid contract defense programs. However, they do speak to the quality of defense services generally. Their provisions are as relevant to attorneys practicing under contract as to assigned counsel or attorneys in full-time public defender offices. Where such standards are in any way relevant or useful to competitive bid contract defense systems these Guidelines refer to them as "Related Standards." But while these Guidelines intend to reflect existing standards and to help implement them in the context of competitively bid contract defense programs, they do not restate them and are not a substitute for them.

These Guidelines draw upon several published and unpublished sources, including the various Standards referred to above. The text of, and comments to, these Guidelines contain short citations to those sources. Full citations are listed in Appendix A (Bibliography of Materials Cited) behind the short citation form by which they are referred in the text.

HISTORY OF THESE STANDARDS

Competitively bid contract defense systems are relatively new. The authorities and standards governing systems used to provide criminal defense services either neglect, or condemn, contract systems,

particularly competitively bid contract systems. See Wilson, Contract Bid Programs. Competitively bid contract systems have provoked a great deal of controversy and concern. Wilson, id. As a result, the National Legal Aid and Defender Association began consider the issues that arose when jurisdictions elected to provide criminal defense services to poor persons through competitively bid contracts with lawyers or legal organizations. Ultimately, the Association produced these Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, but only after consideration, study and deliberation.

The foundation for the Guidelines as they appear here was laid by a subcommittee of the Defender Committee of the NLADA during the Association's meetings in Washington, D.C., on May 17, 1980. Designated originally as the Subcommittee on Accreditation, over the next two years this group evolved into the Subcommittee on Contracts and Accreditation. It met during NLADA's quarterly meetings and slowly became prominent in the Defender Committee's agenda.

On December 17, 1981, the subcommittee assigned to itself the task of reviewing standards and guidelines of the NLADA, ABA, and the National Advisory Commission on Criminal Justice Standards and Goals (NAC), and to consider an appropriate response to contract bid program . In the course of its deliberation, the subcommittee noted that several counties had referred the question of establishing contract systems to local bar associations. Jonathan Gradess, Executive Director of the New York State Defenders Association, proposed preparing information about contract defense programs which would simultaneously warn county governments of the dangers of contract bid programs and assist them and local bar groups in assuring cost effective quality representation. The Committee and NLADA staff began a serious effort to review existing standards and collect and publish information about contract defense programs.

At a meeting in Washington, D.C. in May 1982 the Subcommittee on Contracts and Accreditation focused on identifying the issues and problems associated with contract programs and continued to collect and assimilate information. The subcommittee decided to prepare and promulgate minimum standards for letting defense services contracts. On, the same day, the NLADA Defender Committee considered the content and impact of Richard J. Wilson's article, Contract Bid Programs, supra, and passed the following resolution (prefatory "whereas" clauses not reprinted):

BE IT THEREFORE RESOLVED:

1. THAT the National Legal Aid and Defender Association opposes the continued use and further proliferation of contracts which do not comply with the ABA Code of Professional Responsibility or nationally recognized standards on providing indigent defense services; and
2. THAT the National Legal Aid and Defender Association strongly urges that, if used, such contracts must insure quality delivery in compliance with the constitutional mandate of effective counsel, in addition to the cost efficiency of such services.

At meetings in Atlanta on July 30, 1982 the Subcommittee on Contracts and Accreditation again proposed preparation of guidelines for counties which were considering contract defense systems and requested consideration of the matter at NLADA's Annual Conference. The Defender Committee considered for the first time the "Discussion Draft, Standards for Contract Defense Systems" prepared by subcommittee chair Nancy Albert-Goldberg and based upon discussions and research undertaken over the preceding two years. At the Annual Conference in Boston in November 1982, the subcommittee adopted the Goldberg Discussion Draft, with several amendments, and submitted the Draft to the Defender Committee for approval. However, due to the press of other business, the Defender Committee deferred action on the Goldberg draft. In early 1983, Alex Landon, the new chair of the Subcommittee on Contracts and Accreditation, prepared a new draft, circulated it, and re-submitted it after staff review to the Committee. On September 19, 1983 in Philadelphia, the

Subcommittee on Contracts and Accreditation and the NLADA Defender Division staff submitted the Proposed Draft, Guidelines for Negotiating and Awarding Indigent Defense Contracts for review and action to the Defender Committee. The Defender Committee made several minor changes in the text of the Proposed Draft, directed addition of one additional Guideline, and approved the Proposed Draft for circulation and comment before submission to NLADA's Board of Directors.

