

# **STATE OF COLORADO PROCUREMENT MANUAL**



**ISSUED BY THE:**

**COLORADO DEPARTMENT OF PERSONNEL &  
ADMINISTRATION**

**By The**

**Office of the State Controller, State Purchasing Office,  
Department of Human Resources, and Office of the State Architect**

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## STATE OF COLORADO PROCUREMENT MANUAL

# ACKNOWLEDGMENTS

The State of Colorado Procurement Manual (Manual) is the combined effort of State Employees who volunteered their time and talents to improve the State Procurement process.

### CONTRIBUTORS:

Barbara Sohnen	Office of the State Controller, DPA
Beth Christianson	Metro State College
Dana Stansbury	Office of the State Architect, DPA
Denise Kincaid	State Purchasing Office, DPA
John Utterback	State Purchasing Office, DPA
Joi Simpson	Division of Human Resources, DPA
Kevin Edwards	Office of the State Controller, DPA
Kirsten Jahn-Elfton	Division of Human Resources, DPA
Lea Ann Baker	Office of the State Controller, DPA
Linda Shubow	Office of the Attorney General
Markie Davis	Office of Risk Management, DPA
Richard Brough	Department of Natural Resources
Robert Jaros	Office of the State Controller, DPA
Thirza Kennedy	Governor's Office of Information Technology
Yvonne Anderson	Office of the State Controller, DPA

### SPECIAL CONTRIBUTORS:

Brenda Lujan	Office of the State Controller, DPA
RaLea Sluga	Office of the State Controller, DPA

### CHIEF EDITOR:

Kevin Edwards	Office of the State Controller, DPA
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# CAVEAT

Every attempt is made to update the information presented in this Manual. For additional information, refer to the Authorities listed at the beginning of each section, or contact the appropriate office(s), i.e., Division of Human Resources, State Purchasing Office, and/or Office of the State Controller. Subsequent revisions to State and federal statutes, rules, and laws may conflict with the information presented herein. In such situations, the statutes, laws, and rules control. This Manual is a guide and is not an ultimate authority or legal advice. General principles of law are discussed herein, but these are only general principles subject to many exceptions. If this Manual does not address a specific situation, consult with legal counsel or contact the appropriate Central Approver.

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## CHAPTER I. OVERVIEW & INTRODUCTION

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- CRS §§24-50-501 et seq., *Contracts for Personal Services*
- CRS §§24-101-101 et seq., *Procurement Code*
- Fiscal Procedures Manual Chapter 1, §4, *Encumbrance Issues*
- Fiscal Rule 2-2, *Commitment Vouchers* (1 CCR 101-1 State Fiscal Rules, Chapter 2, *Disbursements*)
- Fiscal Rule 3-1, *State Contracts* (1 CCR 101-1 State Fiscal Rules, Chapter 3, *Contracts*)
- Policies of the Office of the State Controller
- Procurement Rules (1 CCR 101-9)
- OMB Circular No. A-133, *Audits of States, Local Governments, and Non-Profit Organizations*
- State Personnel Rules–Chapter 10, *Personal Services Agreements* (4 CCR 801-1)

### 2. PROCUREMENT CORE PROCESSES

#### A. Processes

There is no single “right” way to purchase and contract; various types require different practices, processes, and strategies. The contents of this Manual are not appropriate in every situation. The nature and level of risk associated with individual Procurements vary depending on the type of transaction and the relations of the Parties. Procurement is the coordination and management of four related processes:

##### i) Planning

Planning includes defining the need, developing the means and methods to meet the need, assessing risks, and allocating resources.

##### ii) Purchasing

Purchasing is a two-stage process:

(a) Preparation of the Solicitation and Vendor selection includes researching, selecting the appropriate Solicitation method, preparing the Solicitation, and complying with all related legal requirements; and

(b) Evaluation and Award includes pricing analysis, evaluation, and Award.

##### iii) Contract Formation

Contract formation includes establishing performance measures, negotiating terms and conditions, initial drafting and revising, and signing (Execution).

##### iv) Contract Administration

Contract Administration includes actual Monitoring of Contracts, communicating concerns, and taking corrective actions to ensure successful completion of Contracts.

