

State Contracting

POLICY AND PROCEDURES FOR:

Professional/Technical Services Contracts

Master Contracts and Work Orders

Joint Powers Agreements

Interagency Agreements

Income Contracts

Annual Plans

Amendments

& More...

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Ongoing Content Updates

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Introduction

The state currently expends over \$750,000,000 a year in professional and technical services contracts to accomplish varied tasks, services, projects, and studies. This manual is intended to assist agencies in developing contracts successfully and in the most expeditious way possible, while continuing the wise use of state resources.

Impact of this manual on state agencies

This manual reflects the policies and procedures established by the Commissioner of Administration and Chief Procurement Officer for the supervision, control, and review of state contracts. These policies and procedures provide a framework within which agency heads can seek the statutorily required approval of the Commissioner of Administration to enter into a contract and the decision as to who will be the contractor.

Many of the forms referenced in this manual are available in the secure portion of our website. You can obtain access by registering within the secure portion of the website or by calling the Office of State Procurement (“OSP”) Help Line at 651-296-2600.

Some agencies have, or will develop, their own internal contract manuals, procedures, policies, and guidelines. The procedures, policies, and guidelines of this manual are the minimum requirements for state contracting and should be incorporated into agencies' efforts.

How this manual will be kept up-to-date

This manual was initially distributed to each agency’s contract coordinator or agency heads, if there was no agency contract coordinator. Copies of this manual and the most recent versions of any form can be found under the Professional/Technical Contracting website under Professional/Technical Contracting Manual and Policies. The forms on the web page are approved by the Commissioner of Administration and were created with consultation from the Office of the Attorney General. If your agency chooses to modify these forms in any way, you need the approval of the Commissioner of Administration prior to using them.

Changes will be updated on the website and periodically distributed as needed through agency contract coordinators or through the agency head, if there is no agency contract coordinator.

Modifications to this manual will be made on an ongoing basis, as needed, with the date of last modification, listed in the Index and on the footer of each page. Please note that the Index and footers reflect when the content of the manual text was last modified, not when the referenced forms (available through links in the manual chapters) have been updated. Forms that can be

accessed via links within this manual are updated more frequently. Users of this manual will be responsible for assuring that they are using the most current manual and thereby complying with state law and policy. OSP will make every effort, as set forth above, to notify users of any changes to this manual.

Section 1: Overview

Getting started right is the most difficult hurdle in the contracting process. Deciding whether a contract is the right way to do business is critical and can get confusing. After looking at all options and deciding that a contract is appropriate, more decisions have to be made. One decision is what type of contract is needed. Is it for services or for professional/technical services? Another particularly important decision is determining the cost of the work needed.

After these two decisions have been made you need to proceed to produce a legal, well-designed, well-written, workable contract to help get the business of the state done.

What is a professional/technical service contract?

Professional or technical services are services that are intellectual in character, including consultation, analysis, evaluation, prediction, planning, programming, or recommendation, and result in the production of a report or the completion of a task. Professional or technical contracts do not include the provision of supplies or materials except by the approval of the commissioner or except as incidental to the provision of professional or technical services ([Minn. Stat. § 16C.08, subd. 1](#)).

You can use a variety of different state contract types to obtain professional or technical services. These include: interagency agreements, joint powers agreements, or professional or technical service contracts.

Keep in mind that you can never write a department purchase order for professional/technical service.

What is a service contract?

A service contract is a contract for any nonprofessional or technical services ([Minn. Stat. § 16C.02, subd. 16](#)). Examples include snow plowing, copy machine repair, maintenance, and housekeeping.

Unlike professional/technical service contracts, there is no general statutory authority for agencies to enter into service contracts with private vendors. It is the Commissioner of Administration that enters into all service contracts, unless specifically provided by statute or delegated by the Commissioner of Administration. However, when one agency needs services

that can be provided by another agency, an interagency agreement should be used to obtain those services.

What is an Interagency Agreement?

An interagency agreement is a contract used between two or more state agencies. It is used to document the work desired to be done and the promise to pay for that work. To put an interagency agreement in place all you have to do is write the contract. There are no notice requirements like those for professional/technical agreements. The authority for interagency agreements is the same authority as for joint powers agreements ([Minn. Stat. § 471.59](#)).

What is a Joint Powers Agreement?

Joint powers agreements are governed by [Minn. Stat. § 471.59](#), and are defined as two or more governmental units, working together by agreement to exercise any power common to the contracting powers. Governmental units are state agencies, cities, counties, townships, school districts, the University of Minnesota, and other political subdivisions of this state and any other state or the federal government.

What is a Grant Agreement?

Grants agreements may only be written pursuant to specific legislative authority. See the Grant section of this manual for more information.

Alternatives to Contracts

Entering into a self-standing contractual agreement may not always be the most cost-effective or efficient way to obtain professional/technical services. There are other alternatives.

Another state agency may be able to provide the needed service through an **Interagency Agreement**, described later in the manual. Another mechanism is the **Interagency Request for State Employee Services**, which is handled through your human resource office.

The state may have an existing **master contract** for the desired services. Review the Office of State Procurement website for the list of [Enterprise Master Professional/Technical Services Contracts](#).

Your agency contract coordinator and the Department of Administration can help you identify alternatives

[Roles, Responsibilities, and Help!](#)

Throughout the contracting process, OSP recommends that you seek help when you are unclear about how to proceed. Even the most basic question, if unanswered, can cause major delays, embarrass you and the agency, and create real problems in accomplishing the task(s) you need done.

[Within your agency](#)

Each agency should have an agency contract coordinator. This is an individual designated by the agency head, who is a point of contact for contracting from within the agency and who is the main contact for the Commissioner of Administration in dealing with contract questions, issues, and problems. A list of the [current agency contract coordinators](#) is available on the OSP website. An agency head wishing to designate an agency contract coordinator should notify the Professional/Technical Contracts staff of the Office of State Procurement in writing.

[PT Coordinators' Meetings](#)

Meetings of agency PT Coordinators occur on a regular basis, generally every-quarter. The sessions are a useful way to keep apprised of changes and topics of interest. There is also a PT Coordinators' mailing list that is used as another mechanism to distribute information. For more information about the PT Coordinators' meetings or to request inclusion on the mailing list, please contact Rachel Dougherty at (651) 201-3115 or rachel.dougherty@state.mn.us.

[The Attorney General's Office](#)

The Attorney General's Office is available to help you with legal questions and unusual drafting situations. Although the Attorney General's Office is no longer required to sign contracts as to form and execution, the office is statutorily responsible to periodically review and evaluate samples of state contracts to ensure compliance with laws.

[The Department of Administration](#)

By statute, the Commissioner of Administration is authorized to supervise, control, review, and approve all state contracts and purchasing; and perform all contract management and review functions for contracts, except those functions specifically delegated to be performed by the contracting agency, the attorney general, or otherwise provided for by law. *The responsibility*

of the department begins at the point the agency makes a decision that a contract is required to fulfill its needs and ends when the contract is complete and all post contract reporting has been conducted.

The Professional/Technical Contracts staff of the Office of State Procurement will be able to assist you with state contract drafting and with questions concerning contracting laws, regulations, and procedures. OSP facilitates regular meetings of agency Professional/Technical Coordinators and maintains a website which provides updates on changes in laws, policies, and procedures. If you would like to be added to the mailing list or have contracting questions, contact:

Rachel Dougherty
Enterprise Contracts Counsel
651.201.3115
Rachel.Dougherty@state.mn.us

Section 2A: Gifts

When a state agency is presented with a gift, there are several issues the agency must consider. A gift can include anything you can think of, including personal, real, or intellectual property, given by either a public or private entity.

Here is some general guidance on accepting a gift.

First and most importantly, contact your Assistant Attorney General to discuss the acceptance of the gift.

Second, after examining the gift, does your agency want to accept it? Have you thought about all the hidden costs of the gift? For example, if the state is presented with the gift of a building, is the site contaminated? Does the building have asbestos that needs abatement before it can be used? Also, think about whether or not your agency/the state can honor the commitment of any terms or restrictions placed on the gift.

Third, if the agency wishes to accept the gift, it must next consider whether the agency has the statutory authority to accept the particular gift. Most agencies do not, but the Commissioner of Finance, through [Minn. Stat. §16A.013](#), has general authority to accept gifts on behalf of the state.

Particular care and attention must be given to offers to provide “free” products or services. Few things are truly free and some analysis needs to be done regarding the advantages and disadvantages to both the state and the vendor. If we conclude that acceptance of a gift would pose a real or perceived unfair advantage to a vendor, we need to avoid it, mitigate it, or acknowledge and waive it. In some instances, public notice that the state is seeking free products or pro bono services is a best practice.

Finally, make sure to review the [Minnesota Management and Budget policy on Gift Acceptance](#).

Section 2: Ethics and Conflict Of Interest (Including Organizational Conflicts of Interest)

The Commissioner of Administration, in accordance with the direction in [Minn. Stat. § 16C.04](#), has developed policies regarding code of ethics and conflicts of interest designed to prevent conflicts of interest for state employees involved in the acquisition of goods, services and utilities. A copy of the policy follows this section.

Applying the Conflict-of-Interest Statutes and Policies

A conflict of interest is any situation in which your judgment, actions or non-action may, might or could be interpreted to be influenced by something that would benefit you. The situation exists either directly when you gain something, or indirectly when a friend, relative or acquaintance receives something. The situation may be fuzzy to you, and perfectly clear to others, or vice versa.

Statutory Guidance

There are a number of guidelines on the issue of conflict of interest in Minnesota statutes. Additionally, most state agencies have agency specific statutes, rules and policies. This section does not attempt to cover all of these, but focuses on the major four statutory standards and on some of the obligations and responsibilities that flow from them. If you have a question as to whether or not something is a conflict of interest, contact your agency ethical practices officer.

Note: each state employee, as an individual, is responsible for NOT putting themselves and the state in a position where a conflict of interest might exist or could give the appearance of existing.

[Minn. Stat. § 15.43](#), states in part (emphasis added):

No employee of the state or of the University of Minnesota in direct contact with suppliers or potential suppliers to the state or the university, or who may directly or indirectly influence a purchasing decision or contract by establishing specifications, testing purchased products, evaluating contracted services, or otherwise has official involvement in the purchasing or contracting process may:

(1) Have any financial interest or have any personal beneficial interest **directly or indirectly** in contracts or purchase orders for goods or services used by, or purchased for resale or furnished to a department or agency of the state or the university; or

(2) Accept *directly or indirectly from a person, firm, or corporation to which a contract or purchase order has been or may be, awarded, a rebate, gift, money, or anything of value other than items of nominal value.* No such employee may further accept any promise, obligation or contract for future reward.

[Minn. Stat. § 43A.38](#) establishes a code of ethics for executive branch employees and states in part (*emphasis added*):

Subd. 5. Conflicts of interest. The following actions by an employee in the executive branch *shall be deemed a conflict of interest* and subject to procedures regarding resolution of the conflicts, [section 43A.39](#) or disciplinary action as appropriate:

(1) use or attempted use of the employee's official position to secure benefits, privileges, exemptions or advantages *for the employee or the employee's immediate family or an organization with which the employee is associated which are different from those available to the general public;*

(2) acceptance of other employment or contractual relationship that will affect the employee's independence of judgment in the exercise of official duties;

(3) actions as an agent or attorney in any action or matter pending before the employing agency except in the proper discharge of official duties or on the employee's behalf; or

(4) the solicitation of a financial agreement for the employee or entity other than the state when the state is currently engaged in the provision of the services which are the subject of the agreement or where the state has expressed an intention to engage in competition for the provision of the services; unless the affected state agency waives this clause.

Subd. 6. Determination of conflicts of interest. *When an employee believes the potential for a conflict of interest exists, it is the employee's duty to avoid the situation. A conflict of interest shall be deemed to exist when a review of the situation by the employee, the appointing authority or the commissioner determines any one of the following conditions to be present:*

(1) the use for private gain or advantage of state time, facilities, equipment or supplies or badge, uniform, prestige or influence of state office or employment;

(2) receipt or acceptance by the employee of any money or other thing of value from anyone other than the state for the performance of an act which the employee would be required or expected to perform in the regular course or hours of state employment or as part of the duties as an employee;

(3) employment by a business which is subject to the direct or indirect control, inspection, review, audit or enforcement by the employee;

(4) the performance of an act in other than the employee's official capacity which may later be subject directly or indirectly to the control, inspection, review, audit or enforcement by the employee.

[Minn. Stat. § 16C.04](#), focuses directly on employees involved directly or indirectly in the acquisition process (including professional/technical service contracting) at any level. It is repeated here to provide a basis for understanding the actual policy that follows (emphasis added).

Subd. 1. Duty. *An employee of the executive branch involved directly or indirectly in the acquisition process, at any level, is subject to the code of ethics in [section 43A.38](#).*

Subd. 2. Conflict of interest policy development.

(a) The commissioner [of administration] must develop policies regarding code of ethics and conflict of interest designed to prevent conflicts of interest for [state] employees involved in the acquisition of goods, services, and utilities. The policies must apply to [state] employees who are directly or indirectly involved in the acquisition of goods, services, and utilities, developing requests for proposals, evaluating bids or proposals, awarding the contract, selecting the final vendor, drafting and entering into contracts, evaluating performance under these contracts, and authorizing payments under the contract.

(b) The policies must contain a process for making [state] employees aware of policy and laws relating to conflict of interest, and for training [state] employees on how to avoid and deal with potential conflicts.

(c) The policies must contain a process under which an [state] employee who has a conflict of interest or a potential conflict of interest must disclose the matter, and a process under which work on the contract may be assigned to another [state] employee if possible.

The message delivered by these statutes is clear and simple:

- Each state employee, as an individual, is responsible for NOT putting himself/herself and his/her state agency in a position where a conflict of interest might exist or could give the appearance of existing.
- Any activity, influence or input related to any part of the acquisition process IS covered by these standards - from getting the idea to approving the payment and everything in between.
- When anyone in a position of responsibility in a state agency becomes aware of a potential conflict of interest THAT PERSON MUST ACT to remove the state employee from ANY involvement with the acquisition in question.

General Information

The Commissioner of Administration has established the [Procurement Code of Ethics](#) and the following policies designed to prevent conflicts of interest regarding the acquisition of goods, services and utilities, pursuant to [Minn. Stat. § 16C.04](#).

Affirm Knowledge of Ethical Code

Based on a policy requirement of the commissioner of the Department of Employee Relations, each state employee must sign a statement that s/he has read and understands the code of ethics for employees in the executive branch (see [Minn. Stat. § 43A.38](#)). Employees must have this document in their personnel file in the agency's human resources office.

Affirm Knowledge of Policy and Laws

On an annual basis, each state agency must require employees directly and indirectly involved in the acquisition process to read and understand this policy and the relevant statutes and sign a statement to that effect (see Minn. Stat. §§ [16C.04](#) and [43A.38](#)). Statements affirming review should be maintained in a file designated by the agency.

If an employee is only occasionally involved in an acquisition (e.g., developing specifications for or evaluation of a single RFP), it is acceptable for him/her to read and understand the policy and laws at the beginning of the process. Statements affirming review must be maintained in the actual contract file.

Ethics Officer Designation

Each state agency must designate an ethics officer who is responsible for providing advice, assistance and training to agency staff on ethical practices and conflicts of interest. This employee may be an internal auditor or a member of the agency's human resources division. Notice of this designation should be disseminated throughout the agency and identification of the ethics officer included in the employee's required knowledge of this policy, the code of ethics for executive branch employees and the laws previously described.

Identifying Conflicts of Interest

Each state agency should establish a policy creating an internal mechanism for employees' use in identifying an actual conflict of interest or a potential conflict of interest. Notice of this policy should be disseminated throughout the state agency and included in the employee's required knowledge of this policy, the code of ethics for executive branch employees and the laws previously described.

Immediate Action Required

A state agency or employee must immediately act upon any suggestion, inquiry or intimation that an actual conflict of interest exists. Upon identification, such matters are referred to the agency ethics officer and to a supervisor, manager, director, assistant commissioner or agency head. It is appropriate for small agencies having no internal auditors or human resources staff to refer suspected conflicts to the Department of Administration's Office of State Procurement.

Transfer Responsibility If Conflict Exists

If a state employee, supervisor, manager, appointing authority or agency head determines that a potential conflict of interest exists, as defined by this policy or relevant law, responsibilities for the acquisition must be assigned to an employee having no conflict of interest. If the agency head determines that assigning those duties to another employee within the agency is not possible, s/he must contact the Commissioner of Administration, who will assist in finding personnel to perform the acquisition.

Policy Application to Non-State Employees

State agencies should consider establishing a policy for non-state employee participation in the acquisition process. Agencies routinely use non-state employees to assist in creating and evaluating requests for proposals and in making contract award recommendations. (In some cases, legislation may dictate the participation of representatives from certain groups.)

Ideally, this policy should require that non-state employees read, understand and agree to be bound by the mandates of the statutes and this policy relevant to their participation in the state acquisition process. A record of this agreement should be kept with the official agency copy of activity related to the acquisition or the resulting contract. To protect the state, its agencies and employees, everyone involved in the acquisition process must be held to the same standards.

Example Situations

A conflict of interest is any situation in which your judgment, action, or nonaction benefits you. A conflict of interest situation can exist directly (when you gain personally) or indirectly (when a friend, relative, or acquaintance does). Some clear-cut examples of conflicts of interest and violations of law include buying from your brother, sister, or spouse with state funds; buying from a firm and then accepting a job from that firm; buying from a firm that has taken you to dinner, flown you to Boston for a vacation, or bought you a new car. Other conflict of interest situations are not as clear-cut.

Example 1

You have known Jane, owner of Jane's Garage, a long time—she has worked on your family cars for years. You know she performs good work at a reasonable price, so why not just take state vehicles to her to work on? If Jane says, "I'd really like the state's business and if I get it, you'll get a discount on work on your car," the situation is obvious: this is clearly a potential conflict of interest. But what if Jane has not said a thing and you get a reduced charge on personal work or what if your daughter or your nephew works for Jane? What if Jane rents her garage property from your mother-in-law? These situations are not as clear. How do you benefit, if at all? In the first instance, if it is your daughter who works at Jane's garage, an indirect benefit exists—your family makes money directly from Jane's business. On the other hand, the situation of your nephew working for Jane may appear to be different, but only by degree. You might not directly get money from Jane's business, but you could be considered indirectly involved. These are all examples of situations that have the appearance of a conflict of interest. What to do?

- Because there is potential for a conflict of interest, remove yourself from the acquisition and report it immediately. Be sure that your supervisor, manager, director, etc., knows exactly why you are extracting yourself from the process.
- Make sure that the new agency representative carefully defines the agency's needs and puts the requirements "on the street" by preparing a request for proposal (RFP).
- Have the responses evaluated by individuals who do not know of your involvement and who have no similar personal conflicts of interest.
- Have your supervisor or a neutral entity make the final award.
- Avoid any involvement with the contract or its future evaluation.

Assuming these procedures are followed and Jane's Garage ultimately gets the business, it is likely that the process was correct, above board and beyond reproach. However, the appearance of a conflict of interest may remain, even with these recommended actions. By carefully documenting what you and the agency did and when you did it, you will have the information necessary to dispel the appearance of a conflict of interest. In some cases, the appearance of a conflict may be unavoidable. The documentation recording the actions you and your agency take will be the only evidence that such an appearance did not evolve into a potential or actual conflict of interest. The process does not have to be time consuming and complex if everyone associated with the acquisition understands the rules and abides by them.

Example 2

An employee suggests that your division purchase a piece of equipment so that s/he can do a better job. Division management agrees that the equipment would be useful. The employee happens to have just such a piece of used equipment and is willing to sell it to the state for a very reasonable price.

Buying used equipment may be a good purchasing decision and should be considered when an agency needs equipment. The issue is not whether to purchase used equipment or not, but rather where the equipment comes from and how to determine its reasonable value. Assuming that you think the employee's idea is a good one, and if the piece of equipment is available, in good condition, with a warranty and at a good price, then the purchase may be wise. The answer to the conflict question is that a potential conflict does exist, due to the proximity in the relationship of the purchaser to the seller.

What to do?

- Procedurally remove yourself and the employee from the acquisition.
- Identify someone else to proceed: another office, district, region, the central office or even the Office of State Procurement. The most appropriate person is someone who has no awareness of the employee and his/her relationship to the purchase.
- Request that this individual develop an RFP for a used piece of equipment, being very thorough about specifications, conditions and warranties. Publish the RFP in the *State Register* as a formal solicitation (regardless of its dollar value).
- Ensure that someone else opens the responses and makes the award decision.

Assuming that these steps are taken and the employee happens to “win” the award, it would be difficult to argue that the employee’s situation affected the outcome because the entire process was conducted “in the open.” Some caution is appropriate, however. High point-value items in an evaluation, such as a warranty, are unlikely to be something an employee could reasonably provide. An actual used equipment dealer might provide a warranty, which has real economic value. As an individual, the employee would have a hard time providing the same level of protection for the state as a dealer would. For example, how likely would you be to take the employee to court to enforce a warranty?

The appearance of a conflict of interest in this example could probably never be dispelled by any amount of documentation or action by the agency. The agency must make the decision to proceed very carefully, with full awareness of the issues involved.

Example 3

You are offering employment to an individual whose husband is employed by Widgets-R-Us. Your agency has made purchases from Widgets-R-Us in the past and may do so in the future.

This is not a conflict of interest. The potential employee and her relationship to the company have obviously not affected state acquisitions in the past. Once hired, the relationship has no impact as long as the employee does not directly or indirectly participate in any decisions to make purchases from Widgets-R-Us. However, the question is how to define “indirect” participation.

(A) Widgets-R-Us makes widgets. Your agency uses widgets and routinely orders them from OSP’s Central Stores. There is no conflict of interest regardless of the relationship.

Central Stores chose to carry the product independent of the individual's employment with your agency. The product is a common item and was used before the new employee arrived. It is reasonable to continue to use widgets.

(B) Widgets-R-Us creates a new product and offers it to its employees to test and informally market outside the company. If the new state employee brings the product to your agency and decides that it should be purchased, there is an appearance of a conflict. Since the product is not publicly available and the purchase decision is made by the spouse of the benefitted company's employee, the appearance of a conflict of interest exists and the acquisition should not proceed. Even if the product is available publicly, the appearance of a conflict of interest exists. What to do?

Once the new Widgets-R-Us product becomes available publicly, only an employee having no actual financial relationship with the company should ask Central Stores to acquire it. If the product will not be carried by Central Stores, an individual not connected to the new employee must place the order after the product is available publicly.