Within two months of the September, 1983 meetings, the Defender Division printed and circulated a Tentative Draft of these Guidelines dated 19 September, 1983. Distribution included the Defender Committee and Board, persons who had contributed to or expressed an interest in the Guidelines, and various organizations including the staff of the American Bar Association's Criminal Justice Section. The Defender Division staff received comments from several persons and circulated these to the Sub-committee on Contracts and Accreditation. As a result of those comments, several changes to the text and one additional Guideline were proposed to the Defender Committee at its meetings in Washington on 24 February 1984. The Defender Committee considered the changes and additions and voted to approve and publish the Guidelines. The Board of the National Legal Aid and Defender Association formally approved the Guidelines by mail ballot following its meeting on 25 February, 1984.

The guidelines are designed to protect the integrity of systems which provide constitutionally required public defense services. They were created to protect the rights of defendants and taxpayers and to encourage zealous and effective representation of the poor. The guidelines have already been utilized by the Supreme Court of Arizona to condemn a constitutionally defective and fundamentally inadequate competitively bid contract system.

These guidelines must therefore be viewed for what they are. They are simultaneously designed to respond to penny-wise, pound-foolish actions taken by good governments wishing to cut costs at the expense of quality and to help assure for good governments an approach to providing quality service which will prevent municipal liability.

As stated in the preamble, infra, the guidelines neither endorse nor support competitively bid contract defense systems. Rather, they are an effort designed to provide assurance that minimum constitutional requirements are met when local governments choose to serve poor clients through a contract defense system.

PART I: DEFINITIONS: "CONTRACTING AUTHORITY" AND "CONTRACTOR"

Guideline I-1: Contracting Authority. As used in these Guidelines, the Contracting Authority is the public office, officer, or agency which has the authority to prepare bids, negotiate, or otherwise conclude a contract and to obligate funds for those unable to afford criminal defense services.

Guideline I-2: Contractor. As defined in these Guidelines, the Contractor is an attorney, law firm, professional association, lawyer's association, law school, bar association or non-profit organization which enters into, or is eligible to enter into, a competitive bidding or open negotiating process with the Contracting Authority for the purpose of concluding a contract to provide public defense services to those unable to afford counsel.

PART II: POLICY BOARD

Guideline II-1: Purposes. The Contracting Authority should appoint a Policy Board if it has appointment powers, or should request that an appropriate authority appoint a Policy Board if it lacks the power of appointment itself. Policy Boards should be constituted to ensure the independence of the Contractor and to provide the Contracting Authority with expertise and support in such matters as criminal defense functions,

determination of attorneys fees and salary levels, determination of reasonable caseload standards, interpretation of standards governing the provision of public defense services, response to community and client concerns, and implementation of the contract defense system.

Guideline II-2: Members. The Policy Board should consist of from three to thirteen members, depending upon the size of the community the number of identifiable factions or components of the client population, and judgments as to which groups should be represented.

Policy Board members should be appointed using the following criteria:

- (a) appointees should be persons who will ensure the independence of Contractor.
- (b) Policy Board members should represent a diversity of factions in order to insure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the Policy Board.
- (d) Private organizations directly serving the poor should be a source for Board members.
- (e) Organizations concerned with the problems of the client community should be represented on the Policy Board.
- (f) A majority of persons on the Board should be practicing attorneys.
- (g) The Policy Board should not include judges, prosecutors, or law enforcement officials.
- (h) Members of the Policy Board should serve staggered terms in order to ensure continuity and to avoid upheaval.

Guideline II-3: Duties. Duties of the Policy Board shall be to:

- (a) advise the contracting Authority about, and approve, the terms and minimum requirements of any contract for defense services; and
- (b) advise the Contracting Authority on fee schedules, rate of reimbursement, prevailing attorneys fees and other issues related to the cost of public defense services.
- (c) supervise the contract bidding and award process, if not retained by the Contracting Authority;
- (d) select the contract defender or contract defender to whom contract will be let, if not retained by the Contracting Authority; and
- (e) establish and apply minimum qualifications for lawyers whose services are provided by the Contractor, if this function is not assigned to the contractor as a condition of the contract.

PART III: ELEMENTS OF A CONTRACT FOR PUBLIC DEFENSE SERVICES

Each of the following Guidelines should be included in a contract for public defense services. If contracts are to be awarded through some kind of bidding, RFP, or other competition, these should serve as the basis for

the RFP or bidding document. Contracts should be awarded on the basis of the completeness and adequacy of a Contractor's consideration of these Guidelines.

Guideline III-1: Parties. The contract should identify the Contracting Authority, the Contractor, and any other public or private person, agencies or organizations which are party to the contract.

Guideline III-2: Scope of Contract. The contract should specify the categories of cases in which the Contractor is to provide services.