#### B. Participants

The number of State participants in the contracting process changes depending on a project’s size and complexity. Agencies/IHEs should identify necessary staff and designate a project manager (and any assistants) early in the Procurement process. Personal and team responsibilities should be clearly defined, including assigning individual and team goals, tasks, outcomes, Quality levels, acceptable performance standards, and completion deadlines. Procurements involve a variety of personnel performing distinct functions and roles, including:

i) Accounting, budget, and audit;

ii) Agency/IHE Purchasing staff;

iii) Central Approvers (OSC, SPO, DHR, OSA, OIT, and OAG);

iv) Executive and organizational management;

v) Legal;

vi) Planning and project (including Vendor) management;

vii) Program staff (Subject Matter Experts and monitors); and

viii) Quality control/assurance.

### **3. PURPOSE OF THIS MANUAL**

The scope of this Manual is limited to the Procurement of Goods and/or Services from a Party who is not on the State's payroll. Such Parties may be individuals or legally recognized entities, for example, a Corporation. "Self-provided" or "in-house" Services performed or provided by State Employees are not covered by this Manual.

Procurement-related questions not answered herein should be first directed to the central Procurement office of each Agency/IHE. Central Procurement staff can answer most general and Agency/IHE specific questions and can obtain answers to the remainder by contacting the appropriate Central Approver.

#### **A. Framework and References**

This Manual provides a framework for Agency/IHE staff responsible for Procurement (Purchasing and/or contracting functions and related decisions) and for improving Procurement-related processes and practices. This Manual also provides references to statutory, regulatory, and guidance materials that affect the Procurement process, which it supplements, but does not overrule or replace (Agencies/IHEs must independently develop sound business procedures in accordance with them).

#### **B. Contract Managers**

This Manual describes the duties of Contract Managers, including how to select Vendors, develop and negotiate a Contract, and Monitor Vendor and Subcontractor performance. The primary responsibilities of Contract Managers include:

- i) Participating, as necessary, in developing the Solicitation and writing Contracts;
- ii) Monitoring Vendor progress and performance to insure that Goods and Services provided conform to Contract requirements;
- iii) Managing any State property used in Contract performance;
- iv) Making payments consistent with Contract requirements;
- v) Exercising State Remedies, as appropriate, where Vendor performance is deficient;
- vi) Resolving Disputes in a timely manner; and
- vii) Maintaining appropriate records.

### **4. HOW THIS MANUAL IS ORGANIZED**

This Manual includes the entire Procurement process from the conception of an idea/need to contract through Termination and a glossary defining terms of art used herein. Separate Chapters are devoted to each of the processes listed in Chapter I §2(A)(i-iv), above; however, as all of these processes are inter-related, Procurement personnel should be familiar with the content of each Chapter. References and links to authorities and sources are provided to assist in locating information omitted from this Manual. A glossary explaining terms used herein and related concepts is included as a reference tool in Chapter VI, *Glossary*, of this Manual.

### **5. ETHICAL STANDARDS AND POLICIES**

#### **A. State Officials and Employees**

State officials and Employees are responsible for acting properly and prudently with public funds, and should avoid acts which are or appear to be improper. Professional conduct is crucial for State Employees involved in Procurement as they obligate expenditures of State funds. Hints of impropriety are detrimental to the integrity of the entire Procurement process and erode public trust. Therefore guidelines and rules are created to prevent actual and potential Vendors from influencing State officers or Employees in discharging their official duties and to prevent compromise of State officials' and Employees' independent judgment. All Agency/IHE Employees, Vendors, and potential Vendors should adhere to the following policies and procedures:

##### **i) Ethics Policy**

State officers and Employees shall not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any Obligation of any nature that may conflict with the proper discharge of their respective duties in the public interest.

**ii) Conflict of Interest**

Agencies/IHEs should require all Bidders to Solicitations to disclose any actual or potential conflicts of interest that may arise if they are selected to perform the Obligations solicited, both before selection and throughout the term of any Contract.

**iii) State of Colorado Procurement Code of Ethics**

The State's Procurement Advisory Council promulgated a State Procurement Code of Ethics setting forth minimum standards of conduct for State Purchasing staff. It provides as follows:

- (a)** Any person employed by the State of Colorado who purchases goods and services, or is involved in the State purchasing process is be bound by the Code of Ethics and shall:
- (01)** Avoid the intent and appearance of unethical or compromising practice in relationships, actions, and communications.
  - (02)** Demonstrate loyalty to the State of Colorado and the State organization where employed by diligently following the lawful instructions of the State of Colorado while using professional judgment, reasonable care, and exercising only the authority granted.
  - (03)** Conduct all purchasing activities in accordance with State laws and remaining alert to and advising the State organization where employed regarding the legal ramifications of purchasing decisions.
  - (04)** Refrain from any private or professional activity that would create a conflict between personal interests and the interests of the State of Colorado (CRS §18-8-308).
  - (05)** Identify and strive to eliminate participation of any individual in operational situations where conflicts of interest may arise.
  - (06)** Not solicit or accept money, loans, credits, or discounts for personal use and shall avoid the acceptance of personal gifts, entertainment, favors, or services from present or potential suppliers which might influence, or appear to influence purchasing decisions.
  - (07)** Promote positive supplier relationships through impartiality in all phases of the purchasing cycle.
  - (08)** Display the highest ideals of honor and integrity in all public and personal relationships in order to merit the respect and inspire the confidence of the State of Colorado and the public.
  - (09)** Provide an environment where all business concerns, large or small, majority or minority owned, are afforded an equal opportunity to compete for business with the State.
  - (10)** Enhance the proficiency and stature of the purchasing profession by adhering to the highest standards of ethical behavior.

In addition to the above, some Agencies/IHEs have internal conflict of interest provisions applicable to their Employees, which should also be reviewed and followed. The complete Procurement Code of Ethics is available on SPO's website at:

<https://www.gssa.state.co.us/purchasi.nsf/444e9694db1e7b81872564dc006ee0a9/faa615f8671338718725654700663793?OpenDocument>.

**B. Vendors**

In many, but not all instances, Vendors should not be allowed to assign any portion of their performance to third parties such as Subcontractors, without the prior written consent of Agencies/IHEs. Analyze Independent Contractor issues, especially with sole proprietors and one-person legal entities such as LLCs, corporations, etc, when deciding whether to limit assignments. If Assignment is allowed, Vendors should remain responsible for the performance of the Contract notwithstanding any such Assignment or subcontract. This ensures that the evaluated and selected Vendors remains responsible for performance and that proposed transactions may be reviewed for compliance with the conflict of interest and related-Party provisions.

## CHAPTER II. PLANNING

### 1. AUTHORITIES

- CRS §24-30-202, *Procedures–vendors and warrants–rules-penalties*
- CRS §24-50-504, *Personal services contracts not implicating state personnel system*
- Fiscal Rule 2-2, *Commitment Vouchers* (1 CCR 101-1 State Fiscal Rules, Chapter 2, *Disbursements*)
- Fiscal Rule 3-1, *State Contracts* (1 CCR 101-1 State Fiscal Rules, Chapter 3, *Contracts*)
- Fiscal Procedures Manual, Chapter 1, §4, *Encumbrance Issues*
- OMB Circular A-133, *Audits of States, Local Governments, and Non-Profit Organizations*

### 2. PROCUREMENT TEAM

Procurement includes the entire core processes set forth in Chapter I.2(A)(i-iv), *Overview & Introduction-Procurement Core Processes-Processes*, of this Manual. Staff (internal and external) involved in the Procurement process include program, Purchasing, budget, Human Resources, contract, and Central Approvers as required in certain circumstances. Program staff provide input regarding technical requirements, serve as the Subject Matter Experts, and are the first-level monitors of Contract performance. Purchasing staff assist in the preparation of SOWs, draft and issue Solicitations, conduct and Award the Solicitation, draft and issue POs, and review Contracts to ensure that Purchasing statutes are followed and that the purchase is handled in a fair and competitive environment. Human Resources staff ensure that State classified Employees are not displaced as a result of a Personal Services Contract, offer guidance to help mitigate direct or indirect impacts, and verify Independent Contractor status. In addition, Human Resources can provide guidance on how to evaluate potential contracting benefits and disadvantages and whether it is appropriate to outsource or perform Services in-house. Contract staff prepare and negotiate final Contracts and are the second level monitors which review the Monitoring activities of program staff. The OCA is the third level and final monitor and oversees all Contract Management. Purchasing and contract staff may function as a single unit or operate as separate units, depending on the size and organization of the Agencies/IHE.

Designated program staff should start by determining who should be involved in the Procurement. Once selected, this “Procurement team” should be involved early in the process to obtain the maximum benefit from the valuable information each member can provide, including timelines, constraints, best practices, and procedures. See Chapter V.2(C), *Contract Administration-Introduction to Contract Administration-Monitoring the Contract-Who Does This?*

### 3. NEEDS ASSESSMENT

Initial needs assessments are used to assist the Procurement team in overall planning and addressing Personal Services review requirements. Clear definitions of contracting objectives and purposes assist the Procurement team later in developing SOWs and Solicitations, negotiating and drafting Contracts and related documents, and verifying Vendor performance.