(C) The new employee is the program manager responsible for all agency systems development and purchasing activity. The program manager also has authority to sign contracts for the agency head. The employee's spouse is a systems integration and services executive for Widgets-R-Us, which provides consulting and development as part of its services. The agency has published an RFP to develop a new system; responses have been received and the evaluation completed. The evaluation team recommended that Widgets-R-Us get the award and completed contract negotiations, but the contract has not yet been signed. The new program manager did not serve on the evaluation team and must not sign the contract. Doing either would create the appearance of a conflict of interest. The program manager has a potential conflict of interest if she is involved with administration of the contract, evaluation of the contractor's performance, approval of invoices or recommendations to accept the final product.

(D) Two further variations:

- The RFP has been sent out, responses received and evaluation completed, but no recommendation has been made to the agency head. The program manager is involved in the recommendation.*
- The RFP has been sent out and responses received, but the evaluation has not been completed and no recommendation has been made. The new program manager is involved in both.*

All of the scenarios described in “C” and “D” have the potential for an appearance of a conflict of interest because of the likely financial interest of the program manager in her spouse’s employment. The acquisition process should not continue without reporting the appearance of the conflict.

Example 4

An employee serves as a compensated board member of a local nonprofit organization that provides social services and counseling. Your department needs a local source of social services case management.

It would be impossible for the employee to avoid the appearance of a conflict of interest if the agency wants to enter into a single source agreement with a nonprofit organization from which the employee benefits financially. If the nonprofit is determined to be the only source of the needed service, someone other than the conflicted employee must conduct the process.

What if the employee is an uncompensated member of the board? The issue of compensation does not remove the appearance of a conflict. Participation on the board brings some benefit, although it is more implied than actual. Mere association with this nonprofit’s decision-making raises the appearance of a conflict which must be managed.

References

Minnesota Statutes

[Minn. Stat. § 10A.07](#) – CONFLICTS OF INTEREST

Subdivision 1. **Disclosure of potential conflicts.** A public official or a local official elected to or appointed by a metropolitan governmental unit who in the discharge of official duties would be required to take an action or make a decision that would substantially affect the official's financial interests or those of an associated business, unless the effect on the official is no greater than on other members of the official's business classification, profession, or occupation, shall take the following actions:

(1) prepare a written statement describing the matter requiring action or decision and the nature of the potential conflict of interest;

(2) deliver copies of the statement to the official's immediate superior, if any; and

(3) if a member of the legislature or of the governing body of a metropolitan governmental unit, deliver a copy of the statement to the presiding officer of the body of service.

If a potential conflict of interest presents itself and there is insufficient time to comply with clauses (1) to (3), the public or local official shall orally inform the superior or the official body of service or committee of the body of the potential conflict.

Subd. 2. Required actions.

(a) If the official is not a member of the legislature or of the governing body of a metropolitan governmental unit, the superior shall assign the matter, if possible, to another employee who does not have a potential conflict of interest.

(b) If there is no immediate superior, the official shall abstain, if possible, by assigning the matter to a subordinate for disposition or requesting the appointing authority to designate another to determine the matter. The official shall not chair a meeting, participate in any vote, or offer any motion or discussion on the matter giving rise to the potential conflict of interest.

(c) If the official is a member of the legislature, the house of service may, at the member's request, excuse the member from taking part in the action or decision in question.

(d) If the official is not permitted or is otherwise unable to abstain from action in connection with the matter, the official shall file a statement describing the potential conflict and the action taken. A public official shall file the statement with the board and a local official shall file the statement with the governing body of the official's political subdivision. The statement must be filed within a week of the action taken.

Subd. 3. Interest in contract; local officials. This section does not apply to a local official with respect to a matter governed by sections 471.87 and 471.88.

For purposes of [10A.07](#) and this policy, the term “public official” refers to commissioners, deputy commissioners or assistant commissioners of any state department as designated pursuant to section 15.01. It also includes any executive branch employee authorized to adopt, amend or repeal rules or adjudicate contested cases. (See [Minn. Stat. § 10A.01, subd. 18.](#))

[Minn. Stat. § 15.054](#) – SALE OR PURCHASE OF STATE PROPERTY; PENALTY

No officer or employee of the state or any of its political subdivisions shall sell or procure for sale or possess or control for sale to any other officer or employee of the state or the subdivision, as appropriate, any property or materials owned by the state or subdivision except pursuant to conditions provided in this section. Property or materials owned by the state or a subdivision, except real property, and not needed for public purposes, may be sold to an employee of the state or the subdivision after reasonable public notice at public auction or by sealed bid if the employee is the highest responsible bidder and is not directly involved in the auction or sealed bid process. Requirements for reasonable public notice may be prescribed by other law or ordinance so long as at least one week's published or posted notice is specified. A state employee may purchase no more than one motor vehicle from the state in any 12-month period. A person violating the provisions of this section is guilty of a misdemeanor. This section shall not apply to the sale of property or materials acquired or produced by the state or subdivision for sale to the general public in the ordinary course of business. Nothing in this section shall prohibit an employee of the state or a political subdivision from selling or possessing for sale public property if the sale or possession for sale is in the normal course of the employee's duties.

[Minn. State. § 16C.04](#) – ETHICAL PRACTICES AND CONFLICT OF INTEREST

Subdivision 1. **Duty.** An employee of the executive branch involved directly or indirectly in the acquisition process, at any level, is subject to the code of ethics in [section 43A.38](#).

Subd. 2. **Conflict of interest policy development.** (a) The commissioner must develop policies regarding code of ethics and conflict of interest designed to prevent conflicts of interest for employees involved in the acquisition of goods, services, and utilities. The policies must apply to employees who are directly or indirectly involved in the acquisition of goods, services, and utilities, developing requests for proposals, evaluating bids or proposals, awarding the contract, selecting the final vendor, drafting and entering into contracts, evaluating performance under these contracts, and authorizing payments under the contract.

(b) The policies must contain a process for making employees aware of policy and laws relating to conflict of interest, and for training employees on how to avoid and deal with potential conflicts.

(c) The policies must contain a process under which an employee who has a conflict of interest or a potential conflict of interest must disclose the matter, and a process under which work on the contract may be assigned to another employee if possible.

[Minn. Stat. § 43A.38](#) – **CODE OF ETHICS FOR EMPLOYEES IN THE EXECUTIVE BRANCH.**

Subdivision 1. **Definitions.** For the purpose of this section the following definitions shall apply:

(a)"Business" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual or any other legal entity which engages either in nonprofit or profit making activities.

(b)"Confidential information" means any information obtained under government authority which has not become part of the body of public information and which, if released prematurely or in nonsummary form, may provide unfair economic advantage or adversely affect the competitive position of an individual or a business.

(c)"Private interest" means any interest, including but not limited to a financial interest, which pertains to a person or business whereby the person or business would gain a benefit, privilege, exemption or advantage from the action of a state agency or employee that is not available to the general public.

Subd. 2. **Acceptance of gifts; favors.** Employees in the executive branch in the course of or in relation to their official duties shall not directly or indirectly receive or agree to receive any payment of expense, compensation, gift, reward, gratuity, favor, service or promise of future employment or other future benefit from any source, except the state for any activity related to the duties of the employee unless otherwise provided by law. However, the acceptance of any of the following shall not be a violation of this subdivision:

(a) Gifts of nominal value or gifts or textbooks which may be accepted pursuant to section 15.43.

(b) Plaques or similar mementos recognizing individual services in a field of specialty or to a charitable cause.

(c) Payment of reimbursement expenses for travel or meals, not to exceed actual expenses incurred, which are not reimbursed by the state and which have been approved in advance by the appointing authority as part of the work assignment.

(d) Honoraria or expenses paid for papers, talks, demonstrations, or appearances made by employees on their own time for which they are not compensated by the state.

(e) Tips received by employees engaged in food service and room cleaning at restaurant and lodging facilities in Itasca State Park.

Subd. 3. Use of confidential information. An employee in the executive branch shall not use confidential information to further the employee's private interest, and shall not accept outside employment or involvement in a business or activity that will require the employee to disclose or use confidential information.

Subd. 4. Use of state property. (a) An employee shall not use or allow the use of state time, supplies or state-owned or leased property and equipment for the employee's private interests or any other use not in the interest of the state, except as provided by law.

(b) An employee may use state time, property, or equipment to communicate electronically with other persons including, but not limited to, elected officials, the employer, or an exclusive bargaining representative under chapter 179A, provided this use, including the value of the time spent, results in no incremental cost to the state or results in an incremental cost that is so small as to make accounting for it unreasonable or administratively impracticable.

(c) The commissioners of administration and employee relations shall issue a statewide policy on the use of electronic mail and other forms of electronic communications by executive branch state employees. The policy is not subject to the provisions of chapter 14 or 179A. Appointing authorities in the legislative and judicial branches shall issue policies on these issues for their employees. The policies shall permit state employees to make reasonable use of state time, property, and equipment for personal communications and shall address issues of privacy, content of communications, and the definition of reasonable use as well as other issues the commissioners and appointing authorities identify as necessary and relevant.

Subd. 5. Conflicts of interest. The following actions by an employee in the executive branch shall be deemed a conflict of interest and subject to procedures regarding resolution of the conflicts, [section 43A.39](#) or disciplinary action as appropriate:

(a) use or attempted use of the employee's official position to secure benefits, privileges, exemptions or advantages for the employee or the employee's immediate family or an organization with which the employee is associated which are different from those available to the general public;

(b) acceptance of other employment or contractual relationship that will affect the employee's independence of judgment in the exercise of official duties;

(c) actions as an agent or attorney in any action or matter pending before the employing agency except in the proper discharge of official duties or on the employee's behalf; or

(d) the solicitation of a financial agreement for the employee or entity other than the state when the state is currently engaged in the provision of the services which are the subject of the agreement or where the state has expressed an intention to engage in competition for the provision of the services; unless the affected state agency waives this clause.

Subd. 6. Determination of conflicts of interest. When an employee believes the potential for a conflict of interest exists, it is the employee's duty to avoid the situation. A conflict of interest shall be deemed to exist when a review of the situation by the employee, the appointing authority or the commissioner determines any one of the following conditions to be present:

(a) the use for private gain or advantage of state time, facilities, equipment or supplies or badge, uniform, prestige or influence of state office or employment;

(b) receipt or acceptance by the employee of any money or other thing of value from anyone other than the state for the performance of an act which the employee would be required or expected to perform in the regular course or hours of state employment or as part of the duties as an employee;

(c) employment by a business which is subject to the direct or indirect control, inspection, review, audit or enforcement by the employee;

(d) the performance of an act in other than the employee's official capacity which may later be subject directly or indirectly to the control, inspection, review, audit or enforcement by the employee.

Subd. 7. Resolution of conflict of interest. If the employee, appointing authority or commissioner determine that a conflict of interest exists, the matter shall be assigned to another employee who does not have a conflict of interest. If it is not possible to assign the matter to an employee who does not have a conflict of interest, interested persons shall be notified of the conflict and the employee may proceed with the assignment.

This process is sometimes called recusal, which in legal terminology is the action of a judge to excuse himself/herself from participation in a case because of a pre-existing situation. The purpose is the same, to minimize the potential for conflict of interest in state acquisitions. No matter how difficult, it is always necessary to assign the matter to a state employee who does not have a conflict of interest. For a complex acquisition, an agency head could arrange with the commissioner of administration to make a purchase or assist in evaluating a proposal and making a recommendation. Other employees in the agency or a committee with leadership can review and approve work products and invoices.

Subd. 8. **Precedence of chapter 10A.** Where specific provisions of chapter 10A apply to employees and would conflict with this section, the provisions of chapter 10A shall apply.

Subd. 9. **Limits.** This section shall not be interpreted to apply to any activity which is protected by sections 179A.01 to 179A.25 and collective bargaining agreements and practices thereunder nor to prevent a current or former employee from accepting employment with a labor or employee organization representing employees.

[Minn. Stat. § 471.87](#) – **PUBLIC OFFICERS, INTEREST IN CONTRACT; PENALTY**

Except as authorized in [section 471.88](#) [list of exceptions], a public officer who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor.

[Minn. Stat. § 609.43](#) – **MISCONDUCT OF PUBLIC OFFICER OR EMPLOYEE**

A public officer or employee who does any of the following, for which no other sentence is specifically provided by law, may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both:

(1) Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the office or employment within the time or in the manner required by law; or

(2) In the capacity of such officer or employee, does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity; or

(3) Under pretense or color of official authority intentionally and unlawfully injures another in the other's person, property, or rights; or

(4) In the capacity of such officer or employee, makes a return, certificate, official report, or other like document having knowledge it is false in any material respect.

Organizational Conflict of Interest

[Minn. Stat. § 16C.02](#), subd. 10a - "Organizational conflict of interest" means that because of existing or planned activities or because of relationships with other persons: (1) the vendor is unable or potentially unable to render impartial assistance or advice to the state; (2) the vendor's objectivity in performing the contract work is or might be otherwise impaired; or (3) the vendor has an unfair advantage.

[Minn. Stat. § 16C.04](#), subd. 3. Organizational Conflicts of Interest. (a) The commissioner shall make reasonable efforts to avoid, mitigate, or neutralize organizational conflicts of interest. To avoid an organizational conflict of interest, the commissioner may utilize methods including disqualifying a vendor from eligibility for a contract award or canceling the contract if the conflict is discovered after a contract has been issued. To mitigate or neutralize a conflict, the commissioner may use methods such as revising the scope of work to be conducted, allowing vendors to propose the exclusion of task areas that create a conflict, or providing information to all vendors to assure that all facts are known to all vendors. (b) In instances where a conflict or potential conflict has been identified and the commissioner determines that vital operations of the state will be jeopardized if a contract with the vendor is not established, the commissioner may waive the requirements in paragraph (a).

Sample Conflict of Interest Policy

Below is a sample policy agencies may use to build their conflict of interest policies. It is drafted using the fictitious agency, the Department of Regulatory Services.



Minnesota Department of Regulatory Services

Departmental Policy

Policy 00-01

Effective Date: January 1, 2000

ETHICAL PRACTICES AND CONFLICT OF INTEREST

PURPOSE: This departmental policy requires and encourages compliance with various statutory and policy requirements related to the individuals within the Department of Regulatory Services who acquire goods, services and utilities and the ethical standards they have to meet. This policy also defines certain requirements for acknowledging the understanding of these statutory and policy requirements and who these requirements apply to.

STATUTORY BASIS: Minnesota Statutes §§ 15.43, 16C.04 and 43A.38 establish the statutory basis for this policy.

STATEWIDE POLICY BASIS: The Commissioner of Administration acting under the authority in Minn. Stat. § 16C.04 has established a statewide policy on conflict of interest (Admin Policy & Procedure: 98.30) related to the acquisition of goods, services and utilities which requires the Department of Regulatory Services to establish a policy on Conflict of Interest. The Commissioner of Employee Relations acting under the authority in Minn. Stat. § 43A.38 has established a statewide policy on employee acknowledgment of having read and understood Minn. Stat. § 43A.08.

DEPARTMENT POLICY STATEMENT: It is the policy of the Department of Regulatory Services that the department, its management and supervisory staff and employees have an absolute duty and responsibility to take all actions necessary to prevent an employee involved in any way in the acquisition of goods, services and utilities from being put in a position where that individual employee might have a conflict of interest.

First, any suggestion, inquiry and/or intimation that an “actual conflict of interest” exists must be immediately acted upon by the agency or department employee receiving this information. The agency ethical practices officer and the Office of the Legislative Auditor should be contacted



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immediately. Remember, an “actual conflict of interest” means that a state decision or action has already been compromised. Action must be immediate.

It is the goal of the Department of Regulatory Services to insure that “actual conflicts of interest” do NOT take place within the department. This policy is directed at defining what conflict of interest is and how the department will ensure that it does not take place.

In the information that follows there are distinctions made between three different groups of individuals:

1) those department employees who as a routine or regular part of their jobs are involved in the acquisition of goods, services and utilities, 2) those department employees who might occasionally be involved in the acquisition of goods, services and utilities, and 3) non-departmental employees who might occasionally be involved in the acquisition of goods, services and utilities. For purposes of the Department of Regulatory Services we will treat these groups as including:

Group 1 - Department employees routinely involved in the acquisition process:

- The Commissioner, deputy commissioner, assistant commissioner and all assistants to these individuals
- All managers, supervisors and professional staff who receive delegations from the commissioner, or anyone authorized by the commissioner to delegate authority, to expend department or state funds or to sign contracts or purchasing documents for the department
- All staff of the Office of Administrative Services and of the Financial/Accounting Office

Group 2 - Department employees occasionally involved in the acquisition process:



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-
- Any department staff member who serves on any team, task force, committee, group or similar body that develops specifications or requirements, evaluates responses or in any way becomes involved in the acquisition of goods, services and utilities

Group 3 - Other individuals occasionally involved in the acquisition process:

- Members of the various department advisory task forces, including both state employees and non-state employees
- Individuals, including employees of other public bodies, who serve on the departments focus groups or task forces

Definitions:

Commissioner means the Commissioner of Regulatory Services.

Acquisition of goods, services and utilities means purchasing, procuring, contracting, getting, buying, selling or trading anything with any value (goods [which includes utilities used by state agencies], non-professional/technical services, professional/technical services) that comes into the possession of the state or leaves the possession of the state. This includes all kinds of contracts, agreements, orders, etc. to which the state or a state agency may be a party. If the funds involved in the acquisition are, were or should have been in accounts belonging to the State of Minnesota, the process is covered by this policy. ONLY in cases where federal or state law places more specific, stringent or demanding requirements, do those requirements apply. If there is any doubt, the situation should be described in writing to the agency contract coordinator.

Department Employee means an employee of the Department of Regulatory Services.



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Actual Conflict of Interest means a situation where a department employee (as defined in this policy) has outside interests which conflict with his/her public responsibilities to the extent that public responsibilities or decisions are influenced to either the detriment of the public or the benefit of the department employee or their outside interests. Such actions may include receiving a direct or indirect financial benefit as a result of using their public position and/or influence, or the outside influence could be so prevalent as to have public decisions influenced or dictated by the department employee's outside interests.

Potential Conflict of Interest means a situation where a department employee (as defined in this policy) has outside influences and/or interests which could influence future decisions or responsibilities. The difference from an "actual conflict of interest" is that NO actions have yet occurred whereby the department employee's outside influences and/or interests have influenced or dictated public decisions or actions.

Appearance of a Conflict of Interest means a situation whereby a reasonable person would conclude that a department employee (as defined in this policy) has outside influences and/or interests which conflict with his/her public responsibilities and duties.

ACTIONS REQUIRED:

- 1) Each department employee, based on a policy requirement by the Commissioner of Employee Relations, is required to sign and have on file in their official personnel file with that department's human resources office a statement that he/she has read and understands Minn. Stat. § 43A.38.
- 2) Each department employee in Group 1 (defined above) must review, read, and understand Minn. Stat. §§ 15.43 and 43A.38 and this policy **ANNUALLY** during the month of their anniversary of state employment. Attachment A is the form used by the department to document this action



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and will be filed in the office of the commissioner, along with delegations of authority issued by the commissioner.

3) Each department employee in Group 2 (defined above) must review, read, and understand Minn. Stat. §§ 15.43 and 43A.38 and this policy statement at the beginning of their involvement with a specific acquisition process. Attachment B is the form used by the department to document this action and will be filed with the department's contract file for the specific contract involved.

4) Individuals who are not department employees (Group 3 defined above) participate in the acquisition process for the department, as defined by Minn. Stat. § 16C.04, subd 2. These individuals are required to sign Attachment C in order to be able to participate in the acquisition process. This form will be filed with the department's contract file. Individuals who cannot or will not agree to this requirement SHOULD NOT participate in the acquisition process. In instances where legislation may dictate the "participation of representatives" from certain groups the same requirement exists. Unless empowering legislation actually names specific individuals by name or title (such as, "Chairman" of this group or organization), ANYONE involved in the acquisition process is to be held to the same standards. Even in cases where specific individuals have been identified in legislation, the individual will be asked to sign Attachment C and the document will be filed with the department's contract file.

5) If a department employee, supervisor, or manager determines that a potential conflict of interest, as defined by Minn. Stat. §§ 15.43, 43A.38, and 16C.04, Admin Policy & Procedure 98-99 and/or this policy, exists, the acquisition action in question must be assigned to another department employee who does not have a conflict of interest. If the supervisor or manager determines that assigning those duties to another department employee within the department is not possible, the agency contract coordinator should be notified immediately. After discussion



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with the commissioner, the agency contract coordinator will contact the commissioner of administration, who will assist in finding someone else to take the assignment.

6) The training specialist in the human resources office is designated as the Department of Regulatory Services “agency ethical practices officer.” And is responsible for providing advice, assistance and training to department staff on ethics and conflict of interest. The Human Resources Office will provide notice of this designation to all employees.

7) Department employees are directed and authorized to discuss any and all questions about ethics and/or conflict of interest with the agency ethical practices officer. If any department employee is concerned for any reason about being connected with reporting any information related to conflict of interest to their supervisor or manager, the agency ethical practices officer or the commissioner (personally), they should contact the Office of the Legislative Auditor directly.

8) The department, commissioner of administration and the department of employee relations all offer training on ethical practices and conflict of interest. Department employees should work through their supervisors and managers to register for this training. The agency ethical practices officer and the agency contract coordinator will act as internal training resources.



Minnesota Department of Regulatory Services

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Policy 00-01

Effective Date: January 1, 2000

Attachment A to Department Policy 00-01

ANNUAL ACKNOWLEDGMENT OF REVIEW

OF ETHICAL PRACTICES AND CONFLICT OF INTEREST STATUTES AND POLICIES

DATE: January 1, 2000

TO: Commissioner of Regulatory Services

FROM: (Individual Department Employee)

SUBJECT: Review of Statutory and Policy Guidance

I have reviewed Minnesota Statutes §§ 15.43, 16C.04, and 43A.38, Department of Administration Policy and Procedure 98.30, and Department of Regulatory Services Policy 98-01 and understand my personal responsibility under these statutes and policies as they relate to my duties and activities related to the acquisition of goods, services and utilities.

I certify that I am aware of my personal responsibility to prevent myself, the Department of Regulatory Services, and the State of Minnesota from being placed in a situation where a conflict of interest might exist or could give the appearance of existing.

I certify that, if I am a manager or a supervisor, it is my personal responsibility to assist staff who work for or with me from placing themselves, the Department of Regulatory Services and the State of Minnesota from being placed in a situation where a conflict of interest might exist or could give the appearance of existing.