Guideline III-3: Determination of Eligibility. The Contract should specify the procedure by which client financial eligibility is to be determined and the person, officer or agency responsible for making the determination initially and at subsequent review proceedings. The contract should either incorporate eligibility standards by reference to those in accepted use or it should specify the eligibility standard applicable in all cases handled by the Contractor. The contract should provide that any information or statements of the defendant obtained in the process of determining eligibility shall be considered confidential and privileged.

Guideline III-4: Term of Contract. Contracts for legal defense service should be awarded for at least two year terms. Removal of the Contractor short of the agreed term should be for good cause only.

Guideline III-5: Definition of "Good Cause." The Contract shall define "good cause" such as is required for removal of the Contractor (Guideline III-4 as: failure by the Contractor to comply with the terms of the contract to an extent that the delivery of services to clients by the Contractor is impaired or rendered impossible, or a willful disregard by the Contractor of the rights and best interests of clients under this contract such as leaves them impaired. The individual actions of the Contractor or any one attorney taken in connection with one case alone, shall not necessarily constitute "good cause" for removal.

Guideline III-6: Allowable Caseloads. The contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation. Attorneys employed less than full-time on handling a mix of cases should handle a proportional caseload.

Guideline III-7: Minimum Professional Qualifications. The Contract should specify minimum qualifications for staff lawyers. These qualifications should be developed by the Advisory Board which screens contract applications. If defense services are to be provided in more than one category of cases, the contract should specify different minimum-qualifications for each category of cases for which the Contractor will provide services.

Guideline III-8: Support Staff and Forensic Experts. The contract should provide for employment of secretaries, social work staff, mental health professionals, forensic experts and support staff to perform tasks not requiring legal credentials or experience and tasks for which support staff and forensic experts possess special skills. Such skills are particularly important in ensuring effective performance of defense counsel at the bail, pretrial release, investigation and sentencing stages, and in the preparation of dispositional plans.

- (a) **Secretaries.** The contract should provide an adequate number of secretaries to ensure competent representation to clients and adequate assistance to attorneys.
- (b) **Social Service Personnel.** The contract should provide an adequate number of social service personnel to assist at and their clients.

- (c) **Mental Health Professionals.** The contract should specifically include funds for confidential hiring of mental health professionals to perform evaluations and to assist at trial, unless mental health professionals are provided to the contractor to perform mental evaluations by court order or otherwise upon request.
- (d) **Forensic and Other Experts.** The contract should specifically include funds for confidential hiring of forensic and other experts and for the use of forensic experts at trial.

Guideline III-9: Investigators. The contract should specify that adequate investigation services necessary to provide competent representation shall be available to the Contractor. No contract clause should interfere with the contracting attorneys selection, supervision, or direction of investigators.

Guideline III-10: Compensation. The contract shall provide that the Contractor compensate:

- (a) its staff, employees, subcontractors and retained forensic experts at rates commensurate with their training, experience and responsibilities and with compensation paid to persons doing similar work in public agencies in the jurisdiction, and
- (b) attorneys at a minimum rate which reflects the following factors:
 - (1) the customary compensation in the community for similar services rendered by privately retained counsel to a paying client or government or other publicly-paid attorneys to a public client;
 - (2) the time and labor required to be spent by the attorney;
 - (3) the degree of professional ability, skill and experience called for and exercised in the performance of the services.

Guideline III-11: Special Case Compensation. The contract should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation, including but not limited to, capital cases. Services which require special fees should be determined in the contract.

Guideline III-12: Case and Work-Overload. The contract should provide that the Contractor may decline to represent clients at no penalty in the event that during the contract:

- (a) the caseload assigned to the Contractor exceeds the allowable caseloads specified through the process recommended in Guideline III-5; or
- (b) the Contractor is assigned more cases requiring an extraordinary amount of time and preparation than the Contractor can competently handle even with payment of extraordinary compensation as specified in Guideline III-11; or
- (c) the cases assigned to the Contractor exceed any number that the, contract specified or that the Contractor and Contracting Authority reasonably anticipated at the time the contract was concluded.

Guideline III-13: Conflicts of Interest. The contract should avoid creating conflicts of interest between Contractor or individual defense attorney and clients. Specifically:

- (a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys or other personnel; and
- (b) contracts should not, by their provisions or because of low fees or compensation to attorneys, induce an attorney to waive a client's rights for reasons not related to the client's best interest; and
- (c) contracts should not financially penalize the Contractor or individual attorneys for withdrawing from a case which poses a conflict of interest to the attorney.

Guideline III-14: Payment. The contract should provide that payments to the Contractor be made monthly or at times agreed to by the parties without regard to the number of cases closed in the period.