Team members should never assume that Vendors understand an Agency/IHE’s business. Business requirements which are documented, communicated, and understood by Vendors help ensure the success of a Contract. Agency/IHE practices are frequently incorporated into SOWs, which generally require staff input.

### 4. CONTRACTING OBJECTIVES

Each Procurement is different and the description of the objectives, assumptions, and constraints varies and defining them can be quite complex. Agencies/IHEs may find that individuals on the Procurement team hold different views. Answering the following questions will aid the Procurement team in clarifying and harmonizing potential divergent objectives and interests:

- What does the Agency/IHE specifically need?
- Why must the need be fulfilled and how does it benefit the Agency/IHE?

- When must the need be fulfilled?
- What is the duration of this need?
- How will the Agency/IHE know when the need has been met?
- How is the business transaction expected to work?
- Who can fulfill the need? Can another Agency/IHE meet this need?
- Do Vendors have all the information needed to submit a complete proposal?
- Do the contracting objectives, assumptions, and constraints make sense? Are the objectives, assumptions, and constraints described too broadly or too narrowly?

## **5. RESEARCH AND COST ESTIMATES**

### **A. Initial Research**

Some Procurements require initial research, for which Purchasing staff can provide invaluable aid. They may know of Agencies/IHEs that have engaged in Procurements similar to the one being planned, who are willing to share lessons learned. Other sources for conducting research include:

- i) Reviewing websites for information, discussion, and forms; and
- ii) Asking universities, trade associations, and professional organizations to identify industry practices, methods, standards, and rules. Purchasing staff can also publish a Request for Information (RFI) asking potential Vendors to identify information regarding the availability, features, or measures for the purchase of Goods or Services that will assist Agencies/IHEs during the Procurement process.

### **B. Estimated Costs**

Agencies/IHEs should develop an estimated Cost for the needed Goods and Services during the Procurement planning stages. Estimated Costs aid in determining which Procurement method to use and provide an idea of the Quantity of Goods or Services that can be ordered. Estimated Costs should be developed by State staff with Knowledge in the subject area, with assistance from Purchasing staff as needed.

### **C. Pre-Solicitation Discussion**

Agencies/IHEs may contact potential Bidders pre-Solicitation to discuss Procurements if conducting research and/or developing Cost estimates; however, Agencies/IHEs should contact Purchasing staff first for guidance as this approach has risks. In general, when contacting potential Bidders, the Procurement team should:

- i) Solicit information from more than one potential Bidder and advise them in advance that current interest is strictly for research purposes and formal requests for pricing or other information will be made via appropriate Solicitation processes; and
- ii) Not give potential Bidders a competitive advantage, including providing project or department specific information to some but not all potential Bidders or by including one potential Bidder's specifications in the resulting Solicitation document. To avoid such situations, ask all potential Bidders the same questions and do not answer any questions from a potential Bidder that could provide an unfair advantage.

## **6. AUTHORITY AND BUDGET**

State Procurements must be authorized and supported by available funds. To ensure authority and funding exists before proceeding to the next phase of the Procurement process, the Procurement team should answer the following questions:

### **A. Authority**

Is the activity expressly permitted? Team members should check the governing statutes to verify authority to contract for the Services. Footnotes in the Long Bill generally do not constitute legal authority.

### **B. Fund Availability**

Are funds available? Team members should check the budget or discuss the Procurement with an Agency/IHE budget analyst to verify that funds are available and the Agency/IHE has spending authority. If funds will become available at a later date, for example at the beginning of the Fiscal Year, the team members should ask Agency/IHE budgeting, Purchasing, and accounting staff if Vendor selection and Contract preparation can be done before they are available.

**C. Approvals**

Have the proper authorities approved the Procurement? Team members should check with the appropriate authority, for example directors, boards, or commissions, for approval. If the project is part of an integrated Agency/IHE plan, a computer project for example, the team members should check with those responsible for the plan. Checking with the appropriate authority in advance avoids wasting time and effort.

**7. RISK MANAGEMENT**

The Procurement process should include management of the risks, which are as varied as are the types of Contracts to which they are attendant. Risk assessment is a continuing process and risks should be reviewed and re-evaluated by Contract Managers during Contract formation and on a continual basis until the Contract is fully performed and final payment is made. Successful Contract Management requires allocation of scarce resources to Monitor risk.