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Policy 00-01

Effective Date: January 1, 2000

I certify that I have read and understand the requirements of the Minnesota Data Practices Act (Minnesota Statutes Chapter 13) as they relate to my duties and activities related to the acquisition of goods, services and utilities and will act accordingly.

Signed: _____

Dated: _____



Minnesota Department of Regulatory Services

Departmental Policy

Policy 00-01

Effective Date: January 1, 2000

Attachment B to Department Policy 00-01

ACKNOWLEDGMENT OF REVIEW

OF ETHICAL PRACTICES AND CONFLICT OF INTEREST STATUTES AND POLICIES

DATE: January 1, 2000
TO: Commissioner of Regulatory Services
FROM: (Individual Department Employee)
SUBJECT: Review of Statutory and Policy Guidance

I have been assigned/requested to participate in the following project/task/duty related to the acquisition of goods, services and utilities by the Department of Regulatory Services:

[insert paragraph describing project/task/duty and potential responders
contractors or vendors if possible



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I certify that I do not have any conflicts of interest with this project/task/duty in accordance with Minnesota Statutes §§ 15.43, 16C.04, and 43A.38, Department of Administration Policy and Procedure 98.30, and Department of Regulatory Services Policy 98-01. I am aware of my personal responsibility to prevent myself, the Department of Regulatory Services and the State of Minnesota from being placed in a situation where a conflict of interest might exist or could give the appearance of existing.

I further certify that, if I am a manager or a supervisor, it is my personal responsibility to assist staff who work for or with me from placing themselves, the Department of Regulatory Services and the State of Minnesota from being placed in a situation where a conflict of interest might exist or could give the appearance of existing.

I certify that I have read and understand the requirements of the Minnesota Data Practices Act (Minnesota Statutes Chapter 13) as they relate to my duties and activities related to the acquisition of goods, services and utilities and will act accordingly.

I have a potential conflict of interest or a situation in which there might be the appearance of a conflict of interest and will be unable to perform the project/task/duties as described. I have informed by manager or supervisor of this situation.

Signed: _____

Dated: _____



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Policy 00-01

Effective Date: January 1, 2000

Attachment C to Department Policy 00-01

ACKNOWLEDGMENT OF REVIEW OF ETHICAL PRACTICES AND CONFLICT OF INTEREST STATUTES AND POLICIES BY AN INDIVIDUAL NOT AN EMPLOYEE OF THE DEPARTMENT OF REGULATORY SERVICES

DATE: January 1, 2000

TO: Commissioner of Regulatory Services

FROM: (Individual)

SUBJECT: Review of Statutory and Policy Guidance

I have been requested to participate in the following project/task/duty related to the acquisition of goods, services and utilities by the Department of Regulatory Services:

[insert paragraph describing project/task/duty and potential responders
contractors or vendors if possible]



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I certify that I do not have any conflicts of interest with this project/task/duty in accordance with Minnesota Statutes §§ 15.43, 16C.04, and 43A.38, Department of Administration Policy and Procedure 98.30, and Department of Regulatory Services Policy 98-01. I am aware of my personal responsibility to prevent myself, the Department of Regulatory Services and the State of Minnesota from being placed in a situation where a conflict of interest might exist or could give the appearance of existing.

I certify that I have read and understand the requirements of the Minnesota Data Practices Act (Minnesota Statutes Chapter 13) as they relate to my duties and activities related to the acquisition of goods, services and utilities and will act accordingly.

I agree to be responsible for my own acts and behavior including the results from my personal and individual failure to comply with Minnesota Statutes Chapter 13.

I have a potential conflict of interest or a situation in which there might be the appearance of a conflict of interest and will be unable to perform the project/task/duties as described. I have informed the project manager of the Department of Regulatory Services of this situation.

I am not an employee of the Department of Regulatory Services or of any other state or public entity and will not comply with the statutory and policy guidelines cited. I have informed the project manager of the Department of Regulatory Services of this fact.

Signed: _____

Dated: _____

Organizational Conflicts of Interest

In 2001, the Commissioner of Administration created a policy addressing organizational conflicts of interest. As opposed to traditional conflicts of interest where the focus rests with the ability of the state employee to act in an impartial manner, these types of conflicts focus on the state vendor. For example, an organizational conflict may exist when because of certain financial or other interests, a hired consultant is unable to provide impartial or objective advice to the state.

An organizational conflict of interest is defined in Minnesota law at [Minn. Stat. 16C.02](#), subd. 10a as follows:

Organizational conflict of interest.

"Organizational conflict of interest" means that because of existing or planned activities or because of relationships with other persons:

- (1) the vendor is unable or potentially unable to render impartial assistance or advice to the state;
- (2) the vendor's objectivity in performing the contract work is or might be otherwise impaired; or
- (3) the vendor has an unfair advantage.

Minnesota law further provides at [Minn. Stat. 16C.04](#), subd. 3, the following requirements:

(a) The commissioner shall make reasonable efforts to avoid, mitigate, or neutralize organizational conflicts of interest. To avoid an organizational conflict of interest, the commissioner may utilize methods including disqualifying a vendor from eligibility for a contract award or canceling the contract if the conflict is discovered after a contract has been issued. To mitigate or neutralize a conflict, the commissioner may use methods such as revising the scope of work to be conducted, allowing vendors to propose the exclusion of task areas that create a conflict, or providing information to all vendors to assure that all facts are known to all vendors.

(b) In instances where a conflict or potential conflict has been identified and the commissioner determines that vital operations of the state will be jeopardized if a contract with the vendor is not established, the commissioner may waive the requirements in paragraph (a).

Additional provisions, including vendor disclosure requirements and remedies available to be pursued in the event such a conflict cannot reasonably be avoided, mitigated, or neutralized, are addressed in [Minnesota Rules, Chapter 1230.0750](#).

The Department's [Organizational Conflict of Interest Policy](#) is available on the OSP website.

Section 3: State Contracting Decision Guidelines and Canceling a State Contract

There are many critical issues that must be addressed before an agency contracts. Examples of these issues are how an agency (and by extension, the State) makes the decision to enter into a contract, how to evaluate the proposals, the contract's content, who manages the contract, and who evaluates the final product. Since the state is spending taxpayers' dollars, the contracting agency is held to a different, and stricter, set of standards and guidelines than the private sector.

Contracting Decision Guidelines

These guidelines will assist you in determining whether you need a contract to accomplish a required task. For each of the guidelines there is a short statement of what the statutes provide as guidance and a series of questions. If you respond to all the points in the positive (that is, yes or true), you should be on strong ground to proceed with a contract. If you respond to any of the points in the negative (that is, no or false), you should seek assistance from your agency contract coordinator before proceeding further.

At any point in the process of determining to develop a contract, you can contact your agency contract coordinator or the Professional/Technical Services Contract Section of the Department of Administration for assistance. Experience suggests that the earlier in your analysis you call for help, the smoother the process goes. This is especially true for contracts over \$5,000.

There are times when a decision to contract has been made for an agency. Such as, legislation that specifically directs use of a contractor or outside party; a federal funding requirement that specifically directs use of a contractor or outside party; an appropriation that specifically requires delivery of a service without funding staff to support the service; legislation or an appropriation that says something has to be done in a time frame that the agency has already identified as being impossible to meet; any of these are situations in which the decision has already been made. You should keep a copy of the information with your files on the contract and proceed to the appropriate section of the manual for the type of contract you need.

The following are guidelines; they are questions you should ask yourself when deciding to contract. They are intended to be a checklist that helps you - not a paperwork burden. None of that work will be wasted, it will provide the basis for creating a good contract. You should keep a copy of whatever documentation is created and file it with the agency's copy of the contract.

This part of this section is divided into two pieces: the first identifies the guidelines to be used in the decision to proceed with a contract, and the second takes these guidelines and expands on them to assist you in making the decision.

Guideline # 1: The nature of the work to be done must be specific

You must know exactly what work you want done. Then the contract can be written with specific detail about what the contractor needs to get done, the responsibilities for accomplishing the work, and a clear concise description of the results. It must be written so that the contractor can be held accountable for the work intended to be completed.

The "make or buy" decision, the decision to use a contractor rather than state employees to deliver service(s) or accomplish a task(s), must be initially based on three elements:

- a) **A Needs Statement:** A needs statement answers two questions: (1) Is there a real need? and (2) What is the most feasible method to meet the need? A needs statement is a clear definition of the issue, need, or problem. An important ingredient is input from the working staff, the people with the hands-on experience, so that the need is very clearly defined.
- b) **A Statement of Work:** A statement of work is performance oriented. Based on the needs, what is it that must be done? A statement of work answers the questions who, what, when, where, why, and how.
- c) **A Cost/Benefit Analysis:** A cost/benefit analysis compares the costs, both short- and long-term, of using a contractor rather than state employees and the benefits on both sides of the "make or buy" decision. The cost/benefit analysis process for your use is outlined later in this manual.

Guideline # 2: No state employees are able or available to perform the work

Determine if a current state employee is able and available to perform the services called for in the contract. Contracting is expensive and, where feasible, utilizing a state employee could save money.

State statutes assume that a contract is needed because state employees are not available or lack the expertise to perform the study or produce the product required in a contract. Minn. Stat. §§ [43A.047](#) and [16C.08](#), subdivision 2 (b) (1), requires that agencies demonstrate that they cannot use available staff BEFORE hiring outside contractors for services. In addition, state statute requires that if the results of the contract work will be carried out or continued by state

employees upon completion of the contract, the contractor is required to include state employees in development and training, to the extent necessary to ensure that after completion of the contract, state employees can perform any ongoing work related to the same function.

Here are some sample questions that may help you assess this guideline.

- Is the workload or funding for the tasks to be undertaken by the contractor likely to vary, so that you cannot justify assigning existing staff or adding staff to accomplish the tasks?
- Have you identified the required qualifications of the individual(s) you are expecting to do the tasks you have outlined for the contractor?
- Are these required qualifications highly specialized skills or levels of expertise that are not routinely used by the agency?
- Have you notified your staff of the need for these services?
- Have you determined that the needed staff is not available within your agency or from another agency (building, area or district/region)?
- Have you identified alternatives you could use to accomplish the tasks required of the contract, if you are not able to sign a contract?
- Have you investigated to determine whether another state agency has previously performed or contracted for a similar study or set of tasks, the results of which could be useful to your agency?

Guideline # 3: Agency must retain control

The agency must retain the capability to prescribe, monitor, and evaluate the work of the contractor. The institutional memory (product of the work and how it was done) must reside with the agency, not with the contractor. Policy decisions must always be made by agency officials. Contractors may not represent a state agency in legislative matters.

Specific guidelines include:

- (1) an agency must retain the ability to develop, consider, and implement options other than those proposed by the contractor--the contractor cannot be the sole owner of the power to determine the outcomes of a contract.

(2) an agency must retain the skills/techniques/understanding of how the contractor did what it did, so that agency staff could accomplish the task(s) in the contract in the future (institutional memory)--agency staff should learn the hows and the whys of the processes used to complete a contract.

(3) agency staff must make all decisions related to the contract and its performance--in short, the contractor works for the agency, not the agency for the contractor.

(4) contractors should not lobby the Minnesota Legislature for agency programs, projects, or legislation.

(5) the contractor should not represent the agency before the Minnesota Legislature or be involved in lobbying for the agency.

(6) include, as part of the contract when appropriate, detailed requirements for the contractor to train agency staff in the task(s) being performed.

(7) identify, when appropriate, staff to be trained by the contractor and develop plans and provide resources that allow these staff to take maximum advantage of the training opportunity provided by the contract.

(8) only agency staff must apply discretion and make value judgments throughout the contract.

Guideline # 4: Time limit on contracts

The anticipated need for the contract should be for a fixed period of time, not to exceed two years; although, a contract may include language that permits extension of the contract to five years. Nonprofessional/technical contracts (except service contracts) may exceed the five year statutory limit, with written authorization of the Commissioner of Administration. However, in no event may a professional/technical contract exceed the five year limit. NOTE: By statute, an exception to the time limitations for contracts exists when the Commissioner of Administration, in consultation with the commissioner of Finance, determines in part that the contractor will incur up-front costs under the contract that cannot be recovered within a two-year period. Under these circumstances, as described in [Minn. Stat. § 16C.03](#), subd. 17, the term of a contract may be extended up to a total term of ten years.

Guideline # 5: Do not limit competition

The decision to contract must not limit competition at the time of the initial award, and when follow up needs are being considered, they must not create any conflicts of interest or result in an unfair competitive advantage to that contractor.

The statutes assume that fair, open, public competition between potential contractors is the best means of getting the most for the taxpayers' dollar. There is also inherent in the statutes the assumption that the state should not commit itself to using processes/systems/applications that are proprietary--that belong exclusively to a contractor--and are not "open" to modification/use by other processes/systems/ applications.

The decision to proceed with a contract should allow all qualified potential contractors to be treated as equals in the award of the contract. The contract should not commit the agency to use a proprietary process/system/application that will prohibit or limit the agency's alternatives in the future. No plans should be made or discussions entered into that suggest, as a result of the proposed contract, that the contractor would be considered a *SINGLE SOURCE* for future contracts.

Guideline # 6: Contract will not create an employer-employee relationship

State statutes prohibit establishing an employer--employee relationship between the state or the agency and anyone performing under a professional/technical services contract.

There are several types of "employees." For our purposes the critical ones are 1) contractual employees and 2) common law employees.

Contractual employees are **state employees**, individuals employed under one of the state's bargaining agreements or plans.

Common law employees are individuals who meet the tests outlined at the end of this section and are determined by the Internal Revenue Service.

In the "Professional/Technical Service Contracts" section of this manual are the rules and questions used by the Internal Revenue Service in determining whether an employer-employee relationship exists for common law employees. You should review them carefully BEFORE you decide to contract for a service.

Guideline # 7: No State Employee Can Engage in the Performance of a Contract

Entering into a professional/technical services contract with current state employees is prohibited. There are several mechanisms available for agencies to utilize state employees' services. If you want to use an individual state employee, you should contact your human resources office for more information. If you want to use another agency's services, you should use an interagency agreement.

Guideline # 8: Privatization

Others (a contractor) could reasonably be expected to match or surpass the value and service levels which the state agency and its employees provide, based on a detailed cost benefit analysis.

OSP recommends that the agency work directly with the Departments of Administration and Employee Relations when this situation is identified.

Canceling a State Contract

In the event you need to cancel a state contract, for any reason, contact your Assistant Attorney General.

Section 4: Cost/Benefit Analysis

Determining what a professional/technical services contract may cost is challenging, but it is essential to do it *up front* for two reasons: (1) so that you have some comparison with your own costs to make a *make or buy* decision and (2) so that you know which procedure to use in getting the request for proposal ready. It is not the amount of work you do to put together a cost/benefit analysis that makes the difference, but how well you cover the basic points that counts. A 3x5 card may be all that is necessary for a small *need*. However, it might also take several pages of analysis to identify all the costs of a large *need*. The *benefit* portion of the analysis is completed by doing the needs statement and statement of work in the previous section, and you have determined that doing the work is more important than doing something else with the money, for whatever reason.

A suggested format with instructions is included in this section to assist you in completing the analysis.

First, try to identify all costs related to *doing the service/task yourself*. Some of the points on the format may be easily skipped but can be costly.

Next, try to determine what kinds of responses you might get to your request for proposal (RFP). At this step you will not have firm numbers. But, you should have some idea about what the *cost* is going to be or you would not be determining that your employees cannot do it. By carefully setting out the cost benefit analysis structure you will identify critical issues that need to be considered when you are putting together the evaluation criteria for the RFP.

Compare these numbers to both your own costs and your budget, then determine if you should proceed.

As you proceed with a contract, make sure you have identified all the support costs the responders expect from you; the format makes a handy comparison device. Your analysis of responses needs to factor in these *hidden* costs in order for you to get the best return for your funds. It is not unusual for Responder A to have a lower *cost* (\$10,000) but require you to commit more of your staff hours to getting the job done (80 hours x \$15 an hour = \$1,200), while Responder B is a little higher *cost* (\$10,500) but does not expect you to commit more than a quarter of the hours of Responder A (20 hours x \$15 an hour = \$300). Which one is really the best buy, all other things being equal? Add to these simple costs the impact of having staff not available to do regular or other work for those 60 hours, and you can create a significant *hidden* cost.

Explanation of Model Cost Analysis Format

The following format focuses on COST. You have identified the non-monetary tradeoffs (benefits) of the *make or buy* decision in creating the needs statement and the statement of work, in Section 2.

Contractors respond with a *price* for base expenses. The other costs under the **Contractor** columns are for your specific costs based on their responses. You might not have all of them filled in for every contract or contractor.

Categories

Estimated Contract Price:

Based on your knowledge of the field, seminars, conferences, mailings, discussions with other individuals in the field, etc., some idea of what potential contractors might charge for the *service* you want.

Base Expenses:

Costs of state employees providing the service. These would be your major costs if you had the staff or the expertise or the time to provide the service.

Contract Management Costs:

Costs that you will pay for managing the contract. This is NOT your agency's contract manager. It is the person(s) you will have to assign to managing the contract (Project Manager, Liaison, etc.).

Contractor Support Costs:

Costs that you incur to support the contractor. Office space, forms you provide, equipment you buy for the contractor to use. If you would buy this equipment anyway, and it will be used for other things, it probably does not belong in this category but under Base Expenses.

One-Time Costs:

Costs for putting the RFP and the contract together and the other details of using RFPs and contracts. These are one-time costs, in that they apply to a specific contract and happen only once.

Terms

Salaries:

Actual salaries paid to an employee may be expressed in dollars-per-hour or a total amount.

Fringe Benefits:

The nonsalary personnel expenses, health insurance, vacation/sick leave, etc., that are costs of employing someone. Your human resources office or financial office should be able to help provide an estimate--this is usually (but not exclusively) expressed as a percent of salary.

Travel and Living Expenses:

If there is travel involved, what those costs would be given the respective collective bargaining agreements. Contractors are required to document and invoice these costs separately and are required to meet the standards in the Commissioner's Plan.

Service and Supplies:

Cost of phones, fax lines, space (if you internally charge for space), paper, pencils, etc., that it takes to support a person (employee or contractor).

Equipment (Capital Outlay):

Things you would have to buy, generally costing over \$500, that you would need to provide the service, (e.g., PCs, printers, and special equipment).

RFP Advertising (Public Notice):

The cost of putting an announcement in the *State Register* and any additional advertising.

RFP/Contract Preparation:

The cost of writing an RFP and a contract. May be only a couple of hours for one person. In other cases, it may be a couple of hundred hours for a number of people.

RFP Evaluation:

Again, it may be very simple, but it can be very complex and expensive.

Staff Training:

You may need to train a number of state staff to monitor a contract or to perform some interim tasks to allow a contract to be completed. These are costs that you might not have to pay if you were using state staff.

Monitoring Systems Development:

If you have to create a separate system (fiscal, programmatic, operational, or automated) to monitor the contract, this is an additional cost you need to identify.

SAMPLE

| Model Cost Analysis Format | | | |
|-----------------------------------|----------------------|--------------|--------------|
| | <i>Cost of State</i> | Contractor A | Contractor B |
| | <i>Employees</i> | Estimated | Estimated |
| | <i>Tasks</i> | Price | Price |
| Estimated Contractor Price | XXXXX | | |
| Base Expenses - Salaries | | XXXXX | XXXXX |
| Fringe Benefits | | XXXXX | XXXXX |
| Travel & Living Expenses | | XXXXX | XXXXX |
| Service & Supplies | | XXXXX | XXXXX |
| Equip (Capital Outlay) | | XXXXX | XXXXX |
| Total Base Expenses | | XXXXX | XXXXX |
| Contract Mgt. Costs-Salaries | | | |
| Fringe Benefits | | | |
| Travel & Living Expenses | | | |
| Service & Supplies | | | |
| Equip (Capital Outlay) | | | |
| Total Contract Mgt. Costs | | | |
| Contractor Support Costs-Space | | | |
| Travel & Living Expenses | | | |
| Service & Supplies | | | |
| Equipment (Capital Outlay) | | | |

| | | | |
|--------------------------------|--|--|--|
| Total Contractor Support Costs | | | |
| One Time Costs-RFP Advertising | | | |
| RFP/Contract Preparation | | | |
| RFP Evaluation | | | |
| Staff Training | | | |
| Monitoring System Dev | | | |
| Total One Time Costs | | | |
| TOTAL COSTS | | | |
| | | | |

Section 5: Contract Drafting And Processing Checklist

Careful contract drafting ensures that the parties to the contract--the state agencies and contractors--have achieved an understanding and have mutually agreed on the terms of the contract, such as duties, quality of performance, time of performance, and terms of payment. Careful drafting avoids future disputes, which are costly and waste valuable resources.

An ambiguous contract may result in failure to obtain the services the agency assumed were contained in the contract. Agencies may find it difficult to require contractors to perform duties that are not clearly and specifically stated. Ambiguous contracts lead to amendments that are used to clarify items that should have been in the original contract. The written contract is generally the only thing that counts in a dispute over whether the contractor has fulfilled its promises.

In a legal action, ambiguities are often interpreted against the party in the more powerful position. In most cases, this is the agency, so a provision that can be interpreted against the agency most likely will be. Don't take for granted that something you and the contractor have discussed and verbally agreed upon will happen. If it is not written in the contract, it is not readily enforceable.

What is a contract?

Understanding the elements necessary to create a contract will assist you in writing a better contract. First, contracts can be verbal; however, by law the state can only enter into written contracts. No one in the state has the authority to enter into a verbal state contract.

In contract law there are three basic elements required to create a contract: offer, acceptance, and consideration.

An offer is a proposal to do a thing or pay an amount.

Acceptance is agreeing to the terms of the offer.

Consideration is the inducement of a contract, the impelling influence which induces a contracting party to enter into a contract. In state contracts it is primarily, but not always, the payment of money.

The last step of a contract is performance, where each party lives up to their respective side of the bargain.

To determine if a contractor's performance is complete and acceptable, the terms of the contract must establish clear, unambiguous quantities and types of services and specific standards for the services required under the contract (Section 18 contains more details on monitoring and evaluating vendor performance). The contract must also specify dates for beginning and completion of performance.

Sound contracting practice requires that details, such as specific answers to who, what, when, where, and how much, are written into the contract.

A state contract is a written instrument or electronic document containing the elements of offer, acceptance, and consideration to which an agency is a party, including an amendment to or extension of a contract. The state can ONLY be bound to a contract that has been signed by the contractor, agency head, and the Commissioner of Administration, and the state accounting system shows an obligation in an expense budget or encumbrance for the amount of the contract liability ([Minn. Stat. § 16C.05](#), subd. 2).