Guideline III-15: Financial Records. The contract shall provide that the Contractor shall retain financial records, submit financial reports, and produce an Annual financial evaluation or audit.

Guideline III-16: Supervision and Evaluation. The contract should establish a procedure for internal systematic supervision and evaluation of the performance of the Contractor's staff based upon publicized criteria. Supervision and evaluation efforts should include monitoring of time and caseload records, review and inspection of transcripts, an evaluation of attorney case activity, in-court observations, and periodic conferences. A system of performance evaluations should be based upon personal monitoring by the Contractor's Director or Chief Attorney and should be augmented by regular, formalized comments by judges, prosecutors, other defense lawyers and clients. The criteria of performance employed should be those of a skilled and knowledgeable criminal lawyer.

Guideline III-17: Professional Development. The contract should provide funds and sufficient staff-time to permit systematic and comprehensive training to attorneys and professional staff. Resources for training should be no less than is provided to prosecutors and judges in the jurisdiction, and should include continuing legal education programs, attendance at local training programs, and the opportunity to review training and professional publications and tapes. Where appropriate and where the size of the contract program requires, all attorneys should be required to attend an intensive, entry-level training program.

Guideline III-18: Standards of Recommendation. The contract shall require that the Contractor provide defense services to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, any applicable state bar association standards, the canons of ethics for attorneys in the state of the contract, and case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. The contract shall provide that counsel under contract shall be available to eligible defendants at their request, or the request of someone acting on their behalf, beginning at questioning, arrest, formal charging, or indictment. The Contracting Authority or the Contractor, as appropriate, shall ensure that attorneys provided by the contract shall be accessible to defendants before formal court appointment.

Guideline III-19: Confidentiality. The contract should prohibit the Contractor from releasing confidential attorney-client information or work product related to any case, except under a legal court order to do so, or after receiving a voluntary, knowing, and intelligent waiver from the client in the case, or to a subsequent

attorney on the case.

Guideline III-20: Insurance. The contract may require that the Contractor provide malpractice insurance for attorneys representing clients under terms of the contract. The contract shall not provide that the Contractor hold the government or Contracting Authority harmless for the attorneys representation of defendants.

Guideline III-21: Retention of Files. The contract shall provide that the Contractor provide for retention of client files in a manner that affords protection of the client's confidentiality interests (see Guideline III-17) for a specified period of time after the conclusion of the case at least equal to the period provided in rules governing all other lawyers' files in the jurisdiction but in no event less than five (5) years.

Guideline III-22: Management System. The contract shall provide that the Contractor shall maintain a case reporting and management information system, data from which shall be available to, or provided to, the Contracting Authority and Policy Board. Any such system shall be maintained independently from client files so as to disclose no confidential or privileged information. The case reporting and management information System shall be used to provide the Contractor, the Contracting Authority and the Policy Board with caseload information sufficient to assure compliance with Guidelines III-3, III-5, 111-14, and III-16 particularly.

Guideline III-23: Duration of Representation. The contract shall specify that the Contractor has the responsibility to complete any and all cases once representation is commenced under terms the contract. Representation commenced by the Contractor in trial court shall be continued through all trial court proceedings if provided by the contract; representation commenced by or taken to an appeal court by the Contractor shall be continued until the appeals process is terminated by an act on of the appeals court which is accepted as final on the merits by defense counsel and his or her client. Nothing in this Guideline shall prohibit a Contractor or attorney from withdrawing from a case in which a court has recognized a conflict of interest for the attorney or in which defendant is found to be ineligible for services as defined in Guideline III-3.

PART IV: CONTRACTING PROCEDURES

The following Guidelines prescribe procedures by which a contract should be prepared and state the overriding consideration to be made in awarding a contract. The Guidelines in this part are particularly relevant if contracts are to be awarded through a competitive bid process.

Guideline IV-1: Role of the Contracting Authority. The Contracting Authority in consultation with the Policy Board shall prepare, issue, and receive responses to any contracts, bids, RFPs, issued in connection with contracting for indigent defense services. Such contracts, bids and RFPs should comply with these guidelines.

Guideline IV-2: Role of the Policy Board. The Policy Board should assist the Contracting Authority in the contracting process as requested. At a minimum, the Policy Board should set minimum fees and salary levels as specified in the contract or as established after receipt of all proposals, and shall review, decided between, and recommend Contractors to the Contracting Authority.

Guideline IV-3: Awarding the Contract. The Policy Board and/or Contracting Authority should award contracts for representation for those unable to afford counsel only when Contractors have complied with these guidelines. Under no circumstances should a contract be awarded on the basis of cost alone. The Policy Board and/or Contracting Authority shall determine whether the proposed budget of a potential contractor will provide the capability of complying with these Guidelines.