Preliminary risk assessments should be conducted to make an initial determination about the level, type, and amount of management, oversight, and resources required to plan and implement Contracts from beginning to end. As the risks associated with Procurements increase, the level and degree of sponsorship, participation, and oversight by executive management should increase correspondingly; for example, high-risk Contracts, such as finance Contracts, should involve significant executive management participation while low-risk Contracts, such as routine purchases of Goods or Services, may not require any executive oversight.

All Agency high-risk Contracts require approval by the OSC and all IHE high-risk Contracts require approval by the IHE's General Counsel. For details regarding OSC specific risk review requirements, see OSC Policies, *Review and Approval of State Contracts–Delegated Agencies* and *Review and Approval of State Contracts–Delegated Institutions of Higher Education*.

**A. Process**

Risk management is a three part process:

- i) Identifying risk;
- ii) Quantifying and analyzing the likelihood and potential impact, of the identified risk; and
- iii) Limiting or lessening the identified risk.

Risk categories common to Procurement include product, process, financial, performance, and schedule risks.

**B. Factors**

Identifying and quantifying risks related to Procurements cannot be reduced to a formula; risk determination is based on subjective criteria. Some factors useful in identifying risk levels include:

- i) The complexity and subject matter of the Procurement;
- ii) The dollar amount;
- iii) Whether the Procurement will result in a major Contract;
- iv) The anticipated payment methodology;
- v) Whether the results of the Procurement will impact the general public or only the Agency/IHE;
- vi) Vendor experience with this type of Procurement;
- vii) Whether the Procurement includes "cutting edge" development or technology;
- viii) Time constraints or the expected duration of the Procurement; and
- ix) The type, availability, or experience of State staff required to implement the objectives of the Procurement.

**C. Resource Allocation**

The size, complexity, and sensitivity of Contracts dictate the amount of resources devoted to them, although not all large Contracts are complex and risky and not all small Contracts are simple and risk-free. The Procurement team should consider the following when assessing Contracts:

- i) The size of the Contract is measured in terms of its dollar value;
- ii) The complexity of the Contract is measured in terms of its SOW and potential risk; and
- iii) The sensitivity of the Contract is measured in terms of who it impacts; e.g. the public, students, children, etc.

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Table II-6 below provides examples of various degrees of risks associated within specific Procurements:

**Table II-1-Example of Procurement Risk Factors**

<b>CONTRACT FACTOR</b>	<b>LOW RISK EXAMPLES</b>	<b>HIGH RISK EXAMPLES</b>
Complexity	Film processing Services	Service Contract for software development program
Dollar amount	\$500	\$1,000,000
Payment methodology	Firm fixed-price	Cost plus % of savings vs. Cost reimbursement
Experience of Agency staff	Office supplies	Outsource IT functions vs. New program that's never been performed
Impact to public or Agency	Overnight express mail	Outsourcing of foster care management Services vs. Janitorial Services
Time constraints or Contract duration	14 day delivery of paper	Implementation of new program to meet legislative mandate

**8. INSURANCE REQUIREMENTS**

Vendors are required to maintain certain types and minimum limits of insurance, which are set forth in the OSC Model Contracts. Any variation from these requirements requires the approval of the State Office of Risk Management. This Policy ensures the selection of responsible Vendors and adequate protection of the State. Vendors should carry the following types of insurance: commercial general liability, professional liability (where applicable), automobile liability, and workers' compensation. See Chapter IV §17, *Insurance*, of this Manual for details.

**9. APPROVALS**

Fiscal Rule 3-1 §7 (revised 1/1/09), *State Contract Approvals*, lists who is required to approve State Contracts. It provides as follows:

**Quote II-1-FR 3-1 §7**

**7. STATE CONTRACT APPROVALS**

The chief executive officer of an Agency or Institution of Higher Education, or authorized delegate, shall sign all State contracts on behalf of the Agency or Institution of Higher Education. An Agency or Institution of Higher Education, at its discretion, may require such additional internal signatures as it deems proper. The Agency or Institution of Higher Education shall obtain all required approvals and signatures and retain documentation thereof in its files for the period specified in State Controller Policy entitled *Records Retention for Contracts*. Unless an Agency or Institution of Higher Education is exempted by statute or has delegated approval authority, prior approval of the State contract by one or more of the Central Approvers is required as follows:

7.1 Capital Construction and Controlled Maintenance contracts require the approval of the State Architect or delegate, unless otherwise exempted by statute or waived by the State Architect. See CRS §24-30-1303(1)(d).