Suggestions for clear drafting

First and foremost you must answer who, what, when, where, and how much. Answering these questions with specific detail is a great start to contract drafting. Thinking through the following list of issues will help you get the most from your contractor.

- List precisely what you want to get (contractor's duties) from the services; the qualifications of the person(s) performing; the work; the time of performance; the final product quality.
- List the cost of the service (compensation and reimbursement for expenses) separately.
- Determine how you know when you got what you wanted; determine how you will enforce the provisions of the contract.
- Look at the contractor's past performance if you have contracted with this contractor previously. Will there be problems getting the services or products on time? Or getting the quality desired? Develop specific requirements to deal with anticipated problems.
- Specify contractor's duties simply and in plain English; for example, "The contractor will provide X (service) by X (date)." Strive for clarity – use plain and simple language and try to avoid jargon.

- Don't rely on the contractor's proposal as the list of duties. It is usually unspecific, is not drafted in legally enforceable language. It may contain language that is extraneous, conflicts with your goals, or is contrary to state law.
- Use the same terms consistently throughout the contract; for example, use *contractor* or *vendor* but not both interchangeably.
- Incorporate all attachments to the contract properly; for example, "Contractor will perform the duties and meet the requirements specified in Attachment B, which is attached and incorporated into this contract."
- Label attachments in the order they are mentioned in the contract; that is, the first attachment mentioned should be Attachment A, the second, Attachment B, etc.
- Attachments must actually be attached to each copy of the contract.
- Lengthy and cumbersome attachments may be incorporated by reference without being attached to the contract IF the contract specifically identifies those items in such a manner that they can be unambiguously identified and their location specifically identified. Such as, "price schedule dated November 15, 1999, and filed with the US Department of Health and Human Services (the place where it is actually officially filed and available)." To incorporate an attachment by reference state in the contract, "see Attachment Q, which is incorporated into this contract by reference. Attachment Q may be located at _____." Another example is a lengthy price schedule. You can incorporate this by stating, "see the price schedule dated November 15, 1999, and filed with the US Department of Health and Human Services (the place where it is actually officially filed and available)."

Standard Contract Requirements

Human Rights Compliance

All state contracts in excess of \$100,000 must contain the following provision dealing with human rights compliance:

For contracts in excess of \$100,000.00 the Contractor certifies that it is in compliance with [Minn. Stat. §363A.36](#).

Workers with Disability

All state contracts, including grants, in excess of \$100,000 must contain the following provision, pursuant to [Minn. R. 5000.3550](#):

The Contractor must comply with the following Affirmative Action requirements for disabled workers:

- A. The Contractor must not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The Contractor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified disabled persons without discrimination based upon their physical or mental disability in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
- B. The Contractor will comply with the rules and relevant orders of the Minnesota Department of Human Rights issued pursuant to the Minnesota Human Rights Act.
- C. In the event of the Contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with [Minn. Stat. § 363A.36](#), and the rules and relevant orders of the Minnesota Department of Human Rights issued pursuant to the Minnesota Human Rights Act.
- D. The Contractor will post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the commissioner of the Minnesota Department of Human Rights. Such notices must state the Contractor's obligation under the law to take affirmative action to employ and advance in employment qualified disabled employees and applicants for employment, and the rights of applicants and employees.
- E. The Contractor must notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the Contractor is bound by the terms of [Minn. Stat. § 363A.36](#), of the Minnesota Human Rights Act and is committed to take affirmative action to employ and advance in employment physically and mentally disabled persons.

Data Disclosure

All state contracts that pay out state money must contain the following clause. It is used as a Tennessee warning to the contractors.

Under [Minn. Stat. § 270C.65](#), Subd. 3 and other applicable law, the Contractor consents to disclosure of its social security number, federal employer tax identification number, and/or Minnesota tax identification number, already provided to the State, to federal and state agencies and state personnel involved in the payment of state obligations. These identification numbers may be used in the enforcement of federal and state laws which could result in action requiring the Contractor to file state tax returns, pay delinquent state tax liabilities, if any, or pay other state liabilities.

Audit Clause

All state contracts, including pass-through disbursements of public funds, grants, must include an audit clause that provides that “the books, records, documents, and accounting procedures and practices of the contractor or other party, relevant to the contract or transaction, are subject to examination by the contracting agency, and either the legislative auditor or the state auditor as appropriate, for a minimum of six years [from the end of the contract].” [Minn. Stat. §16C.05](#), subd. 5. The exception to this requirement is found in the last sentence of [Minn. Stat. §16C.05](#), subd. 5, and states, “An agency contract made for purchase, lease, or license of software and data from the state is not required to contain this audit clause.”

Voter Registration Clause

The commissioner or chief administrative officer of any community-based public agency or nonprofit corporation that contracts with a state agency to carry out obligations of that agency must provide voter registration services for employees and the public. [Minn. Stat. § 201.162](#).

Effective Date

Under no circumstances should an agency permit a contractor to start work, and therefore create an obligation on the part of the state, until the contract has been fully executed and copies are in the possession of both the agency and the contractor. If it appears that the effective date specified in the contract will pass before the contract will be approved by the Commissioner of Administration, the agency must certify to the Commissioner of Administration in writing that no services will begin until the contract has been executed. If this is not the case, and services have begun, the agency must complete a Minn. Stat. § 16A.15/16C Violation Memo.

Data Practices

If a contractor is to have access to data maintained by the state, the contractor must agree to comply with all the requirements of the Minnesota Government Data Practices Act, [Minn. Stat. Ch. 13](#).

Unilateral Termination

A professional/technical services contract must by its terms permit the Commissioner of Administration to unilaterally terminate the contract prior to completion, upon payment of just compensation, if the agency determines that further performance under the contract would not serve agency purposes ([Minn. Stat. § 16C.08](#), subd. 5(a)).

Contracts With any Organization or Entity Governed by a Board

If a contract is with any organization governed by a board, a tribal organization, a political subdivision, or a nonprofit/not for profit organization they must provide a copy of a current resolution or ordinance that either approves the particular contract or authorizes the board's resolution of signature authorization to the individual to sign contracts. This resolution or ordinance should be attached to the signed contract. In the case of a tribal organization, the resolution of signature authorization needs to specify "contracts with the State of Minnesota." Contracts with "boards" can represent severe timing problems, especially for smaller entities. Some of these boards meet irregularly or only quarterly. You need to understand this as you are putting together the contract, and especially the timing of the work.

Commodities in Professional/Technical Services Contracts

If the product of the contract includes multiple copies of a document, the agency must consider the cost of reproducing the documents as a separate issue from the overall cost of the contract. Reproduction costs are often "hidden" in overhead charges or reflect considerably higher per unit costs than can be obtained by the state on a separate printing contract. Also, Minn. Stat. §§ [16B.122](#) and [16B.124](#) add specific requirements which your contractor may not be able to meet in his/her normal business process. You must specifically justify to your agency contract coordinator, and/or the Commissioner of Administration, buying more than three copies--one camera ready--of any document BEFORE you write the contract.

If the product of the contract is multi-media output or audio/visual presentation--radio or television announcement--the agency must perform the same analysis. Normally, no more than a master and two copies may be provided as part of the contract. If additional copies are required, you should consider the cost of using an existing or new service contract. You must

specifically justify to your agency contract coordinator and/or the Commissioner of Administration, buying more than a master and two copies BEFORE you write the contract.

Deposit of Reports in Legislative Reference Library.

If the final product of a professional/technical services contract is a written report, the agency must file one of the copies with the Legislative Reference Library ([Minn. Stat. 16C.08](#), subd. 6).

Reports Required by the Legislature.

If the product of a contract is a report required by the legislature, it shall be made by filing two copies with the Legislative Reference Library, and by making the report available electronically to the Legislative Reference Library. [Minn. Stat. § 3.195](#). This statute contains very specific and directive rules about the distribution of reports to the Legislature, and you should be aware of those in creating your contract.

Tax Withholding on Compensation to Entertainers

[Minn. Stat. § 290.9201](#), requires the state to withhold two percent of all compensation paid to a nonresident entertainer. *Entertainer* is very broadly defined and includes public speakers, musicians, singers, dancers, comedians, actors, and athletes.

The following suggestions in drafting language may be used for contracts for public speakers or other entertainers to ensure that the contractor understands the withholding requirement and the Department of Finance can accurately determine that portion of the compensation from which the two percent must be withheld:

- Clearly distinguish the contractor's duty to speak from other duties, such as preparation of materials;
- Clearly distinguish compensation for speaking from compensation for other duties; and
- Clearly distinguish the speaker's fee from the reimbursement of expenses, specifically identifying the amount of compensation subject to withholding and the amount to be withheld.

Final Payment to Contractor - Delivery of Final "Product"

All professional/technical service contracts must provide for the following:

Retainage. Under [Minn. Stat. § 16C.08](#), subdivision 5(b), no more than 90% of the compensation due under this contract may be paid until the final product of this Contract has been reviewed by the State's agency head. The balance due will be paid when the agency head determines that the Contractor has satisfactorily fulfilled all the terms of this contract.

Note: A retainage clause is not required for professional services as defined in Minn. Stat. §§ [326.02](#) to [326.15](#). For further information see [Minn. Stat. § 16C.08](#), subd. 5(b).

Contract Processing Checklist

The [Contract Processing Checklist](#) is available on the secure area of the OSP website.

Section 6: Encumbrance Worksheet

All contracts covered in the contract manual must be encumbered or entered into the state's contract computer accounting system known as Statewide Integrated Financial Tools (SWIFT). In order to assist agencies with getting the appropriate information to the accounting personnel to encumber the funds, the following worksheet has been developed.

Unlike previous versions of state boilerplate contracts, the accounting information has been removed for a variety of reasons. Except for the signature that certifies that the money for the contract has been encumbered – now found on the signature page, this accounting information is not a part of the contract.

In order to continue to provide this accounting information which is necessary for agency personnel to encumber the contract, OSP has created a worksheet which is considered by OSP to be a stand alone document and not a part of the contract. The worksheet does not have to be circulated to OSP for contract execution.

Please keep in mind that some of the information contained on the worksheet is considered to be private data by the Minnesota Government Data Practices Act, [Minn. Stat. Ch. 13](#). Inappropriate release of this information can result in criminal prosecution and/or loss of your job; therefore it is always best to keep the encumbrance worksheet separate from the contract document. This will reduce the chance of inadvertent release.

A copy of the Encumbrance Worksheet is below and may also be found on the OSP web page.

If you have any questions about how to process information in SWIFT contact the SWIFT Vendor Help Desk at 651-201-8100, Option 8.

[Encumbrance Worksheet](#)

The [SWIFT Encumbrance Worksheet](#) is available on the secure area of the OSP website.

Section 7: 16A.15 / 16C.05 Violation Memo

According to [Minn. Stat. § 16A.15](#), subd. 3(a) (emphasis added), “A payment may not be made without prior obligation... [A] payment made in violation of this chapter is illegal. An employee authorizing or making the payment, or taking part in it, and a person receiving any part of the payment, are jointly and severally liable to the state for the amount paid or received.”

The 2003 and 2004 Legislatures amended Minn. Stat. § 16C.05, subd. 2 to place greater emphasis on the encumbrance requirement. The statute was amended, in part, as follows:

Subd. 2. Creation and validity of contracts. (a) A contract and amendments are not valid and the state is not bound by them and no agency, without the prior written approval of the commissioner granted pursuant to subdivision 2a, may authorize work to begin on them unless:

...

(3) the accounting system shows an encumbrance for the amount of the contract liability, except as allowed by policy approved by the commissioner and commissioner of management and budget for routine, low-dollar procurements and section 16B.98, subdivision 11.

Read as a whole, [Minn. Stat. § 16C.05](#), subd. 2 (a) provides that a contract is not valid and the state is not bound by it until: 1) it has first been executed by the agency; 2) it has been approved by the Commissioner of Administration; and 3) the money has been encumbered in CFMS.

Unless an agency has received prior approval from the Commissioner of Administration as the result of an emergency as defined in [Minn. Stat. § 16C.10](#), an agency may not authorize work to begin on a contract unless the above requirements are met.

The Reporting Form

The [16C.15-16C.05 Reporting Form](#) is divided into three sections and each serves a distinct function. A description of each section and how to use the form follows.

Processing

This form should contain original signatures, not photocopies, and is sent to the Department of Administration, in duplicate, when the contract is processed. OSP will keep one for its file and return the other.

Content and Purpose

Usual situation where Box 1 would be used:

The start date on the contract indicates it begins on January 1, 2000, however the contract is not sent to the Department of Administration until January 31, 2000 -- and NO work under the contract has begun.

Purpose of box 1: The problem with the above situation is that [Minn. Stat. § 16C.05](#), subd. 2, states that all statutorily required signatures must be on the contract before it becomes effective. There is a question about whether or not work started between these two dates. By signing this box the responsible person is indicating to Department of Administration that no work on the contract has started and notice to the contractor to begin work will not be given until the contract is fully signed. This situation is not a violation of statute. This box is for Department of Administration informational purposes only.

Usual situation where Box 2 would be used:

The agency gives the contractor notice to proceed on work without encumbering money or getting a contract fully executed.

There are two problems with the above situation: 1) under [Minn. Stat. § 16A.15](#), the state cannot make an obligation to pay money to anyone unless money is first encumbered in the state's accounting system. *This is a SERIOUS violation of the statute, which states, "If an employee knowingly incurs an obligation or authorizes or makes an expenditure in violation of this chapter (or takes part in the violation) the violation is just cause for the employee's removal."* 2) [Minn. Stat. § 16C.05](#), subd. 2, states that all statutorily required signatures must be on the contract before it becomes effective.

Purpose of box 2: This box gives Department of Administration information about who violated the statute and why it was done. There must be a reasonable explanation for the expenditure and a reasonable explanation of the corrective action that will be taken, or the contract will be returned unapproved.

Even though [Chapter 16A](#) of the statutes is governed by the Department of Finance, the Legislative Auditor has determined that the Department of Administration is responsible for ensuring that this requirement is met if there is a violation.

Usual situation where Box 3 would be used:

The money for the contract is encumbered, work under the contract has started, but as of the date the work started the Department of Administration has not yet signed the contract to make it effective.

Purpose of box 3: The problem with the above situation is that [Minn. Stat. § 16C.05](#), subd. 2, states that all statutorily required signatures must be on the contract before it becomes effective. You must provide a reasonable explanation of why this was done and what corrective action will be taken, or the contract will be returned unapproved.

Attached Page of Statutory Cites

The second page of the [16C.15-16C.05 Reporting Form](#) provides the text of the applicable statutes. The statutory references are meant to provide information to those people who will be completing the form.

[16A.15-16C.05 Reporting Form](#)

The [16A.15-16C.05 Reporting Form](#) is available on the secure area of the OSP website.

Section 8: Contract Amendments

When may a contract be amended?

Legislation passed in 2003 provides as follows:

“Amendments to contracts must entail tasks that are substantially similar to those in the original contract or involve tasks that are so closely related to the original contract that it would be impracticable for a different contractor to perform the work. The commissioner or an agency official to whom the commissioner has delegated contracting authority under [Minn. Stat. § 16C.03](#), subdivision 16, must determine that an amendment would serve the interest of the state better than a new contract and would cost no more.” ([Minn. Stat. § 16C.05](#), subd. 2(d).)

To assist agencies with compliance with this statutory provision, a form was developed that details the legal requirements. The Amendment Cover Sheet must be submitted to OSP to verify the statutory requirements have been met.

Amendment Cover Sheet

The [Amendment Cover Sheet](#) is available on the secure area of the OSP website.

Amendment Guidelines

Timing

It is very important that an amendment be in place before the contract expires. This will avoid any liability that may occur for not having a contract in force when the contractor is working.

Scope of the Amendment

Consistent with statutory requirements, contracts may only be amended within the scope of the original certification and RFP. For instance, if the original certification and RFP asked for "analysis of soil samples" and nothing more, you could not amend the contract to seek "soil stabilization planning and implementation." However, if your original certification and RFP had asked for "analysis of soil samples and potential additional requirements to stabilize the soil," and your contract was only for analysis, you could amend the contract for "soil stabilization planning and implementation." The original certification and RFP identified that these services might be required.

Examples of Amendments

Unexpected developments

Unexpected developments do happen. The agency needs soil samples for groundwater contamination. The drilling identifies an unexpected leaking pipe. The contractor has the capability (and licenses, if necessary) on-site to deal with the issue. An amendment is obviously in order because you must stop the leak.

Unexpected developments are neither routine nor are they extensions of work into different areas. In the example above, if the contractor is taking soil samples but two counties away you become aware of a leaking pipe, you cannot amend the contract to "pick up your rig and go over there and stop the leak." Leaks are always unexpected developments. The contract in question, however, is not connected with the unexpected development.

Time Extensions

A contract amendment may be required because the time of performance has to be extended within the scope of the original *certification* and RFP. If the original RFP indicated that completion of the work within a specific time period was critical, and that factor weighed heavily in your evaluation, you should not amend a contract to extend the deadline simply because the contractor cannot meet the deadline. Obviously, you chose the contractor based on its representation in its response to the RFP that it could perform the job in the time required. If the contractor now cannot meet that commitment, and you have not caused the slowdown, the contractor should be giving up something for failing to perform within the specifications. Of course, if you changed something that added significant time to the process, then that change, and the results you receive from it, is consideration on the contractor's part, so the extension of time would be a consideration on your part. There might be circumstances where something happens that is totally beyond the control of the contractor (an earthquake in California, for instance); you might consider that, but you should be very careful and completely document the circumstances. The theory is very simple. You should get what you paid for in the time that was agreed to. The contractor's obligation is to do that.

Writing and Processing the Amendment

An amendment must be clearly identified and written, and properly executed any time the contractor and agency agree to a change in any provision of the contract. All amendments must be clearly numbered and must be approved in the same manner as the original contract.

The amendment should indicate WHY the contract was changed. You need to detail in the amendment WHY the amendment is necessary. If, for example, you and the contractor have determined that additional work needs to be done *WITHIN THE SCOPE OF THE ORIGINAL CERTIFICATION AND RFP*, you should make additions to the Contractor's Duties specifying what is being added and detailing the additional costs. These additional costs must fall within the scope of the contractor's original response to the RFP.

All contract amendments should be drafted using the format of the sample amendment that is available on OSP's web page.

The [Contract Amendment Form](#) is available on the secure area of the OSP website.

When processing an amendment, you should include copies of the original contract and any/all previous amendments; this will assist OSP in processing the amendment.

Expired Contracts

If the contract has expired and you need to extend it, immediately seek the advice of your agency's contract coordinator or OSP's P/T staff. If the contract expires, work should stop until the extension issue is cleared up. A "16A.15-16C Reporting Form" must be attached to the amendment, if required. The memo must clearly explain and defend the reason for the extension being late or it will be rejected.

Note to Agency Contract Coordinators:

- 1) Please let your agency contact know that this is a serious situation that must be corrected immediately.
 - When the amendment is circulated to the Department of Administration, you must include information explaining why the contract was allowed to expire before it was amended.

- ****Important: Amendments to expired agreements **must** incorporate the original contract and any previous amendments into the amendment or it will not be approved. Sample language is as follows, “The Original Contract and any previous amendments are incorporated into this amendment by reference.”

Section 9: Professional and Technical Service Contracts and Independent Contractor v. Employee

Professional/technical service contracts are defined as, “services that are intellectual in character, including consultation, analysis, evaluation, prediction, planning, programming, or recommendation, and result in the production of a report or the completion of a task. Professional or technical contracts do not include the provision of supplies or materials except by the approval of the commissioner of Administration or except as incidental to the provision of professional or technical services.” [Minn. Stat. § 16C.08](#).

Minnesota statutes strictly regulate professional/technical contracts and the Minnesota Legislature closely monitors these contracts so you should carefully follow all statutes, policies, and procedures.

The laws and policies concerning professional/technical contracts change quite frequently. In order to keep you informed of these changes, the Department of Administration issues periodic informational memoranda as well as updates via email to a large distribution list of those interested in contracting issues. The notices provide updates on changes in laws, policies, and procedures. If you would like to be added to the mailing list, contact the professional/technical section of OSP.

Sample Professional/Technical Contract

The [Sample Professional/Technical Contract](#) is available on the secure area of the OSP website.

Who is responsible for what is in a professional/technical contract?

Minnesota statutes divide the responsibility for contracting for services among two agencies: the agency head requesting the contract, and the Commissioner of Administration.

Procedurally, your agency head or his/her designee signs the contract after the contractor signs it, then a representative of OSP’s Professional/Technical Contract Section reviews the contract for conformance with state and federal laws, state procedures, and content clarity. If it is approved, it is signed by OSP. Legislation enacted in 2003 removed the requirement that the Attorney General’s Office sign contracts as to form and execution. As a result, agencies must be certain that they are using updated and approved contract forms and that the individual signing for the contractor has appropriate legal authority to enter into the contract and has the power to bind his or her organization.

A more complete summary of the responsibilities of the agency head and Commissioner of Administration is set out below.

Agency Head

Unless specifically granted additional authority or specifically denied authority by statute an agency head:

- Determines through a cost-benefit analysis that contracting for a service is the best means of obtaining the service.
- Contracts for professional and technical services in connection with the operation of the department or agency ([Minn. Stat. § 15.061](#)).
- Ensures that sufficient funds have been encumbered in the state accounting system (CFMS) ([Minn. Stat. § 16C.05](#), subd. 2 (a)(3)).
- Bears full responsibility for diligently administering and monitoring the contract ([Minn. Stat. § 16C.05](#), subd. 4).
- Makes sure none of the boiler plate contract terms have been changed. If other terms have been negotiated or additional terms added, alert the Department of Administration to these changes.
- Certifies to the Commissioner of Administration that specific requirements will be or have been met before he/she seeks approval for a professional/technical contract valued in excess of \$5,000 ([Minn. Stat. § 16C.08](#), subd. 2).
- Reviews the final product of the contract and certifies that the contractor has satisfactorily fulfilled the terms of the contract ([Minn. Stat. § 16C.08](#), subd. 5 (b)).
- Designates to small businesses at least 25 percent of the value of anticipated procurement of the agency for professional/technical services ([Minn. Stat. § 16C.16](#), subd. 3).

Commissioner of Administration

- Performs all contract management and review functions for contracts, except those functions otherwise provided for by law (Minn. Stat. §§ [16C.03](#), subd. 4 and [16C.05](#), subd. 4).