7.2 Central Services contracts require the approval of the Director of the Division of Central Services, Department of Personnel and Administration, or delegate, for all Agencies located within Adams, Arapahoe, and Jefferson counties and the City and County of Denver. Institutions of Higher Education are exempted from this requirement. See CRS §24-30-1104(1).

7.3 Contingency-Based contracts require the approval of the Office of State Planning and Budgeting. See CRS §24-17-204.

- 7.4 Debt Collection Services contracts require the approval of the State Controller or delegate. See CRS §24-30-202.4.
- 7.5 Financial Information contracts used by an Agency or Institution of Higher Education to record financial transactions and information, develop financial reports, or prepare financial statements require the approval of the State Controller. See CRS §24-30-202(12).
- 7.6 Information Technology contracts require approval by the Governor's Office of Information Technology as follows:
- 7.6.1 Services under an Information Technology staff augmentation price agreement—any dollar amount; and
  - 7.6.2 All other Information Technology projects—over \$10,000.
  - 7.6.3 The following are exempted from these requirements under CRS §24-37.5-102(5): Legislative Department, Judicial Department, Department of Law, Department of State, Department of Treasury, and State-supported Institutions of Higher Education.
- 7.7 Legal Services contracts require the approval of the State Attorney General or delegate. See CRS §24-31-101.
- 7.8 Personal Services contracts require the approval of the State Personnel Director or delegate. See CRS §24-50-501, et seq.
- 7.9 Real Property contracts, including leases where the Agency or Institution of Higher Education is the tenant, easements, and rights-of-way contracts, require the approval of the State Architect/Director of Real Estate Programs, Department of Personnel and Administration, or delegate, unless otherwise exempted by statute. Real properties administered by the State Board of Land Commissioners, Division of Wildlife, Division of Parks and Outdoor Recreation, and Department of Transportation, and contracts relating to such real properties, are exempted from this requirement. See CRS §24-30-1303.
- 7.10 Utility Cost-Savings contracts require the approval of the State Personnel Director or delegate. See CRS §24-30-2003(1)(b).

See Central Approver's Roles included in Chapter VII §1, *Supplemental Materials*, of this Manual for further description of each Central Approver function and authority.

## **10. PERSONAL SERVICES REVIEW REQUIREMENTS**

All Contracts for Services, regardless of type, require Personal Services review and approval. The State Constitution exempts Intergovernmental Contracts, attorneys, and the judicial branch from Personal Services review. Government Contracts include cities, counties, sovereign and foreign governments, public schools, and those positions exempted from the State personnel system, e.g., professors and officers of IHE. It is strongly recommended that Solicitations be reviewed and approved by Human Resources before Solicitation or publication. See further:

- CRS Title 24, Article 50, Part 5, *Contracts for Personal Services*;
- State Personnel Board Rules and Personnel Director's Administrative Procedures (4 CCR 801), including Chapter 10, *Personal Services Agreements*; and
- *Technical Assistance—Personal Services Contracts* prepared by the Division of Human Resources in the DPA.

The State Constitution creates a preference for the performance of continuing labor needs by State personnel system Employees, but does not specify which Services must be performed by State Employees. CRS Title 24, Article 50, Part 5, *Contracts for Personal Services*, provides the framework for determining if State government functions may be outsourced, and Chapter 10 of the State's Personnel Board Rules and Personnel Director's Administrative Procedures (4 CCR 801), sets forth additional mandatory requirements when labor needs are outsourced. A complete copy of the Personnel Board



Rules and Personnel Director's Administrative Procedures is available through DHR's website at: <http://www.colorado.gov/cs/Satellite/DPA-SPB/SPB/1213608768055>.

All Personal Services Contracts, regardless of the type, must be accompanied with the Personal Services Certification Form, which may include the Personal Services Business Case and Cost Analysis to outsource the Service. Program staff must complete and sign off on the form, and the Human Resources delegated program staff must sign off on the completed form to fulfill the statutory requirements. Some Human Resources offices have departmental Waivers excusing identified Services from Personal Services review and approval. Procurement teams should check with their Human Resources office to inquire about such Waivers.

The Procurement team should ensure that Personal Services Contracts do not create an Employee-employer relationship (Contracts with Sole Proprietorships require extra scrutiny). Even if the Contract is appropriate under CRS Title 24, Article 50, Part 5, *Contracts for Personal Services*, it may create issues under other laws governing Independent Contractors; for example, if an Employee-employer relationship is created with Vendors, Agencies/IHEs may be liable for unemployment claims, misclassification penalties, and other Employee-related benefits. The Procurement team should confirm Independent Contractor status before executing a Contract (see definition of Independent Contractor in the Glossary for more information) and seek advice if there is any question about a Vendor's status.

## **11. COMMITMENT DOCUMENT**

Fiscal Rule 2-2, *Commitment Vouchers*, mandates the use of State Purchase Orders as Commitment Vouchers for all purchases over \$5,000 and State Contracts for all Personal Services Contracts over \$100,000. However, Agencies/IHEs should use State Contracts if they will better protect the State's interests than a Purchase Order.

## **12. PURCHASING METHOD**

Chapter III.4, *Purchasing-Vendor Selection Methods-Procurement Rules: Part 2 of Article 103*, of this Manual outlines different methods available for Vendor selection, which must be considered during the planning phase due to the length of time some Solicitation types take to complete, e.g., RFPs take longer than DQs. The Purchasing team should contact the Agency/IHE Purchasing office to discuss the Goods or Services needed. The Purchasing office will want to review a SOW and Cost estimate, and the type of commitment document to determine the Solicitation method.

## **13. LEAD TIME INFORMATION**

Agencies/IHEs should establish internal processes to control work flow and to ensure compliance with State Statutes, Fiscal Rules, and Policies. When establishing such processes, Agencies/IHEs should take the following into consideration:

### **A. Solicitation Drafting**

Drafting Solicitations (DQs, RFPs, or IFBs) takes time and may require assistance from the SPO. Solicitations for Services may require pre-approval from DPA/DHR or delegate.

### **B. Time Frames**

For time frames see Table II-2, *Planning Lead Time*, below.

### **C. Response Time**

Bidders must be given the following minimum periods of time to prepare their Bids/Proposals:

#### **i) DQs**

Solicitations must remain posted for at least three working days on the State Information Disbursement System (BIDS) unless the State Purchasing Director or head of an Agency/IHE Purchasing office determines in writing that a lesser time is required in order to meet an immediate State need.

#### **ii) IFBs (Other than Construction)**

The Bid Opening date shall not be less than 14 calendar days following notice of the Solicitation. See R §24-103-202a-01(e) and CRS §24-103-203(3).

**iii) IFBs (Construction)**

For construction, bidding time is the period of time between the date of the advertisement for Bids and the date set for Bid Opening. In each case, bidding time will be set to provide Bidders a reasonable time to prepare their Bids, but in no event shall this time be less than 14 calendar days. See R-§24-103-202b-02(d) and CRS §§24-103-202(3).

**iv) RFPs**

Bidders are given a minimum of 30 calendar days to prepare and submit their Proposals, unless special conditions or requirements exist necessitating a shorter time as determined in writing by the State Purchasing Director or head of an Agency/IHE Purchasing office; however, such determination shall not have the effect of reducing competition. See R §24-103-203-07 and CRS §24-103-203(3).

**D. Solicitation Evaluations**

Depending on the complexity of the Procurement and evaluation criteria, evaluation timeframes range from a few days to several months. Evaluations may include site visits; proof-of-concept demonstrations; oral presentations; best and final offer discussions; and proposed exceptions to Contract provisions.

**E. Establish Timeline and Responsibility Areas**

Use the information supplied in Table II-12 below to create timelines for specific Procurements. If a Procurement team is assembled, this is a good time to assign responsibilities and tasks between members, program staff, and Procurement staff and to create internal timelines for such tasks.

Each step in the Procurement process, whether internal or imposed by external authorities, adds time to the process. In addition, time for revisions, consultations, Negotiations, drafting, and review by any necessary Central Approvers and/or the OAG should be factored in the timeframe.

The timeframes shown below are suggestions. Agencies/IHEs may set their own lead time requirements. The Procurement team can use the following Table to record Agency/IHE lead times, if applicable, leaving enough time to accommodate unforeseen delays. It often makes sense to determine the desired Effective Date of the Contract first and work backwards to determine the start date for the specific Procurement process.