- Approves the agency head's decision to enter into a contract and the agency head's decision as to who the contractor will be and how the contractor was selected (Minn. Stat. §§ [15.061](#); [16C.08](#), subd. 3).
- Requires an agency to report to the Commissioner of Administration at any time on the status of any outstanding state contract to which the agency is a party ([Minn. Stat. § 16C.05](#), subds. 1 and 4).
- Reports to the governor and Legislature on all contracts ([Minn. Stat. § 16C.08](#), subd. 4).
- Sets goals that require agencies to include participation by targeted group businesses ([Minn. Stat. § 16C.16](#), subd. 6 (c)).

When should you consider using a professional/technical contract?

In some situations, state agencies lack the staff, time, or expertise to perform a particular function or provide a particular professional/technical service. In these situations, it may be necessary to contract with an outside party.

Generally, professional/technical services contract may be used when:

An agency requires highly specialized work, for which no qualified state employee is capable or available; OR state employees do not have the time to perform the work required; OR a contract is determined to be the most efficient and least costly method of accomplishing the work.

Inappropriate Uses of Professional/Technical Services Contract

It is important to note those activities that are inappropriate for state contracts. Several specific prohibitions that apply uniquely to professional/technical service contracts are written into state law.

Listed below are several additional prohibitions that are more general in nature:

- Professional/technical services contract may not be written to evade hiring restrictions, salary limitations, or competitive employment procedures.
- Agencies cannot spend money that they do not already have in their budgets and/or accounts on professional/ technical contracts. Anticipated receipts are a special case, however agencies cannot commit to spending money from other states or jurisdictions unless those funds have already been deposited in Minnesota state accounts. Even when acting as an approved fiscal agent, agencies should only commit to spending money for

which the State of Minnesota is liable. Check with your agency contract coordinator for assistance.

- Materials and supplies may not be obtained through a professional/technical services contract unless they are incidental to the contract. The outcome of a professional/technical services contract is "intellectual" in nature. With the specific approval of the Commissioner of Administration, materials and supplies incidental to the provision of intellectual services in a professional/technical services contract may be obtained as part of a professional/technical services contract.
- Services of craft, service, or office workers may not be obtained through a professional/technical services contract; and only the Department of Administration has the authority to purchase these services. These services are generally not "intellectual" in nature and can be obtained by a "service contract." [Minn. Stat. § 16C.09](#). Snow plowing, garbage collection, printing, keylining, and typesetting are examples of things that should not be obtained through a professional/technical services contract.

Special Considerations

All contracts an agency enters into **MUST** comply with these special conditions. Some may not apply to all contracts, but if they apply, they must be complied with. Questions should be directed to your agency contract coordinator or the Office of State Procurement.

Small Targeted-Group Requirements

State law encourages agencies to purchase goods and services from small targeted-group businesses. These may be businesses that are at least 51 percent owned, operated, and controlled on a daily basis by racial minorities (African American, Hispanic, American Indian, Asian/Pacific Islander, Alaskan native), women, or persons with a substantial physical disability.

Agencies should have plans for using small targeted-group businesses for professional/technical services contract. Certifications and/or contracts that are reviewed by the Department of Administration may be returned to agencies with specific small targeted-group business goals identified and/or vendors recommended.

Printing, Paper Stock, and Ink Requirements

If this Contract results in reports or documents paid for by STATE, CONTRACTOR must comply with Minn. Stat. §§ [16B.121](#) and [16B.122](#), for the purchase of printing, paper stock, and printing ink. The contractor must ensure that all subcontractors comply with this requirement.

Contracts with the University of Minnesota

Contracts with the University of Minnesota include requirements that differ from the normal contract procedures and requirements and are discussed later in this manual.

Contracts Funded by the Legislative Commission on Minnesota Resources

Like contracts with the University of Minnesota, contracts with the Legislative Commission on Minnesota Resources are governed by a separate set of requirements and are discussed later in this manual.

Authority to Contract

Agency heads and deputy agency heads, unless that authority has not been granted by the agency head as defined in [Minn. Stat. § 15.06](#), subd. 7, hold the authority to enter into contracts. They may delegate this authority for specific contracts or particular types of contracts to an assistant agency head if the delegation has first been approved by the Commissioner of Administration and filed with the secretary of state. An explanation of this delegation process is discussed later in this manual.

Specific Restrictions and Conditions Relating to Certain Kinds of Services

The following kinds of services have specific statutory restrictions or conditions that need to be taken into account BEFORE you proceed with a contract or use these kinds of services under an annual plan.

Contracts for audits with a public accountant

[Minn. Stat. § 3.972](#), subd. 3, places a restriction on contracting with public accountants for audits. It requires (in summary terms) that "a contract shall not be negotiated unless the contract has been reviewed by the legislative auditor." You should send the *certification form* and a copy of the RFP or a draft of the contract to the legislative auditor. It is not good practice to sign a contract and then have it reviewed, since changes will result in additional time delays. Send the *certification form* and a copy of the RFP or a draft of the contract to:

Office of the Legislative Auditor
Deputy Legislative Auditor
Public Finance Division
1st Floor South, Centennial Office Bldg.
658 Cedar Street
St Paul, Minnesota 55155

Contracts with Law Firms or Lawyers

Law firms and lawyers (as individuals) provide a wide range of services, including many that are not related to representing a client in court or providing a client with legal services. Agencies must include the statement below in the contract language of ANY contract entered into with a law firm or a lawyer. ONLY the attorney general has the authority to represent the state, ONLY the attorney general can sign a contract with a law firm or a lawyer for legal services. If you require legal services, work through your assistant attorney general to obtain them.

"Contractor's duties do not include providing legal services to the State within the meaning of [Minnesota Statutes Section 8.06](#)."

Contracts for Banking Services and Banking Related Services

[Minn. Stat. § 16A.27](#), subd. 1, gives to the commissioner of finance the authority to, “control the amount and manner of deposit of state funds.” Agencies need to work with the Department of Finance when seeking ANY services related to the handling of state funds, banking, or banking services.

Contracting Checklists

Checklists are provided in the appropriate section (Contracts \$0-\$5,000; \$5,001-\$50,000; \$50,000+; and Contract Drafting Checklist) to assist you with complying with all statutory and policy required steps when you are preparing a professional/technical service contract. You must estimate the total value of your contract then select the appropriate checklist. The total contract value means the entire cost of the work from beginning to end, including any anticipated amendments.

Agency Central Contract Repository

Agencies are encouraged to create a central repository within the agency for all annual plan agreements, professional/technical services contracts, interagency agreements, joint powers agreements and income contracts so that individuals within the agency can have access to all the information and experience contained in these documents.

[Minnesota Statutes Section 16C.05](#), subdivision 2(e) requires that a fully executed copy of every contract, all amendments to the contract and any performance evaluations relating to the contract must be kept on file at the contracting agency.

Independent Contractor v. Employee

The following rules are taken from Internal Revenue Service publications on this issue. You need to work with your assistant attorney general to carefully define, and be prepared to defend or pay for, any situation where they might apply to your proposed contract.

An employer must generally withhold income taxes, withhold and pay social security taxes, and pay unemployment taxes on wages paid to an employee. An employer does not generally have to withhold or pay any taxes on payments to independent contractors.

Common Law Rules.

To help you determine whether an individual is an employee under the common law rules, 20 factors have been identified that indicate whether sufficient control is present to establish an employer-employee relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed. It does not matter that the employer allows the employee freedom of action, so long as the employer has the right to control both the method and the result of the services. If an employer treats an employee as an independent contractor and the relief provisions discussed earlier do not apply, the person responsible for the collection and payment of withholding taxes may be held personally liable for an amount equal to the employee's income and social security taxes that should have been withheld.

The 20 factors indicating whether an individual is an employee or an independent contractor are:

- 1) Instructions. An employee must comply with instructions about when, where, and how to work. Even if no instructions are given, the control factor is present if the employer has the right to give instructions.
- 2) Training. An employee is trained to perform services in a particular manner. Independent contractors ordinarily use their own methods and receive no training from the purchasers of their services.
- 3) Integration. An employee's services are integrated into the business operations because the services are important to the success or continuation of the business. This shows that the employee is subject to direction and control.
- 4) Services rendered personally. An employee renders services personally. This shows that the employer is interested in the methods as well as the results.
- 5) Hiring assistants. An employee works for an employer who hires, supervises, and pays assistants. An independent contractor hires, supervises, and pays assistants under a

contract that requires him or her to provide materials and labor and to be responsible only for the result.

- 6) Continuing relationship. An employee normally has a continuing relationship with an employer. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.
- 7) Set hours of work. An employee has set hours of work established by an employer. An independent contractor is the master of his or her own time.
- 8) Full-time work. An employee normally works full time for an employer. An independent contractor can work when and for whom he or she chooses.
- 9) Work done on premises. An employee works on the premises of an employer, or works on a route or at a location designated by an employer.
- 10) Order or sequence set. An employee must perform services in the order or sequence set by an employer. This shows that the employee is subject to direction and control.
- 11) Reports. An employee submits reports to an employer. This shows that the employee must account to the employer for his or her actions.
- 12) Payments. An employee is paid by the hour, week, or month. An independent contractor is paid by the job or on a straight commission.
- 13) Expenses. An employee's business expenses and travel expenses are paid by an employer. This shows that the employee is subject to regulation and control.
- 14) Tools and materials. An employee is furnished significant tools, materials, and other equipment by an employer.
- 15) Investment. An independent contractor has a significant investment in the facilities he or she uses in performing services for someone else.
- 16) Profit or loss. An independent contractor can make a profit or suffer a loss.
- 17) Works for more than one person or firm. An independent contractor gives his or her services to two or more unrelated persons or firms at the same time.
- 18) Offers services to general public. An independent contractor makes his or her services available to the general public.

19) Right to fire. An employee can be fired by an employer. An independent contractor cannot be fired so long as he or she produces a result that meets the specifications of the contract.

20) Right to quit. An employee can quit his or her job at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion, or is legally obligated to make good for failure to complete it.

IRS Form SS-8. In doubtful cases, the facts will determine whether or not there is an actual employer-employee relationship. If you want the IRS to determine whether a worker is an employee, file Form SS-8, *Information for Use in Determining Whether a Worker is an Employee for Purposes of Federal Employment Taxes and Income Tax Withholding*, with the IRS District Director. (NOTE: you should only do this on the advice of your assistant attorney general.) The form can be found at the IRS website at: <http://www.irs.gov/formspubs/index.html>.

If you classify an employee as an independent contractor and you had no reasonable basis for doing so, you will have to pay employment taxes for that worker (the relief provisions discussed earlier will not apply). Further, if you do not withhold income and social security taxes from his or her wages, you may be held personally liable for a penalty of 100 percent of the tax if you are the person responsible for the collection and payment of withholding taxes.

Section 10: Certification Form, Public Notice and Type of Solicitation

A certification form and public notice are the starting point for every professional and technical contract in excess of \$25,000. They are the gateway to fair and open competition, which is required for every state contract.

Certification Form

The Commissioner of Administration is required by statute to supervise, control, review, and approve all state contracts and to acquire all goods and services needed by state agencies. Before an agency seeks approval of the Commissioner of Administration for a professional/technical services contract in excess of \$25,000, it must complete a certification form. OSP reviews the certification forms for completeness, appropriateness, and as a mechanism to ensure the planned procurement meets statutory and policy requirements.

The [Certification Form](#) is available on the secure area of the OSP website.

If the potential contract deals with information and communications technology activities, the certification must also be approved by MN.IT Services (“MN.IT”). Consolidated agencies should coordinate with their [MN.IT@Agency](#) staff. Other agencies should submit their IT-related certification forms and accompanying documents directly to MN.IT.

Single Source Request

The use of single source contractors is allowed only under exceptional circumstances and the agency must do a lot of work to get that approval. [Minnesota Statutes Section 16C.02](#), subdivision 18 defines single source as “an acquisition where, after a search, only one supplier is determined to be reasonably available for the required product, service, or construction item.”

There is a difference between a single source contract for services and using a nationally required source of a service. The [Joint Commission for the Accreditation of Healthcare Organizations \(JCAHO\)](#) is the only accepted national accreditation body for hospitals. There is NO other national accreditation body. Without [JCAHO](#) accreditation hospitals CANNOT qualify for certain kinds of funding, support, etc. **Using the [JCAHO](#) is not limiting an open, public, level playing field environment.** To contract with the [JCAHO](#) for an evaluation, an agency simply needs to state on the *certification* that [JCAHO](#) is the national accreditation body. The same would be true for universities and colleges seeking accreditation through regional accreditation bodies.

A more complex question usually deals with *expertise*. There is also a distinction between single source and *only* source. For specific services, location or distance may create an only factor.

Single Source as the Only Reasonable Source

Dr. P is the only optometrist in Grand Marais — in fact, is the only optometrist within 100 miles of Grand Marais. **He is not a single source, he is the only reasonable source of the service.** Our recommendation would be that you check this situation out periodically. Just because he was the only source three years ago, does not mean he is still the only source.

A contract with a nationally recognized reporting service to obtain/share data on "graduating left-handed underwater basket weavers" is probably not a problem-- the institution can justify to itself the cost of that information. If it is over \$5,000, an indication in the single source request form attached to the *certification* that this is the only nationally recognized source of this information would be sufficient.

Single source use can be a trap. What you need to do is assure yourself that they really are the only source, or the only source *reasonably able and available* to conduct a service and justify that along with the *certification*. Also, every attempt should be made to continue evaluating alternative sources so the state does not become too dependent on one particular vendor.

How to Request

In order for this request to be considered you must fill out a single source request form and attach the form to your Certification Form indicating how your fact situation meets the requirements [of Minn. Stat. § 16C.10](#), subdivision 1. The statute provides an exception to the solicitation (Request for Proposal) process when there is “clearly and legitimately only a single source for the goods and services and the commissioner [of administration] determines that the price has been fairly and reasonably established.” When you make a single source request think through the process to ensure the contract is truly a “single source” and be able to substantiate your request.

The [Single Source Request Form](#) is available on the OSP website.

Additional Information for Single Source Contracts

When you are completing a single source request, be aware that all the other requirements for professional/technical contracts still apply. Even if the contract value is below \$25,000, a certification form must be completed and sent to the Department of Administration for review and approval when seeking a single source. Be sure you have completed each required form and

keep them in your contract file. Below is a list of additional information either you or the contractor may be required to complete, depending upon the dollar value of the contract:

- Certification Regarding Lobbying
- Work Force Certification Form
- Equal Pay Certification
- Resident Vendor Form
- Veteran-Owned Preference Form
- New Hire Reporting Forms

The Department's [Single Source Procurement Policy](#) is available on the OSP website.

Types of Notice and Solicitation

Notice at a glance:

| Contract Value | Solicitation Type and Notice Required |
|-------------------|---|
| \$0-\$5,000 | Recommend solicitation, but not required |
| \$5,001-\$25,000 | Quick Call for Proposals sent to at least three vendors; at least one must be TG/ED/VO |
| \$5,001-\$100,000 | Equity Select, direct select of any Office of Equity in Procurement certified TG/ED/VO vendor |
| \$25,001 + | Public Solicitation and RFP posted on the OSP website (\$25,000 - \$50,000) and in <i>State Register</i> (\$50,000 and over) or in <i>SWIFT</i> |

To assist agencies in complying with requirements for publicizing a contract's availability, the Department of Administration has established the following guidelines:

No Solicitation Required

Direct Select Contracts up to \$5,000

There are no formal public notice or solicitation types required for contracts up to \$5,000. You may select the vendor of your choice. However, keep in mind the statutes have the presumption that state contracting is done fairly and openly. Just because the contract is under \$5,000 does not mean that you may continuously use the same contractor every time you need that service. You are still under an obligation to disseminate state work. The Department of Administration monitors the use of these contracts and in the past has put restrictions on agencies who continuously use the same vendor.

Equity Select Contracts up to \$100,000

There are no formal public notice or solicitation types required for contracts with [OEP certified TG/ED/VO vendors](#) up to \$100,000. You may select the certified TG/ED/VO contractor of your choice. However, keep in mind that vendor selection should enhance participation, and not hinder it. Just because the contract is under \$100,000 does not mean that you may continuously use the same contractor every time you need that service. You are still under an obligation to disseminate state work. The Department of Administration monitors the use of these contracts and in the past has put restrictions on agencies who continuously use the same vendor.

Solicitation Required:

Contracts in excess of \$5,000 and up to \$25,000

Quick Call for Proposals are available when the agency intends to contract for professional/-technical services up to \$25,000. No certification form is required, but please submit the Quick Call Contract Cover Sheet to show compliance with statute.

The [Quick Call Contract Cover Sheet](#) is available on the OSP website.

Contracts in excess of \$25,000

Public notice and a solicitation are required when the agency intends to contract for professional/technical services in excess of \$25,000. Also submit a certification form. There are two advertising levels:

1. Contracts in excess of \$25,000 and up to \$50,000:

- a. Write a RFP;
- b. Place a notice of the solicitation on the Department of Administration's Office of State Procurement's web page; and/or
- c. Publish notice of the solicitation in the *State Register* or in *SWIFT*. You are encouraged to publish notice of the solicitation in other publications, such as newspapers or professional or trade journals as appropriate.

The Department has established an interactive form to post solicitations for the convenience of the agencies. The [interactive form](#) can be accessed on the secure area of the OSP website.

After notice is placed, the agency may also direct mail solicitations to vendors who they believe are capable and available to respond.

2. Contracts in excess of \$50,000:

- a. Write a RFP;
- b. Place a notice of the solicitation in the *State Register/SWIFT* of the agency's intent to contract.

This notice informs the public that public funds are being spent for a specific purpose, informs potential contractors that RFPs are available from the agency, and invites interested parties to submit proposals. Publication in the *State Register* meets the minimal requirements for public notification because it is the state's official source of notice to the public.

Procedures for submitting notices to the *State Register* may be found at:

<https://mn.gov/admin/bookstore/register.jsp>

Agencies should allow at least two weeks lead time for getting an announcement in the *State Register*. This lead time is AFTER the Certification Form and RFP have been approved by the Commissioner of Administration.

The final date for accepting completed proposals **SHOULD** be a minimum 21 days from the date the notice is first published. The agency wants good, reasonable and accurate responses to their proposals, therefore, you need to give potential vendors a reasonable time to read your RFP, ask questions, develop answers, and

submit quality responses. The most important factor is the quality of responses, the shorter the time allowed, the less quality you are likely to get.

Agencies CANNOT discuss the potential contents of an RFP or potential RFP requirements with ANYONE prior to the actual publication date of the RFP. This provides an unfair advantage to those responders. Additionally, if you are sending copies of the RFP to potential responders, these copies cannot be mailed until the date of first publication of the notice in the *State Register*, which is

8 a.m. Monday morning. Again, early mailing would provide an unfair advantage to these responders.

The Department of Administration must approve all RFPs before notice is published in the *State Register*. The agency must therefore attach a copy of the approved Certification Form to all notices submitted to the *State Register* for publication.

State Register Notice

The [State Register Notice Form](#) is available on the secure area of the OSP website.

Publishing the full RFP

The Internet has become a popular place for putting out notices of RFPs. The web is widely available and is a very good communications tool. However, if not using SWIFT, the agency has NO WAY of knowing who is looking at its website and who might be making copies of the RFP. How do you keep control of notification of changes or requirements within the RFP?

The section of this manual on RFPs provides detailed guidance on keeping control of who has “real” copies of the RFP. One thing to consider on the web is to put a watermark on a web version of an RFP that says, “Not for Response” or something similar and also making the copy on the web a picture not a real copy (using a .pdf file format) would also add extra precaution to the notice process.

Remember, when using the Internet, you need to ensure that NOTHING appears in any other form of advertising BEFORE it is announced in the *State Register*. You will create some tricky legal issues by making this mistake.

Section 11: Annual Plans and Annual Plan Agreements

An Annual Plan is a memorandum of understanding between an agency head and the Commissioner of Administration. Annual Plan contracts are written from this agreement. The requesting agency head identifies routine, cookie-cutter, repetitive needs for certain kinds of professional/technical services, with total expenditure limits. Common examples are speakers and trainers.

Using the standard Annual Plan Agreement, the process of “ordering” the needed services is also quick and legal. The Commissioner of Administration and Attorney General’s Office have determined, in accordance with [Minn. Stat. § 16C.05](#), subd. 2(b), that as long as the agency is using the standard Annual Plan Agreement form to “order” services under an approved annual plan, the Commissioner of Administration does not need to sign the form.

Preparing annual plans

Annual plans should be submitted prior to the beginning of the state fiscal year. You can submit a request for an annual plan whenever the need arises, and you can amend an annual plan if you identify different needs. They must be written in memorandum form and include the following information:

- List of types of services to be used under the plan.
- The dollar amount for each service category.
- The total dollar amount requested as an agency limit per contractor for the specific fiscal year (not to exceed \$5,000).
- A justification of need, and reasons why state employees cannot fill this need.
- The method used to establish the rates, order services, and bill for services.
- How the agency intends to set and meet small business, targeted group business, and economically disadvantaged business goals for expenditures covered by the plan.
- How the agency intends to evaluate contractors used and maintain a record of the evaluation to use in future decisions.

Exceptions to Policy

Agencies may request that the level of funds covered by an annual plan be higher than \$5,000 for any one firm or individual in a given fiscal year. This request must include a detailed justification for the increase covering the points listed above. Special attention should be paid to the setting and meeting of small targeted group business goals and the process of establishing rates, ordering services, and billing for services.

Requests should include documentation of the volume of services needed that supports the higher threshold.

The Commissioner of Administration, through OSP, will grant or deny the request for exception to policy based on the strength of the justification and how effectively the agency has addressed annual plan compliance in the past.

Procedures Checklist

This checklist may serve as a guide as you move through the approval process. Players in the process are presented on the left, with their associated responsibilities outlined on the right.

1. The agency originates annual plan for the use of professional/technical services, submitting the plan before the beginning of the fiscal year.
2. The contract coordinator reviews proposed annual plan and, if approved, sends to agency head or designee for approval.
3. The agency head or designee approves and signs two copies of the annual plan and returns all copies to contract coordinator.
4. The contract coordinator sends copies of the signed annual plan to the Office of State Procurement.
5. Office of State Procurement reviews and either approves, disapproves, or modifies the plan.

a. If not approved:

Returns copies of the plan to the originating agency contract coordinator with a memo detailing the reason(s) for rejection and the agency corrects the annual plan and sends it back to the Office of State Procurement, Professional/Technical Services Section.

b. If approved:

Assigns T-Number(s)

Signs copies, files one copy and returns one copy to the agency contract coordinator.

The agency accounting unit files a copy of the approved plan for use when reviewing the actual encumbrance document against the plan.

Amendments to the Annual Plan are possible. Contact your Agency Contract Coordinator.

Annual Plan Memo

A [Sample Annual Plan](#) is available on the secure area of the OSP website.

Annual Plan Agreement

A [Sample Annual Plan Agreement](#) is available on the secure area of the OSP website.

Section 12: RFPs and Contractor Selection

This section provides detailed instructions and guidance on how to prepare a request for proposals and how to select a contractor. Writing the RFP and going through the selection process is usually where most errors take place that cause the nightmares and problems with contracting.

What is an RFP?

A request for proposals (RFP) is a formal invitation to a potential contractor to submit a proposal to provide a solution to an agency identified problem or need. The RFP is also a procurement process where the state can judge if the contractor's experience, qualifications, and approach will provide the best solution to the state's problem.

When is an RFP Used?

- When the agency has defined a need and wants contractors to propose the best method for getting the need met.
- The total value of the contract will be \$50,000 or more.
- The agency will consider factors other than lowest price when determining whether to make an award.
- When the problem or need is complex or detailed.
- When the contractor's skills, expertise, or technical capability will be evaluated.

Formal v. Informal

A formal RFP is required for any contract of more than \$50,000, unless you have an approved single source certification.

A formal RFP is a comprehensive written document that contains the minimum information outlined below. An informal RFP is a letter stating the needs of the state and requesting a proposal from selected contractors. However, in an informal RFP the level of detail of the task(s) to be accomplished, and outcomes SHOULD have the same detail as a formal RFP.

An RFP and the proposals received provide the basis for creating a contract, so the more care that is taken with the RFP, the less work will have to be done on the contract. The agency will still need to carefully and fully restate the expectations and work products expected in the contract.

DO NOT just attach the RFP and the selected proposal to the contract as the scope of work in order to avoid writing the contractor's duties. The RFP is written as a request, not tasks to be completed. The same goes for the proposal, it is written as just that, a proposal. There are often conflicts between the RFP and a proposal. Attaching the RFP and the proposal to the contract only creates confusion about what tasks are to be completed. It is also an indication that there may not have been a meeting of the minds between the contractor and the state.

The RFP process provides agencies with the flexibility to negotiate certain aspects of the potential contract with the selected responder.

Best Value

"Best Value" is the method required by state statute for selecting contractors to perform professional and technical services. It consists of a combination of qualification-based selection and cost-based selection. [Minn. Stat. § 16C.02](#), subdivision 4, defines "Best Value" as, "[A] result intended in the acquisition of all goods and services. Price must be one of the criteria when acquiring goods and services. Other evaluation criteria may include, but are not limited to, environmental considerations, quality, and vendor performance." Each RFP based on "best value" should provide a balance between the need for quality and cost factors.

Your RFP should require a cost proposal in a separate, sealed envelope.

Late Proposals – When is late too late?

Any proposal not received at the place, date, or time designated in the RFP must be rejected. Even if the proposal is one minute late or received in the mail room instead of Room 200, it must be rejected regardless of cause.

Trade Secrets

All materials submitted in response to an RFP become property of the State and become public record after the evaluation process is completed. The evaluation period is complete when the governmental entity has completed negotiating the contract with the selected vendor. If the Responder submits information in response to this RFP that it believes to be trade secret materials, as defined by the Minnesota Government Data Practices Act, [Minn. Stat. § 13.37](#), the Responder must follow certain criteria listed below in the sample RFP.

Amendments to RFPs

After you have announced and published the RFP you may have to make changes to it. To amend an RFP you need to simply prepare the changed/added/eliminated language in a memo or addendum format and send it to the people/firms to whom you sent the RFPs originally as well

as those who requested the RFP. Make sure you send it to the SAME individual, address, etc., to whom you sent the original.

If the addendum changes/adds/eliminates ANY substantive requirements or changes the *response due date*, you are strongly encouraged to allow a minimum of an additional 21 days to respond from the day you send out the addendum. Since the goal is to get good proposals you need to give your responders reasonable time to respond. Likewise, when you issue a substantive addendum you need to allow reasonable response time.

When are the proposals public?

According to [Minn. Stat. § 13.591](#), only the name of the responding contractors to all requests for proposals will be made public on the due date of the proposals. All other information contained in a contractor's response to a request for proposal, other than the name of the contractor, is classified as nonpublic data, as defined in [Minn. Stat. § 13.02](#), and remains nonpublic data until the completion of the evaluation process. The completion of the evaluation process occurs when the governmental entity has completed negotiating the contract with the selected vendor. (See, [Minn. Stat. § 13.591](#).)

RFPs for Master Contracts

Master contracts are complex to institute and maintain. Contact your agency contract coordinator, your assistant attorney general, and the Office of State Procurement very early in your planning process.

A [Sample Request for Proposal \(RFP\)](#) is available on the OSP website.

Evaluation of Responses and Selecting a Contractor

Conflict of Interest

Since conflict of interest and ethical practices requirements are critical factors in the evaluation and selection of a contractor, you are strongly encouraged to review that section of the manual before you proceed with the rest of this chapter.

Conflict of Interest Memo

You might want each member of the evaluation team to complete a conflict of interest memo prior to becoming a member of the evaluation team. Obtaining these forms from your evaluation team members not only provides an additional layer of protection from scrutiny, but it protects the selection process. Further, the memo furthers the intent of the Commissioner of Minnesota

Management and Budget, that each employee is required to sign and have on file in their official personnel file with that employee's human resources office a statement that he/she has read and understands [Minn. Stat. § 43A.38](#) and [Administration Policy 98.30](#).

The [Evaluation Team Member Agreement](#) is available on the OSP website.

Evaluation Process

Agency staff must review all responses to the public notice, checking for compliance with the specifications in the RFP and consistency with the agency's stated contract goals.

An agency should use an evaluation team to independently review and evaluate proposals. For an informal RFP--\$5,000-\$50,000--it may seem easier to just make a decision; however, it is always best if you run the alternatives by a couple of colleagues to make sure. This way the selection will be easier to defend if there is a protest. For formal RFPs --over \$50,000 -- a formal evaluation team must be used. Sometimes, representatives of special interest groups or clients may be included in an evaluation team.

When developing an evaluation team it is recommended that you select members that are neither subordinates nor superiors of each other. This reduces the appearance of pressure to select a particular contractor.

The procedures, evaluation process, criteria, and methods can and should be, administratively reviewed and approved. Once these are in place, however, the actual decision should be left to the panel.

Criteria for selecting a contractor will differ from contract to contract, but several factors are important in the process. These include costs; experience and background of both the firm and its personnel; past work examples; level of understanding regarding the contract and its specifications; and overall strategy or methodology.

It may be useful to create an actual evaluation form listing criteria and weights associated with each. The format at the end of this section may serve as a starting point.

Selection of a contractor to provide professional/technical services must not be based exclusively on the *lowest cost* response. However, you cannot make a selection based on a proposal that differs materially from the specifications in the RFP. "Differs materially" is a subjective call, but it can have very definite meanings.

You asked for a study of a problem of how to produce checks. The response proposes to develop a system to produce checks. You asked for a study, not a solution.

You required that the task(s) take no more than six months to finish. The response proposes taking 12 months to do the same task(s). Twelve months are materially different from six months.

Situations like this can be fixed. If only one prospective contractor materially deviated from your request, then it should be disqualified. If all materially deviate, you need to start the process over with a new RFP. This is not uncommon. You learn enough from the first RFP to make the second one really good.

Examples of things that might not differ materially could include changes in assumptions rather than actual requirements.

You assumed that the work would be done at one place. The response accomplishes the task(s) from/at another place. It does not require any additional effort on your part (be careful about your monitoring responsibilities). This difference does not change any requirements, so it would not differ materially.

You required that the task(s) be accomplished in six months. The response says it will take seven months, in part because data needed to accomplish the task is not available so that the six-month time frame can be met. No other responder points this out. This difference impacts your getting the best product, and having good data is more important than the 6-month date.

Selection Using Best Value.

The primary selection and ranking of the RFP responses is made by the evaluation team based on an analysis of the contractors' qualification listed in the proposals. If any of the RFP responders are a Targeted Group Business as defined by Minnesota statute, a predetermined number of additional points may be given.

Primary Selection and Ranking.

Based on these qualifications, each evaluation team member independently gives each RFP responder points that comprise, for example, 70 percent of the final score. Then each evaluation team member as an individual, scores the proposals numerically. At the meeting of the evaluation team, the scores are discussed, and totaled to determine the most qualified RFP responders.

Cost-Based Selection

Next the cost proposals of the responders are opened, discussed, and, for example, a 30 percent consideration is given to the cost for each proposal. The lowest cost proposal is given the full 30

percent, each of the other proposals are given a percentage of the 30 percent based on a ratio of its cost divided by the low cost proposal. These cost-based percentages are then added to the totals awarded for qualifications and the proposals are re-ranked.

Negotiations

The RFP permits agencies to negotiate with a selected responder. It is the [policy of OSP](#) that price will be ambitiously negotiated as a routine step in the RFP process. You may also negotiate the scope of work and state terms and conditions. Please reach out to pt.contracts@state.mn.us for negotiation assistance.

Award

The contract is then awarded to the RFP responder that gives the state the “Best Value” for the work. This is the proposal that scored the highest after consideration of the combined qualification-based and cost-based criteria.

Sample Evaluation Worksheet

A [Sample RFP Evaluation Worksheet](#) is available on the secure area of the OSP website.

Section 13: Checklist for Professional/Technical Service Contracts Valued \$5,000 or Less

This section outlines procedures for contracts of \$5,000 or less. The approval of the Commissioner of Administration is required. The Commissioner of Administration has overall responsibility for contract management and review.

The following checklist will assist you with complying with all statutory and policy required steps when you are preparing a professional/technical service contract. The total contract value means the entire cost of the work from beginning to end, including any anticipated amendments.

1. Agency determines a need for P/T Services that are anticipated to cost under \$5,000. When making the cost estimate, be sure to include any potential amendments and extensions. The value of the *entire* contract is the amount that should be considered when determining if a \$5000 direct select is the appropriate procurement method.
2. Agency reviews the requirements stated in [Minn. Stat. 16C.08, Subd. 2 \(1\)-\(10\)](#) and makes sure all of those provisions are adhered to. This includes making sure that no state agency employees are able and available to perform the work before pursuing a contract with a vendor.
3. Once the contractor is selected, agency begins negotiations. OSP can assist you with this process if you desire help. Contact the PT Team at PT.Contracts@state.mn.us for negotiations assistance.
4. Agency prepares contract, encumbers funds and routes to the vendor for signature.
5. Agency signs contract and sends to OSP for review and final execution of the contract.

The [Professional Technical Contract Checklist \\$0 to \\$5,000](#) is available on the secure area of the OSP website.

Section 14: Procedures for Equity Select and P/T Service Contracts Valued Between \$5,001 and \$25,000

This section outlines procedures for Equity Selects up to \$100,000 and contracts between \$5,001 and \$25,000. As with those for \$5,000 or less, the final contract must be approved by the Commissioner of Administration.

Equity Select

Equity Select is a procurement method that allows you to award directly to an [OEP certified TG/ED/VO business](#) a contract up to \$100,000, including all extension options, for goods, services, professional/technical services, and construction. With Equity Select, you may forgo a competitive solicitation process. Please use and attach the Quick Call & Equity Select Cover Sheet for contracts entered into under this method. If you choose to use a competitive process instead, you are encouraged to invite multiple TG/ED/VO businesses to respond. Use of the Equity Select option should enhance participation, not hinder it.

Process Steps: Equity Select

1. Agency determines a need for P/T Services that are anticipated to cost under \$100,000. When making the cost estimate, be sure to include any potential amendments and extensions. The value of the *entire* contract is the amount that should be considered when determining if an Equity Select or Quick Call is the appropriate procurement method.
2. Agency reviews the requirements stated in [Minn. Stat. 16C.08, Subd. 2 \(1\)-\(10\)](#) and makes sure all of those provisions are adhered to. This includes making sure that no state agency employees are able and available to perform the work before pursuing a contract with a vendor.
3. Once the contractor is selected, agency begins negotiations. OSP can assist you with this process if you desire help. Contact the PT Team at PT.Contracts@state.mn.us for negotiations assistance.
4. Agency prepares contract, encumbers funds and routes to the vendor for signature.
5. Agency signs contract and completes the Quick Call Contract Cover Sheet. Send this Cover Sheet along with 3 copies of the P/T Contract to OSP for review and final execution of the contract.

Quick Call for Proposals

Professional Services valued in excess of \$5,000 must be procured via a competitive process unless a statutory exemption exists. In 2014, the legislature adopted a streamlined approach that enables a simplified and streamlined process for the acquisition of professional services under \$25,000. Admin's Office of State Procurement has termed this process a "Quick Call for Proposals" or a "Quick Call" process.

A Quick Call is a simple solicitation document that is prepared by the agency and sent out to a minimum of three vendors, with one required to be a certified Targeted Group/Economically Disadvantaged or Veteran-Owned business, if available. The document is simple and short and structured so that vendors will be able to respond succinctly and with relative ease. The Quick Call template is structured similar to a typical application that is easy for agencies to put together and user friendly for the responding vendors to use in submitting information to agencies about the services they are proposing to provide.

Based on the information contained within the agency's Quick Call, vendors will submit proposals to the soliciting agency. The agency will review, evaluate (score) the proposals received and document the results. Contract negotiations will commence with the highest scoring vendor. If the agency is not able to successfully negotiate a contract with the highest scoring vendor, the agency may move on to the next highest scoring vendor, and so on. Once a contract is fully negotiated and written, the agency will encumber funds and send the contract to the vendor for signature. Once returned, the agency will sign the contract and submit it to Admin's Office of State Procurement for approval and final execution. Agencies must also submit a Quick Call Contract Cover Sheet along with the contract.

The [Quick Call and Quick Call Contract Cover Sheet](#) are available in the secure area of the OSP website at.

Process Steps: Quick Call

1. Agency determines a need for P/T Services that are anticipated to cost under \$25,000. When making the cost estimate, be sure to include any potential amendments and extensions. The value of the *entire* contract is the amount that should be considered when determining if an Equity Select or Quick Call is the appropriate procurement method.
2. Agency reviews the requirements stated in [Minn. Stat. 16C.08, Subd. 2 \(1\)-\(10\)](#) and makes sure all of those provisions are adhered to. This includes making sure that no state agency

employees are able and available to perform the work before pursuing a contract with a vendor.

3. Agency prepares the Quick Call. Make sure to read, but then remove all agency instructions that are listed in brackets. Make sure to obtain all required internal agency approvals before distributing the Quick Call.
4. Agency sends the Quick Call to vendors. It is the agency's option to either directly solicit a minimum of 3 vendors (at least one of which must be a Targeted Group/Economically Disadvantaged or Veteran-Owned business if available) or publish a notice of the Quick Call on the OSP website. If 3 vendors are not able to be identified, the agency P/T Coordinator may grant an exception which is required to be documented in writing.
5. Agency prepares for evaluation of expected proposals by establishing a team of evaluators. Be sure to have each reviewer complete an Evaluation Team Member Agreement. Create evaluation sheets.
6. Agency receives proposals. Document the time each proposal was received. Reject proposals if late or if they materially deviate from the minimum qualifications required in the Quick Call. It is recommended that you confer with OSP prior to rejecting a proposal.
7. Agency conducts evaluations of proposals. Not all evaluation processes are the same. Some involve interviews or demonstrations, others do not. Some evaluations entail the shortlisting and interviewing of the top-tiered responders. Make sure you are detailing your intended process in the Quick Call document and following that procedure. If you want to discuss process options, contact OSP.
8. Once the successful responder is identified, agency begins negotiations. OSP can assist you with this process if you desire help. Contact the PT Team at PT.Contracts@state.mn.us for negotiations assistance.
9. Agency prepares contract, encumbers funds and routes to the vendor for signature.
10. Agency signs contract and completes the Quick Call Contract Cover Sheet. Send this Cover Sheet along with 3 copies of the P/T Contract to OSP for review and final execution of the contract.

Contracting Checklist

The following checklist will assist you with complying with all statutory and policy required steps when you are preparing a professional/technical service contract. The total contract value means the entire cost of the work from beginning to end, including any anticipated amendments.

The [Contract Checklist for Equity Selects and P/T Contracts \\$5,001 - \\$25,000](#) is available in the secure area of the OSP website.

Section 15: Checklist for Professional/Technical Service Contracts Valued Over \$50,000

This section outlines procedures for contracts over \$50,000. As with contracts for \$5,001-\$50,000, the final contract must be approved by the Commissioner of Administration. There are several additional steps required for these contracts. Before seeking approval for a contract of more than \$50,000, an agency head or designee must certify to the Commissioner of Administration, through OSP, that it is following specific laws and policies.

Requirements Unique to Contracts more than \$50,000

The following must be considered before beginning the contracting process:

Certification

Before an agency seeks approval of a professional/technical services contract in excess of \$50,000, it must complete a Department of Administration Certification form.

A notice of an RFP will not be published in the *State Register* until the Department of Administration's Professional/Technical Services Contract Section approves the certification form.

Formal RFP

A notice for publication and an RFP must be prepared along with the certification form. See the appropriate section of this manual for a discussion of RFPs.

Contracts of more than \$100,000

No agency of the state will execute any contract over \$100,000 unless the firm or business, having more than 40 full-time employees within this state on a single working day, or the state where they have their primary place of business, during the previous 12 months, has a certificate of compliance which signifies that they have an affirmative action plan approved by the commissioner of Human Rights. The necessary documentation to execute a contract is affirmative knowledge by the state agency that the contractor has a certificate of compliance issued by the commissioner of Human Rights.

This process can be extremely complex, and potential contractors should be encouraged to seek a certificate of compliance very early in the RFP process. The Affirmative Action Data Page found

on the OSP web page will help contractors determine which documents are needed to submit a proposal and enter into a contract with the state.

If a responder, contractor or state agency staff have any questions about certification or whether someone has a certification, they can contact the Minnesota Department of Human Rights at 651-296-5663.

Contracting Checklist

The [Contract Checklist \\$50,000+](#) is available in the secure area of the OSP website.

Section 16: Architects, Engineers, Designer Selection Board and Building Construction Contracts

Building construction, remodeling and maintenance projects, and related services are a unique set of professional/technical services contracts.

Accomplishing these tasks is unique for several reasons. First, [Minn. Stat. § 16B.33](#) establishes a Designer Selection Board and establishes specific processes for selecting a designer for these types of projects with an estimated cost greater than \$2,000,000 or a planning project with estimated fees greater than \$200,000. All agencies are required to submit their requirements to the Board for selection of a designer(s).

Second, for projects less than the limits established for consideration by the Designer Selection Board from agencies that are supported by Real Estate and Construction Services (RECS), authority to choose the designer rests with the Commissioner of Administration.

Third, RECS of the Department of Administration has a series of annual master contracts that all agencies can use to accomplish many smaller projects and specific tasks associated with larger projects.

Contract Forms

Building construction, remodeling, and even maintenance contracts are very different from those contracts used by other business sectors. Liability and responsibility issues are extremely complex and can be very expensive if not defined carefully. DO NOT sign a contract for building construction, remodeling, repair or maintenance that has not FIRST been approved by your assistant attorney general.

Designer Selection Board

The Designer Selection Board is charged with choosing the designers used by state agencies "*to construct, erect, or remodel a building by or for the state or an agency.*" A designer means "*an architect or engineer, or a partnership, association, or corporation comprised primarily of architects or engineers or of both architects and engineers.*"

The Department of Administration provides administrative support to the Designer Selection Board. You should contact its executive secretary at 651-201-2389 with specific questions.

The following outlines the steps involved in taking a project through the Designer Selection Board:

1. Agency requests designer selection by a memo to the Commissioner of Administration which includes:
 - Project description, in sufficient detail to identify the entire project including required time frames.
 - Total funds available and their source.
 - Statement relative to the fees for the project, identifying any restrictions or limits placed on fee by funding sources.
 - Special/particular expertise requirements.
 - Expedited awarding schedule requirements.
 - All requests MUST include designation of an agency contact person.
2. The Executive Secretary prepares a Request for Proposal (RFP), working with the agency contact person to ensure that all requirements are properly stated.
 - The RFP will be published in the State Register.
 - Questions relative to the actual project are referred to the agency contact; questions relative to the selection process are handled by the executive secretary of the Designer Selection Board.
3. The process used by the Board to make a determination includes:
 - Proposals are opened, a listing of the responding firms is prepared, and a set of proposals is sent to each board member and the agency contact.
 - The executive secretary, in cooperation with the board members, establishes a meeting date for the review of the proposals.
 - The executive secretary notifies the agency contact and RECS of the meeting date and time.

- At the meeting the board establishes date and time of individual interviews for the shortlisted firms (those firms who passed the first screening) and sets the length of the interviews. Agency contact and other involved agency staff are encouraged to participate in this meeting and provide their input.
- Following the interviews, the board votes on the firms, based on the proposals and the interviews
- The executive secretary notifies all interviewed firms of the choice.

Once the designer has been selected, completion of the project becomes the responsibility of the agency, and RECS if the agency is supported by RECS.

If at any time during the planning or design process the actual fees or costs go over the limits set in statute--\$200,000 for planning and \$2,000,000 for the project--agencies MUST submit the project to the Designer Selection Board for consideration. The board has the authority to replace the project designer if it so chooses. Therefore, estimating complete planning and project costs are critical to maintaining continuity and accomplishing all the work involved on time.

Projects that cost less than the limits for the Designer Selection Board

Selection of the consultant designer for projects less than the limits established by law--\$200,000 for planning and \$2,000,000 for the project--are made by the agency, based on policies established for each agency. A detailed process for those agencies supported by RECS is below.

For those agencies supported by RECS, selection of the consultant designer which are less than the limits of the Designer Selection Board, are selected by the RECS project manager in the following manner:

Consultant contracts with planning costs up to \$25,000

The RECS project managers may select, at their discretion, a qualified firm and proceed with the award and preparation of the contract.

Consultant contracts with planning costs between \$25,001 and \$50,000

The RECS project manager will select a minimum of two qualified firms from the available roster and ask each to submit an informal proposal. The RECS project manager will make a selection using "Best Value" as the criteria for selection based on the predefined criteria set forth in the

solicitation document. Best Value is defined in [Minn. Stat. § 16C.02](#), subd. 4. The RECS project manager will also notify the unsuccessful firms of the selection.

Consultant contracts with planning costs between \$50,001 and \$100,000

The RECS project manager will select a minimum of three qualified firms from the available list, and ask each to submit a proposal. The DSBC project manager will make a selection using “Best Value” as the criteria for selection based on the predefined criteria set forth in the solicitation document. Best Value is defined in [Minn. Stat. § 16C.02](#), subd. 4. The RECS project manager will also notify the unsuccessful firms of the selection.

Consultant contracts with planning costs between \$100,001 and \$200,000

The RECS project manager will select a minimum of 10 qualified firms (or the maximum amount listed in the category, whichever is greater) from the available list, and ask each to submit a proposal. The RECS project manager will make a selection using “Best Value” as the criteria for selection based on the predefined criteria set forth in the solicitation document. Best Value is defined in [Minn. Stat. § 16C.02](#), subd. 4. The RECS project manager will also notify the unsuccessful firms of the selection.

The Roster

The Master Roster is updated electronically, and is continually current. Every six months a Notice will be placed in the State Register to advertise the roster to new firms. Firms requesting to be placed on the roster may submit their information at any time, and once their submittal is reviewed and approved, it will be added to the roster. Once a year a firm is sent an electronic notice to renew and or update their information. If a firm does not do this within thirty days that firm is automatically removed from the Roster. For more information regarding how to be included in the Master Roster, consultants should review the Master Roster RFQ.

Master professional/technical services contracts negotiated by RECS

RECS announces RFPs, evaluates and publishes a list of firms that provide a wide variety of professional/ technical services related to building projects, construction projects, and testing. This [list of master contracts](#) is available from the RECS contracts officer.

These master contracts are available to all state agencies on an as-needed basis to provide the services described in the master contract. You should get a copy of the master contract for the services you need and review it carefully before you proceed. The master contract will contain all special terms and conditions or requirements related to the specific vendor. It will also define

the forms and format that must be used to secure the services under the master contract. You should pay special attention to liability issues and responsibilities when using the M-contracts. Copies of the master contracts are available from the RECS contracts officer.

Section 17: Master Professional and Technical Service Contracts

Including: Master contract Certification Form, Contract, and Checklist; and Department of Administration Real Estate and Construction Services Master Contracts

This section contains information on creating master professional/technical services contracts and details the actual contract document.

Master Professional/Technical Services Contract

- 1) Is an umbrella document that provides the general frame work for using services of multiple contractors. A master contract program is not set up with just one vendor. The contract document identifies, in detail, rates, conditions and products for each kind of service defined for multiple contractors. These conditions include geographic areas supported, amount of notice necessary, and cost of various kinds of services. It also very specifically identifies HOW to use the service, the specific document that is to be used and how it is to be filled out.
- 2) Accomplishes generally identifiable tasks, FOR WHICH NO REASONABLE DETERMINATION OF ACTUAL NEED can be made. For example, some agencies know they will eventually need court reporter services sometime during a fiscal year, however, no one can reasonably predict exactly when or where. Further, it is the nature of the specific need that there is not a lot of warning of the need for the service - the agency(s) do not control the requirement in most cases. Hearings take place in response to claims, appeals, actions in court, discovery, etc., all of which are driven by outside circumstances. The key factors are need, access, and time. The agency knows it has a need, but has no idea where or for how long.

Also, the task(s), while general in nature, can be defined as specific tasks, in measurable blocks of service for definable outcomes. For example: record hearing, \$xx an hour, \$xx a mile for travel, and the output is a transcript and a tape

If desired by the initiating agency, Master Professional/Technical Services Contracts may be available for use by other state agencies, given the specifications, terms and conditions in the certification form, RFP, and master contract. The initiating agency accepts some responsibility for monitoring the use of the contract and reporting on use of the contract.

- 3) Is an unencumbered contract with a single vendor where a maximum dollar limit is identified in the master contract. Funds are encumbered through the work order contract that is issued by a using agency.

- 4) Requires a Work Order Certification Form and Work Order Contract in order to procure work from the master contract. A PURCHASE ORDER MAY NOT BE USED.

Work Order Contract

- 1) Is issued from a master contract;
- 2) Is THE legally binding document (when it incorporates the Master Contract into it);
- 3) Has funds encumbered against it;
- 4) Gives the specific tasks to be completed; and
- 5) Gives the specific information about compensation to the contractor.

Creating a Master Contract Program

- 1) Determine the agency's needs, develop a statement of work, perform a cost/benefit analysis, determine budget limitations, and determine that a contract is the correct method for accomplishing the task(s).
- 2) Draft the Master Contract Certification Form and RFP. The RFP must identify the special requirements of a Master Professional/Technical Services Contract and the details of how work orders will be issued -- will it be a strict rotational basis or will there be a specified selection process?
- 3) Get these documents approved by the appropriate agency officials and by the Department of Administration and publish notice of the contracts in the *State Register*.
- 4) Draft the Master Contracts for the successful responders.
- 5) Circulate the contracts for signatures:
 - Contractor
 - Agency head (or designee)
 - Commissioner of Administration
- 6) Issue work order contracts to the Master Contract Program as set forth in the Master Contract Certification Form.

- 7) Every Work Order Contract requires a Work Order Certification Form. As with every contracting opportunity, agencies are required by law to ensure state employees are not able and available to perform the work prior to entering into a contract. (see Minn. Stat. § 16C.08, subd.2(b)(1) , see also Minn. Stat. § 43A.047(a)).
- 8) You must still follow the retainage requirements for professional/technical service contracts by retaining 10 percent for each work order contract.
- 9) Send copies of the final report, if appropriate, to the Legislative Reference Library. (See, Minn. Stat. § 16C.08, subd. 6.)

Master Contract Forms

The [following master contracts forms](#) are available in the secure area of the OSP website:

- Master Contract Certification
- Sample Master Contract
- Work Order Certification Form
- Sample Work Order Contract
- Work Order Contract Checklist

Section 18: Evaluation of Professional/Technical Contracts Over \$25,000

[Minn. Stat. § 16C.08](#), subdivision 4(c) requires agencies to complete a report “*within 30 days of final completion of a [professional/technical services] contract over \$25,000.. .*” (emphasis added). In addition, when the revised statute takes effect, it will also be a requirement that all of the reports must be publically available online. The OSP website currently has these reports available online in a searchable format and this website will fulfill the statutory requirement for all agencies.

In accordance with the statute, all reports must:

- (1) summarize the purpose of the contract, including why it was necessary to enter into a contract;
- (2) state the amount spent on the contract;
- (3) if the contract was awarded without following the solicitation process in this chapter because it was determined that there was only a single source for the services, explain why the agency determined there was only a single source for the services; and
- (4) include a written performance evaluation of the work done under the contract. The evaluation must include an appraisal of the contractor's timeliness, quality, cost, and overall performance in meeting the terms and objectives of the contract. Contractors may request copies of evaluations prepared under this subdivision and may respond in writing. Contractor responses must be maintained with the contract file.

When processing the report, it is important to remember that it must be submitted within 30 days of the completion of the contract and you may submit it directly to the Professional/Technical Services section of OSP.

Evaluation of Professional/Technical Contracts Over \$25,000

Preparing an evaluation of a Professional/Technical contract can now be done online. The [online form](#) is available in the secure area of the OSP website.

Section 19: Final Payment Approval Form

According to [Minn. Stat. § 16C.08](#), subdivision 5(b) (emphasis added), “The terms of a contract must provide that no more than 90 percent of the amount due under the contract may be paid until the final product has been reviewed by the head of the agency entering into the contract *and the head of the agency has certified that the contractor has satisfactorily fulfilled the terms of the contract*, unless specifically excluded in writing by the commissioner. This paragraph does not apply to contracts for professional services as defined in [Minn. Stat. §§ 326.02 to 326.15](#).”

The following form, available on the OSP website, will assist in certifying the completion of the contract.

[Final Payment Approval Form](#)

The [Final Payment Approval Form](#) is available in the secure area of the OSP website.

Section 19A: New Hire Reporting Form

Government agencies are required to submit this form when contracting with independent contractors. In the context of this form, the term “new hire” seems to be a misnomer.

[Minn. Stat. § 256.998](#) and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 require all employers to report newly hired employees to a state directory. These laws improve child support collections both on a state and national level, and reduce fraudulent unemployment and worker’s compensation payments. Employers reporting their new hires to the Center have assisted Minnesota with increasing child support collections by \$11.6 million from July 1, 1998 to June 30, 1999.

Frequently Asked Questions

1) Do I need to report independent contractors I hire?

Governmental agencies must report independent contractors.

2) Are there penalties for not reporting?

An initial notice will be sent for noncompliance, followed by a \$25 fine for failing to report an employee a second time. Continuing failures to report could result in fines up to \$500.

3) How and When Do I Report New Hires?

You must report new hires within 20 days of hire.

Electronic Reporting

Online Reporting: Use the New Hire Website: <http://newhire-reporting.com/MN-Newhire/default.aspx> to report your new hires. This is the easiest and most efficient way to report new hires!

Create your own Electronic New Hire Reports: Go to the New Hire Website <http://newhire-reporting.com/MN-Newhire/default.aspx> for detailed instructions and electronic data transmission methods for creating electronic new hire reports.

Non-Electronic Reporting

Paper new hire reports may either be faxed or mailed to the New Hire Center.

Mail reports to: Minnesota New Hire Reporting Center, P.O. Box 64212, St. Paul, MN 55164-0212

Fax reports to: (800) 692-4473

Documents should include:

- *Printed List:* The printed list should contain all of the required information on the New Hire Reporting Form, be created using at least a 10-point font size, and have the employer's name, Federal Employer Identification Number, and address clearly displayed at the top of the report.
- *New Hire Reporting Form* (click [here](#) to download). You may download, print, fill out, and fax or mail the New Hire Reporting Form.
-OR-
- *W-4 Form* - If you choose to submit a W-4 form as a new hire report, please ensure that each W-4 is easily readable and has the employer's name, Federal Employer Identification Number, and address written at the top of each form.

4) How Will the Information Be Used?

Minnesota's child support staff will match new hire information against their child support records to locate parents, establish child support court orders, and enforce existing orders. Once these matches are done, the new hire information is sent to the National Directory of New Hires for other states to compare Minnesota's information with their own records. The new hire information will also be shared with the Department of Economic Security and Department of Labor and Industry to help detect and prevent erroneous benefit payments.

The Minnesota New Hire Reporting Center provides additional answers to [Frequently Asked Questions](#).

[Minnesota New Hire Reporting Form](#)

The [New Hire Reporting Form](#) is available in the secure area of the OSP website.

Section 20: IT Contracts

Information Technology Master Contract Programs

MNSITE Master Contract Program (23ASK)

[Visit the program webpage](#) for more information about how to engage the program including/procurement thresholds/

The MNSITE Master Contract Program serves as the preferred method for State of Minnesota agencies to meet their Information Technology (IT) consulting needs. The program accommodates both staff augmentation as well as deliverable based work. The program is continually open to vendor applicants.

Staff Augmentation – The Contractor is paid an Hourly Rate based on the number of hours a resource works,

Deliverable Based – The Contractor is paid based on the completion of defined deliverables or the completion of a project.

The MNSITE Master Contract Program is NOT a contract for hardware, software, or hosting services.

Minnesota Department of Information Technology Services (MN.IT Services) Central Technology Approval

MN.IT Services Central is required by statute to review and approve IT purchases for hardware, software and professional services. To that end, certification forms that entail IT-related professional services are reviewed by both MN.IT Services Central and the Department of Administration. Agencies should submit all IT-related P/T documents, including certification forms, RFP's, and amendment preapproval requests directly to MN.IT Services Central.

Statutory provisions require that all information and telecommunications technology project be registered with the Department of Information Technology Services. Any planned project or purchase subject to the statutory provisions below requires the Department of Information Technology Services involvement at the earliest point possible. Important statutory requirements to be aware of include:

[Minn Stat. §16E.01](#) Department of Information Technology Services

Subd. 3. (c) A state agency that has an information and telecommunications technology project, whether funded as part of the biennial budget or by any other means, shall register with the department by submitting basic project startup documentation as specified by the chief information officer in both format and content. State agency project leaders must demonstrate that the project will be properly managed, provide updates to the project documentation as changes are proposed, and regularly report on the current status of the project on a schedule agreed to with the chief information officer. The chief information officer has the authority to define a project for the purposes of this chapter.

Subd. 3. (d) The chief information officer shall monitor progress on any active information and telecommunications technology project with a total expected project cost of more than \$5,000,000 and report on the performance of the project in comparison with the plans for the project in terms of time, scope, and budget. The chief information officer may conduct an independent project audit of the project. The audit analysis and evaluation of the projects subject to paragraph (c) must be presented to agency executive sponsors, the project governance bodies, and the chief information officer. All reports and responses must become part of the project record.

Subd. 3. (e) For any active information and telecommunications technology project with a total expected project cost of more than \$10,000,000, the state agency must perform an annual independent audit that conforms to published project audit principles promulgated by the office.

Minn. Stat. [§16E.0465](#) Technology Approval

Subdivision 1. **Application.** This section applies to an appropriation of more than \$1,000,000 of state or federal funds to a state agency for any information and telecommunications technology project or for any phase of such a project, device, or system. For purposes of this section, an appropriation of state or federal funds to a state agency includes an appropriation:

- (1) to a constitutional officer;
- (2) for a project that includes both a state agency and units of local government; and
- (3) to a state agency for grants to be made to other entities.

Subd. 2. **Required review and approval.** (a) A state agency receiving an appropriation for an information and telecommunications technology project subject to this section must divide the project into phases.

(b) An encumbrance or expenditure may not be made for any phase of a state agency information and telecommunications technology project subject to this section unless the Department of Information Technology Services has reviewed each phase of the project and based on this review, the chief information officer has determined for each phase that:

(1) the project is compatible with the state information architecture and other policies and standards established by the chief information officer;

(2) the agency is able to accomplish the goals of the phase of the project with the funds appropriated; and

(3) the project supports the enterprise information technology strategy.

Subd. 3. [Repealed, 2005 c 156 art 5 s 24]

History: *1Sp2001 c 10 art 2 s 46; 2005 c 156 art 5 s 14,15; 2009 c 101 art 2 s 109*

Section 21: Interagency, Joint Powers Agreements, and the University of Minnesota

Interagency Agreements vs. Joint Powers Agreements

Interagency agreements are between two or more state agencies, while joint powers agreements are between two or more governmental units (See the section on Joint Powers Agreements for the statutory definition of governmental units).

Interagency Agreements

Interagency Agreements are arrangements between state agencies to share resources, do work for each other, share work, etc., to make the best use of state resources. Although these arrangements can take many forms, they are considered agreements. If they are not handled as an agreement, serious problems can and have resulted. OSP's purpose in defining these requirements and highlighting critical points that need to be covered is not to inhibit the sharing of state resources but to ensure that it is done correctly.

The authority of state agencies to enter into agreements between themselves is, in most cases, not clearly defined. Some state agencies have specific statutory authority to enter into these agreements (the Department of Children, Families and Learning, for instance). Most state agencies do not have specific authority, but their authority is defined in the *Joint Powers Act*, which is Minn. Stat. §471.59.

The differences between interagency agreements and professional/technical service contracts are highlighted below.

A Certification Form DOES NOT have to be submitted when entering into an interagency agreement regardless of the total dollar value of the agreement. By its nature, an interagency agreement is using state resources to accomplish the task, so none of the requirements for a certification exist.

The form of the agreement is probably less important than what it includes. Some agencies have developed detailed internal format requirements for interagency agreements, and these should be followed. Other agencies may want to use the format provided below. In either case, the agreement is a contract and should be processed as a contract.

A special clause on workers' compensation is not required because state agencies must already comply with the statute.

A liability clause is included in the contract form. The form states that “each party will be responsible for its own acts.” Agencies need to make a purposeful decision on whether to use it. While all state agencies might appear to be a single entity, in fact they are not. Each agency has its own budget and, commonly, its unique and special sources of funds. Therefore, in cases where the liability is high, it is in the best interest of both the paying and performing agency to specifically define who is liable for what, and when. It is extremely difficult to define *high risk*.

An indemnification clause IS NOT included in the model because one state agency cannot indemnify and hold harmless another state agency.

A clause on Data Practices, Ownership of Materials and Intellectual Property is included. There are different data practices requirements for different agencies and these differences need to be specifically identified and any special requirements spelled out. The decision to leave in the ownerships of materials and intellectual property provisions will depend on the funding source and your agency's internal policies. These can be complex questions.

Finally, on the signature page you will notice that there are only two signatures required. The Attorney General’s Office and the Department of Administration do not approve these contracts.

[Sample Interagency Agreement](#)

The [Sample Interagency Agreement form](#) is available in the secure area of the OSP website.

[Joint Powers Agreements](#)

Joint powers agreements are contracts with other governmental units. Governmental Units includes “every city, county, town, school district, independent nonprofit firefighting corporation, other political subdivision of this or another state, another state, federally recognized Indian tribe, the University of Minnesota, the Minnesota Historical Society, nonprofit hospitals licensed under sections [144.50](#) to [144.56](#), rehabilitation facilities and extended employment providers that are certified by the commissioner of employment and economic development, day training and habilitation services licensed under sections [245B.01 to 245B.08](#), and any agency of the state of Minnesota or the United States, and includes any instrumentality of a governmental unit. For the purpose of this section, an instrumentality of a governmental unit means an instrumentality having independent policy-making and appropriating authority.” [Minn. Stat. § 471.59, subd. 1](#). If you have any questions, you should always check with your assistant attorney general BEFORE proceeding.

A joint powers agreement is an arrangement between a state agency and another governmental unit to share resources, do work for each other, share work, etc. Although these arrangements

can take many forms, they are considered agreements. If they are not handled as agreements, serious problems can result.

OSP's purpose in defining these requirements and highlighting critical points that need to be covered is not to inhibit the sharing of governmental resources but to ensure that it is done correctly.

BEFORE you enter into discussions that might lead to a joint powers agreement you need to make sure that you have considered several points. Namely, that there is no state agency that can provide the service.

Under what authority are you seeking to create a joint powers agreement?

Unless you have specific, unique statutory authority, there is a critical distinction in law. [Minn. Stat. §471.59](#), subdivision 10, specifically limits the service/tasks that can be performed. It says, *any service or function which the governmental unit providing the service or function is authorized to provide for itself*. While this is not a major issue in all cases, there are instances where a governmental entity's authority is not as broad as that of a state agency and, therefore, this limitation might come into play. Check with your assistant attorney general BEFORE you start the process if you are not certain about the issue of statutory authority.

Are you seeking a service or performance of a task that could be done by more than one governmental entity?

If so, you need to consider using a Request for Proposal (RFP), or some other structured mechanism, to announce your need for the service/task, evaluate responses, and make a decision. If you are using state resources, there is an expectation that they will be used equitably and fairly. The use of a formal RFP helps in ensuring equity and fairness. You DO NOT need to announce it in the *State Register*, though that is a way of ensuring equity and fairness. You should, however, send the RFP to every governmental entity that may be able to perform the service/task you need.

The requirement for ensuring every governmental entity access to a potential agreement is especially true of grants made to governmental entities.

The question posed above in dealing with RFPs is not, "we need work done at several different locations." If you have work that needs to be done in several geographically different locations, and there is only one governmental entity in each location that can perform that task, you have a requirement for several joint powers agreements.

Prepayment to Federal Government

*Note: Pursuant to [Minn. Stat. § 16C.081](#), when required by the **federal** agency entering into an intergovernmental contract, an agency may negotiate contract terms providing for full or partial prepayment to a **federal** agency before work is performed.*

Joint Powers Agreements for Professional/Technical Services

If you want to contract with a governmental unit to perform or provide professional/technical services, you should follow the professional/technical contracting procedures discussed in Sections 9 through 15 of this manual. The only difference is that you should indicate that your authority for entering into the contract is also [Minn. Stat. § 471.59](#).

The following is a sample of how you would modify the Recitals section of the professional/technical services contract form to show that you are contracting with a governmental unit for these types of services:

Recitals

1. Under [Minn. Stat. §§ 15.061 and 471.59](#) the State is empowered to engage such assistance as deemed necessary.
2. The State is in need of [ADD BRIEF NARRATIVE OF THE PURPOSE OF THE CONTRACT].
3. The Contractor represents that it is duly qualified and agrees to perform all services described in this contract to the satisfaction of the State.

A Certification Form MUST BE submitted and approved BEFORE proceeding with a joint powers agreement that exceeds \$25,000. A primary purpose of the certification is to document your efforts to ensure that there are no state employees who could perform the services required and to document your efforts to make all governmental entities who might potentially respond aware of your need for a service or to accomplish a task. If there is ONLY ONE governmental entity that can legally provide the service or perform the task, there is no need to make an effort to consider other governmental entities responses -- just make that clear on the Certification Form. In circumstances where the services proposed to be performed for the state agency involve services that are commonly available through multiple government entities such as training or research services, submit a single source request along with the Certification Form if you believe you must

contract with a specific governmental unit. This will allow for the appropriate level of detail to be relayed to facilitate the review process.

Developing an RFP and carefully evaluating the responses you receive is an exercise of fair and open competition. You should have very good reasons why you have not chosen this process when awarding a joint powers agreement. Your decision about what governmental entity to award a joint powers agreement to is no less subject to the open, public, level playing field concepts.

[Contract Clauses in Joint Powers Agreements](#)

An indemnification clause is included in the model agreement. If the governmental unit objects, agencies should make a decision to use the modified version only after consultation with their agency contract coordinator and their assistant attorney general.

No affirmative action clause is included in the model. Minnesota cities and counties were encouraged by the law to obtain a certificate of compliance but one is not required. If your joint powers agreement is with a governmental entity other than a city or county, you should include the standard Affirmative Action language in the agreement.

Data practices, ownership of copyright and documents or rights to a patent, are not addressed in the model agreement, because if these are generally issues only when you are hiring the governmental unit for professional/technical services. In that case you should use the professional/technical contract form.

[Sample Joint Powers Agreement](#)

The [Sample Joint Powers Agreement form](#) can be found in the secure area of the OSP website.

[University of Minnesota](#)

Do not use the Interagency Agreement or Joint Powers Agreement for University of Minnesota Contracts. The University of Minnesota has its [own contract templates](#) that can be found in the secure area of the OSP website.

Section 22: Innovative Solicitation Options

Innovative solicitations are optional tools available to fulfill an agency's need for P/T services. These tools are useful for many projects, but not all. If you would like to use any of these solicitation methods, you should reach out to pt.contracts@state.mn.us to find out if one of these solicitation methods is right for your project. Below is a summary of each solicitation method, it's best use case, benefits and drawbacks.

Two-Tiered Evaluation

An RFP with a two-tiered evaluation phase has two distinct evaluation phases. During the first phase of an evaluation, the technical proposal is given a weight of 90% and the cost proposal is given a weight of 10%. The top scoring responders are short-listed and move on to the next phase of an evaluation where the technical proposal is now weighted at 60%, the cost is 40%. The second phase evaluates something different from the initial phase, such as an interview or demonstration.

Best-Use

A two-tiered evaluation is a solicitation method that reduces the opportunity for a vendor to underbid, or when quality of the work is of particular concern.

Benefits

A two-tiered evaluation builds an interview or demonstration naturally into the RFP process. It also allows for only the shortlisted vendors to provide demonstrations or interviews, allowing the state to focus only on the top scoring responders for that phase. When executed correctly, it can significantly reduce the risk of underbidding and make negotiation easier. It allows an agency to really focus on areas of importance.

Drawbacks

A two-tiered evaluation will likely add more time to your RFP process to accommodate for scheduling and undertaking demonstrations and interviews, and the time to evaluate demonstrations and interviews. It is possible that a two-tiered evaluation does not reduce the risk of underbidding or make negotiations easier when evaluators do not use the evaluation scale to adequately differentiate between responders; that is, where evaluators score proposals similarly despite material differences between the proposals.

Invitation to Negotiate

Invitation to negotiate (ITN) is a solicitation method that may be released with fewer requirements or a more limited scope of work. After the formal evaluation during the RFP phase, the most qualified responders are selected and move on to simultaneous negotiations. In these negotiations, the State's negotiation team focuses on vetting responders proposals to confirm the understanding built during review of each responder's written proposal, and determining whether any responder can offer additional value beyond what was offered in its written proposal. During ITN The State and responder may also begin building out a scope of work, negotiating general terms and conditions, and revising cost proposals. At the end of the process, the negotiation team identifies the responder that represents best value to the State and submits a justification memo to OSP (and, if applicable, MNIT) for approval. An agency seeking to use ITN must request prior approval from OSP (and, as applicable, MNIT) and closely work with OSP or MNIT procurement teams throughout the process. Overall, the ITN process by its nature enhances communication with the responders during the procurement process.

Best-Use

ITN is most appropriate in the following situations:

- When the State does not have extensive requirements or is open to adjusting business practices to align with how a responder's solution works;
- Procurement of rapidly evolving or new services where the State lacks expertise;
- Where the State is open to innovation or new solutions a responder may offer as part of the negotiation process;
- Complex procurements, typically IT related, when it would be advantageous to discuss and refine the scope of work with vendors before contracting;
- Solicitations in which complexity has presented challenges in the past

Benefits

ITN allows the State to engage in conversations with each responder and to freely explore the responder's capabilities and ideas on how to fulfill the State's needs. ITN can help identify potential misalignments between the State and responder prior to entering into a contract. The ITN process also allows an agency to develop a working relationship with the responder before executing a contract. In situations where the State is open to reducing requirements or aligning business requirements to the way a responder's solution works, ITN can reduce RFP drafting time.

Drawbacks

The negotiation process is extremely resource intensive for both the agency, OSP, and, as applicable, MNIT. It requires a significant time commitment from subject matter experts on the negotiation team, and will add time to the overall procurement process. While there is greater flexibility in vendor selection under an ITN, it cannot be used to overturn the results of the evaluation without a well-reasoned showing that another responder presents the best value to the State.

Challenge-Based RFP

A challenge-based RFP is structured to pose a challenge or problem to be solved by responders rather than prescribing the work to be done. The response to the RFP should contain solutions to overcome the problem or challenge. The agency selects the highest-scoring responder(s) to implement the solution. Challenge-based RFPs can be used in conjunction with an ITN.

Best Use

This solicitation method is best when an agency has fewer or no business requirements, is very open to different kinds of solutions or when it is a newer or emerging market. Challenge-based RFPs are ideal where the State is solution agnostic, looking for innovative ideas, and simply needs a problem solved.

Benefits

A challenge-based RFP allows vendors to put forth new and innovative solutions, when it would be difficult for the State to develop requirements for a solicitation. It allows the State to obtain solutions when the market is still developing.

Drawbacks

The evaluation process can be challenging and the State must think creatively to put some boundaries on the solutions they are seeking. The evaluation can be labor intensive due to the varying nature of the solutions proposed.

Expedited RFP

When an agency issues an expedited RFP, they release a very limited, basic scope of work and ask for responder qualifications and experience for a shorter time than a typical RFP. The evaluation team short-lists the most qualified responders and then releases a more detailed scope of work and cost proposal to those responders as well as directions on how and when to respond. The submissions are evaluated and the highest scoring responder proceeds to negotiate a contract with the state.

Best Use

An expedited RFP is most appropriate for well-developed markets, when the qualifications of a responder are easily ascertained and any vendor with those qualifications should be capable of performing the work. An expedited RFP is most commonly requested when work comes up suddenly for an agency.

Benefits

An expedited RFP gives an agency a bit more time to develop the scope of work during the time period when vendors are responding to the qualifications and experience portion of the RFP. Because much of the RFP process is overlapping, the timeline for the process is condensed.

Drawbacks

There is a risk of missing out on a vendor that has special experience that would lead to a better project. Responders may not be sure exactly what they are getting into when they respond to the RFP; more explanation may be required from the State when using this solicitation method.

Using Innovative Procurement Methods

The P/T unit does not have developed templates for most innovative procurement methods. An option for a two-tiered evaluation is found in OSP's Professional Technical Services RFP Template which is [located in the secure area of the OSP website](#). The other solicitation methods require OSP's assistance in developing the RFP and making sure it is a good fit for your project. If you require such assistance, please email pt.contracts@state.mn.us.

Section 23: Income Contracts

Income contracts are the reverse of all the contracts discussed earlier in this manual. They bring money into state agency accounts rather than expend money from those accounts. However, they are and SHOULD BE processed as contracts to protect the agency and the state from liability and to clearly define who is responsible for what. These *contracts* have all kinds of names: use permits, leases, rental agreements, etc.; however, they are really contracts. You should check with your assistant attorney general to determine if the "form" you are using provides you with the protection from liability and risk that you need.

You need to ensure that your agency has the authority to accept payment for services it provides and that your accounting office has provided you the instructions necessary to get the funds into the proper account. If you have never done it before, this can be a complex experience.

As with interagency agreements, the actual form used is not as important as what is included in it. Some agencies have specific existing guidance and forms that they use--this guidance and those forms should be used. OSP has provided a model that you can use; however, that model may need to be modified to meet your specific needs and approved by your assistant attorney general and agency contract coordinator BEFORE you proceed to use it.

An indemnification and liability clause IS included in the model. But remember, constitutionally, state agencies cannot indemnify the contractor. And as far as accepting liability for actions related to income contracts, you must first discuss it with your assistant attorney general. In cases where the potential liability is high, it is in the best interest of the state to define very specifically who is liable for what, when, where, how, and why.

Clauses on ownership of materials and intellectual property may be required, depending on what services are required by the contract. Check with your assistant attorney general for assistance.

A data practices clause may have to be included depending on the services the contract requires. This is especially true if you are "taking on work" with individuals or subjects that you do not routinely deal with in your agency. This is a complex area since state agencies are held to a much different standard under the data practices law than nongovernmental entities. For this reason, check this out very carefully BEFORE you begin,

Income Contract

The [Income Contract form](#) can be found in the secure area of the OSP website.

Section 24: Grant Contracts

A grant is a class of contract which provides the transfer of cash or something of value to a recipient to support a public purpose authorized by law. Grant contracts are different from other contracts in many key ways.

Definition

Grants are financial assistance paid or services furnished by a state agency via a third party to an eligible recipient instead of acquiring by professional or technical contract, purchase, lease, or barter property or services for the direct benefit or use of the granting agency.

Grants always involve three parties: 1) the state agency with authority to make the grant, 2) the outside entity who will administer the grant or deliver the service, and 3) the final recipient of the service.

You [should visit the Office of Grants Management website](#) for more information about grants.

Section 25: Barter Arrangements

The term “barter” is defined in *Black’s Law Dictionary* as, “to exchange goods or services without using money.”

With regard to barter agreements, Minnesota Statutes Section [16C.055](#) reads as follows:

Subd. 2. [RESTRICTION.] After July 1, 2002, an agency may not enter into a contract or otherwise agree with a nongovernmental entity to receive total nonmonetary consideration valued at more than \$100,000 annually in exchange for the agency providing nonmonetary consideration, unless such an agreement is specifically authorized by law. This subdivision does not apply to the State Lottery or private aquaculture businesses involved in state stocking contracts.

Section 26: Accessibility and Procurement

Introduction

Minnesota Laws 2009, Chapter 131 (now codified in Minnesota Statutes Chapters 16C and 16E) enacted language requiring the adoption of accessibility standards related to the development and procurement of state information technology services and equipment. The law further provided for the establishment of an advisory committee, the Technology Accessibility Advisory Committee (TAAC), to establish standards for accessibility. The intent of the established legislation was to promote accessibility and ensure that state government information technology is accessible to all citizens and employees.

Adopted Standards

The enacted legislation provided that absent a determination that such would pose an undue burden, the state accessibility standards must incorporate Section 508 of the Rehabilitation Act, United State Code, title 29, section 794d, as amended, and the Web Content Accessibility Guideline, 2.0. In response to this requirement, the State adopted the following standards effective September 1, 2010:

WCAG 2.0 Level AA

- Level AAA compliance is encouraged.

Section 508 Subpart A General

- 1194.3 General exceptions subparts (a), (b), (c) for workstations of State employees, (d), (e), (f) and other exceptions defined in Minnesota law or set forth in State policy.
- 1194.4 Definitions, except definitions of “Agency” and “Undue burden” which are defined in Minnesota State Statute
- 1194.5 Equivalent facilitation

Section 508 Subpart B Technical Standards

- 1194.21 Software applications and operating systems
- 1194.22 Web-based intranet and internet information and application. *(Notes to §1194.22 are to be disregarded, as the profile of WCAG 2.0 cited above applies instead).*

- 1194.23 Telecommunications products
- 1194.24 Video and multimedia products
- 1194.25 Self contained, closed products
- 1194.26 Desktop and portable computers

Section 508 Subpart C Functional Performance Criteria

- 1194.31 Functional performance criteria

Section 508 Subpart D Information, Documentation, and Support

- 1194.41 Information, documentation and support

Frequently Asked Questions

What is Section 508?

In 1998, Congress added Section 508 to the Rehabilitation Act to require that when Federal departments or agencies develop, procure, maintain, or use electronic and information technology (EIT) [*referred to in the State of Minnesota Standards as “information technology” or “IT”*] they must ensure that the EIT allows employees with disabilities to have access to and use of information and data that is comparable to the access and use of information and data by other employees and members of the public.

The federal government defined EIT (48 C.F.R. Part 2.101.) as:

“[a]ny equipment, or interconnected system or sub-system that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by an agency.”

EIT (or “IT” or “information technology”) also includes any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. EIT captures a wide range of hardware, software and content; it includes, but is not limited to, telecommunications products (such as telephones), information kiosks and transaction machines, worldwide websites, multimedia, and office equipment (such as copiers and fax machines).

Section 508 uses the Federal procurement process to ensure that technology acquired by the Federal government is accessible. Implementation of Section 508 was incorporated as an amendment to the Federal Acquisitions Rules (FAR) and became effective June 25, 2001. Additional information on Section 508 is available online at: <http://www.section508.gov/>.

What is Web Content Accessibility Guidelines 2.0 (WCAG 2.0)?

The Web Content Accessibility Guidelines (WCAG) are published by the World Wide Web Consortium, a self-described international community where Member organizations and the public work together to develop Web standards. WCAG 2.0 covers a wide range of recommendations for making Web content more accessible. The guidelines are intended to make content accessible to people with disabilities, including blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity and combinations of these. Additional information is available in the [WCAG 2.0 guidelines](#).

Process for PT Contracts

As part of the implementation of the State of Minnesota Standards, a subgroup of the TAAC called the Procurement Accessibility Workgroup was tasked with developing evaluation techniques and tools to incorporate those standards into the procurement process. In order to do so, the workgroup evaluated the procurement implementation methods of the federal government and numerous states. While the workgroup did not find an existing model that it believed would allow for successful implementation in Minnesota, the research proved beneficial in narrowing-down the factors and considerations needed for implementation. As a first step, the group began to establish a list of key *market factors* as a means of identifying the existence and strength of accessible products and services in the marketplace. The workgroup believed that an understanding of the marketplace was a prerequisite to a determination of an appropriate procurement methodology. Once the *market factors* were identified, a set of procurement methods then followed that allow the procurement officer to select a process that is most appropriate based on the market for the product or service.

The following are steps required to ensure the degree of accessibility is addressed in IT procurement conducted by state agencies:

STEP 1 – For PT contracts estimated to exceed \$25,000, determine if the accessibility standards apply to your transaction.

How do I know if the standards apply? There are 8 Sections that are part of the adopted standards. If your PT service contract results in the development of any of the products below, or if your PT contract involves the purchase of any of these products as part of the contract, the standards apply.

| | |
|-----------------|---|
| Section 1194.21 | Software Applications and Operating Systems |
| Section 1194.22 | Web-based Internet Information and Applications |
| Section 1194.23 | Telecommunications Products |
| Section 1194.24 | Video and Multi-media Products |
| Section 1194.25 | Self-Contained, Closed Products |
| Section 1194.26 | Desktop and Portable Computers |
| Section 1194.31 | Functional Performance Criteria |
| Section 1194.41 | Information, Documentation and Support |

The following are examples of common PT service contracts where the standards apply:

- Design and development of a website
- Development of a web-based application
- Development of custom software
- Creation of web-based training
- Creation of computer-based training
- Production of a training or informational video
- Modification or customization of commercial off-the-shelf software

If your answer to any of the following is “yes”, the standards likely apply:

- Would you normally route this procurement through OET?
- Does it involve a service that will result in something that transfers information such as a website, a video, a webcast, etc.?
- Does it involve the design or development of software or a system that will be accessed by people?

If you determine that the standards do not apply to your transaction, you do not need to include any language in your RFP regarding accessibility and you can skip that section of the Certification form.

Related Questions:

If my procurement is estimated to be under \$25,000, does this mean that I can forget about the accessibility standards? No! Maximizing accessibility is the goal for all dollar levels of procurement. While specific language is not mandated under \$25,000, acquiring accessible services and products is a best practice and encouraged. Procurement officials are encouraged to insert appropriate accessibility language (determined by following the remainder of the steps in this guideline) regardless of the dollar level involved.

STEP 2 – Determine whether any exceptions apply that would provide a valid and approved basis for not including accessibility standards in the solicitation.

IF NO EXCEPTION APPLIES, proceed to the next step.

IF AN EXCEPTION APPLIES, you do not need to include any language in your RFP regarding accessibility. You must complete the section in the Certification form that identifies which exception you believe exists and submit a memo with your Certification form describing the circumstances. If your exception is based on the belief that complying with the standards will pose an “Undue Burden” a separate form needs to be filled out in lieu of the memo. *An Undue Burden Determination Form is available at:*

<http://www.mmd.admin.state.mn.us/doc/AccDetermination.doc> or
<http://www.mmd.admin.state.mn.us/pdf/AccDetermination.pdf>.

Related Questions:

What types of exceptions are there? The list of exceptions is relatively small. It includes such things as an exception related to State security issues, emergency contracts or instances where making a product accessible would alter the fundamental nature of the product. [The Accessibility and Usability of Information Technology Standard](#) contains a complete table of exceptions and what they mean.

Does my request for an exception need to be approved? All exceptions except for “Undue Burden” are subject to formal approval by the Office of Enterprise Technology and the Department of Administration. Agencies have the authority to render an “Undue Burden” determination; however, this determination will be reviewed by OET, questioned and/or overruled if appropriate.

STEP 3 – Determine which of the standards are applicable.

How do I know which ones are applicable? The best way to figure out which of the standards apply is to utilize the Buy Accessible Wizard which is a tool that will take you through a series of yes/no questions, determine for you which standards apply, and will give you a print-out to include as part of your RFP. The Wizard has many “Quick Links” that are available for use that will provide a printout of applicable standards by subject matter. Here is a link to the Buy Accessible Wizard: [GSA Buy Accessible Wizard](#)

STEP 4 – Determine which procurement method is most appropriate for the transaction by using the [Accessibility Matrix or the Accessibility Matrix Supplement](#) in the secure area of the OSP website.

Once a determination is made, check the appropriate box in the Certification form as to which procurement method has been selected.

Related Questions:

What do you mean “which procurement method”? There are 6 procurement methods that have been outlined for you on a tool called the “Accessibility Matrix”. The methods range from listing all the standards that have been deemed applicable by the Wizard as pass/fail requirements (meaning that if the vendor does not agree to be compliant, the response will be rejected) to listing all the applicable standards and then comparing the degree to which the various vendors agree to meet the requirements and scoring the responses accordingly.

For most PT service contracts, it is anticipated that a pass/fail scoring methodology will be the appropriate choice in many instances because we are often dealing with situations where the product is being designed and or created (which can be built according to requirements) as opposed to products that already exist.

How do I know which of the 6 methods is most appropriate? The quality of your RFP and the success you will have with your PT procurement process largely depends on the level of effort expended in determining the appropriate procurement method. This is the point where some analysis is required to determine whether there is a mature and robust market that can accommodate an accessible product or whether the market is weak. The procurement method you select is largely dependent on the status of the market with respect to the PT service and/or resulting product you are attempting to procure.

How do I do market research? There are many ways. A comprehensive list developed by the FAA Section 508 Procurement Team is attached at the end of this chapter. The method listed

first, and a very efficient way to do market research is through the Buy Accessible Wizard. Once you have a solid idea about the state of the market for the service or product you are acquiring, utilize the Matrix to determine which procurement option is appropriate. If you intend to utilize a procurement option that is listed as “not preferred” or “not recommended” you must prepare the required documentation that details the rationale for selecting this method, and in the case of an option that is “not recommended”, obtain approval from OSP to move forward with that approach.

STEP 5 – Complete the Certification form and Build your RFP.

With the applicable standards identified and the procurement method determined, it is now time to complete your Certification form and build your RFP. The following paragraphs entail specific language for each of the 6 possible procurement methods. For your convenience, the sample RFP on the OSP website contains all 6 of the options requiring you to delete the options that you did not select. Remember to include the GPAT that you obtained by using the Wizard as an attachment to your RFP. This will identify the applicable standards that will be required or scored as part of the evaluation process.

[Option 1 – Full accessibility is a pass/fail for all applicable requirements]

Proposals must comply with all of the “Applicable” IT Accessibility Standards as identified in the attached Government Product/Service Accessibility Template (GPAT). Proposals that do not fully comply with the identified standards will be rejected and will receive no further consideration.

[Option 2 – Partial accessibility is a pass/fail (i.e., 7 of 10 requirements)]

Proposals must comply with ___(insert number) of ___(insert number) of the “Applicable” IT Accessibility Standards as identified in the attached Government Product/Service Accessibility Template (GPAT). Of the ___(insert number – same as first one) requirements that must be met, the following must be included: [Identify which are mandatory]. [NOTE: the preceding sentence is optional, but recommended. There will be standards that are more significant or applicable than others and some that you would not want the contractor to opt not to select.] Proposals that do not meet the required number of standards or the specific standards required will be rejected and will receive no further consideration.

[Option 3 – Dual responses are obtained for comparison]

This option contemplates that dual Request for Bids will be conducted (one with accessibility requirements and one without for the purpose of conducting a comparison.) This option is not applicable to instances where an RFP is being used and would not be used in a PT process.

[Option 4 – Full/partial accessibility is a pass/fail and is further scored as a % of points]

Proposals must comply with all of the “Applicable” IT Accessibility Standards as identified in the attached Government Product/Service Accessibility Template (GPAT). Proposals meeting this and other pass/fail criteria will be further evaluated based on the evaluation criteria specified in this RFP. [In the “Evaluation Factors” section, you must add evaluation criteria for accessibility. You could title it “Accessibility of Services or Products Provided” and indicate a weight for this criteria.]

[Option 5 – Accessibility is not scored as a pass/fail, but as a percentage of points]

This option does not include accessibility as a pass/fail, so there would be nothing in the pass/fail section of the RFP regarding accessibility. Be sure to include accessibility as one of the evaluation criteria in the RFP along with a specified weight.

[Option 6 – Proposals are shortlisted prior to scoring accessibility as a % of points]

The language for this option related to short-listing is already present in the generic “Proposal Evaluation” language. So, there is nothing about accessibility in the pass/fail section that you need to add if you are using this option. Be sure to include accessibility as one of your evaluation criteria in the RFP along with a specified weight.

Related Questions:

What if I am not doing an RFP, but rather am making a single source request? What do I do then? The fact that a vendor may be a single source vendor, does not bear upon whether the services provided must result in an accessible product. The only way that accessibility language would not go into an IT-service related contract with a single source vendor would be if a separate exception applies, such as a security issue, etc. Unless a case for an exception can be made, the relevant accessibility standards should be determined using the Wizard, and inserted into the contract as a requirement.

STEP 6 – Send documents to OET for review and approval. Documents will also be reviewed by OSP.

Common Methods for Market Research

- Visiting the [Buy Accessible website](#): Government procurement personnel will be able to search the site by specific product or service and see all vendors who have provided links. They can use the links to reach the template information and product and service descriptions necessary to complete the market research. Vendor participation is voluntary.
- Contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements.
- Reviewing the results of recent market research undertaken to meet similar or identical requirements.
- Publishing formal requests for information in appropriate technical or scientific journals, business publications, or in electronic data exchanges.
- Querying Government databases that provide information relevant to agency acquisitions.
- Attending trade shows and receiving capability and “futures” briefings from original equipment manufacturers and developers.
- Obtaining source lists of similar items from other agencies, contracting activities, trade associations, or other sources.
- Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers (or available on-line).
- Using technical analysis publications.
- Using the Internet to post requests for information or to search for technical information.
- Reviewing Government-managed web sites that provide information on products and pricing (often available from existing Government contracts).¹

¹ Examples include *GSA Advantage!* (Available through <http://www.fss.gsa.gov/>) and the Commercial Advocates Forum (<http://www.cadv.org>) <http://www.imart.org> can be used to locate potential sources by industry, product description, Federal Supply Classification, or Federal Supply Group.

Revisions

July 2023 - Revised for formatting, accessibility and content. Content related changes include updates to equity select information, the addition of innovative solicitation options and adjustments to the content related to evaluation and negotiation.