**Table II-2-Planning Lead Time**

Task	Suggested Lead Time	Agency/IHE Lead Time
Begin preparation of RFP/IFB (30 days before issuing RFP/IFB)	180 calendar days	
Advertise & issue Solicitation (30 days to receipt of proposals)	150 calendar days	
Receipt of Bids/Proposals (allow 20 calendar days for evaluation/Award)	120 calendar days	
Contract Negotiations and Award (allow 30 calendar days to prepare Contract)	90 calendar days	
Submit Contract for internal review (allow about one month for internal approvals/corrections)	60 business days	
Review and approval by Vendors (exact time depends on the Vendor)	1-120 calendar days	
Review and approval by DHR, SPO and SBP (allow 12 calendar days for review by DPA & OIT)	24 calendar days	
Review and approval by OAG (if required)	12 calendar days	
Review and approval by OSC (if required)	5 business days	
Performance begins (Effective Date)	0 days	

#### 14. WRITING STATEMENTS OF WORK AND SPECIFICATIONS

In State Contracts, Vendor Obligations are often called Statements of Work (SOW), even if there is not any “work” being performed in the common meaning of the word. SOWs usually include the following elements, which should be considered in every Contract:

- General description of project;
- Definitions (those not already covered in the Contract’s standard provisions);
- Deliverables (Goods/Services);
- Personnel;
- Testing and acceptance criteria;
- Payment; and
- Time frames and deadlines, including any required by law.

SOWs are critical to Contracts and should include as clear, comprehensive, and concise a statement of the Vendor’s Obligations, i.e. what they are to do, as possible. SOWs should also (a) delineate performance measures for Vendors and the State’s Obligations, if any beyond payment, and (b) to the extent relevant, set forth the how, where, when, and by whom of performance. Clear, comprehensive, and concise SOWs are they key to avoiding Disputes and possible litigation with Vendors. While Vendor responses to Solicitations and/or Grant applications, may prove valuable when developing SOWs, they should not be adopted as the SOW as such responses are not drafted for the State’s protection and often contain “sales” language that is inappropriate in Contracts.

Subject matter experts (SMEs) should be included on the Procurement team involving technical and/or complex products and/or Services. SMEs can provide and explain specific information (often called a “Work Description”) critical to good SOWs; e.g. industry standards, terms of art, specifications, reports, benchmarks, timeframes, and necessary tasks. It may be helpful to ask SMEs to provide an initial draft of SOWs.

Purchasing, Human Resources, and contracting staff should review SOWs early in the process to assist with decisions about Solicitation methods, type of Commitment Voucher (PO or Contract), type of model Contract, address personnel issues (including the business case for contracting), and supply sample documents (IFBs, RFPs, SOWs, business cases, etc.) from similar Procurements, which may provide useful information and save time.

See Chapter VII, *Supplemental Materials*, of this Manual and DHR’s, *Technical Assistance - Personal Services Contracts–Business Case*, available through DHR’s website at:

<http://www.colorado.gov/cs/Satellite?c=Page&childpagename=DPA-DHR%2FDHRLayout&cid=1232982641352&pagename=DHRWrapper>, for further guidance and information.

## CHAPTER III. PURCHASING

### 1. AUTHORITIES

- CRS §24-30-202(2), *Procedures-vendors and warrants-rules-penalties*
- CRS §24-30-1301, *State Buildings*
- CRS §24-101-101 et seq., *Procurement Code*
- CRS §24-102-401, *State procurement rules*
- CRS §24-103-101 through §24-103-402, *Source Selection and Contract Formation*
- CRS §24-103-403, *Cost or pricing data*
- CRS §24-103-501, *Types of contracts*
- Procurement Rules (1 CCR 101-9)
- R §24-102-202, *Division of Purchasing*
- OMB Circular A-21, *Cost Principals for Educational Institutions*
- OMB Circular A-87, *Cost Principals for State, Local and Indian Tribal Governments*
- OMB Circular A-102, *Grants and Cooperative Agreements with State and Local Governments*
- OMB Circular A-110, *Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations*
- OMB Circular A-122, *Cost Principals for Non-profit Organizations*
- 24 CFR Part 85 (Housing and Urban Development)
- 29 CFR Part 97 (Labor)
- 34 CFR Part 80 (Education)
- 41 CFR Part 105-71 (General Services Administration), *The Common Rule*
- 44 CFR Part 13 (Federal Emergency Management Agency)
- 45 CFR Part 92 (Health and Human Services)

### 2. DELEGATION

The State Purchasing Office (SPO) of the DPA has authority to purchase Goods and Services for the State. Agencies wishing to make purchases on their own must obtain Purchasing Delegation from the SPO. Non-delegated Agencies must work through SPO Purchasing Agents to obtain Goods and Services. IHEs, through their governing boards, may elect to be exempt from the provisions of the Procurement Code. IHEs which are not exempt from the provisions of the Procurement Code must obtain Purchasing Delegation from the SPO. The Procurement Code does not apply to the State's Judicial or Legislative branches.

The SPO issues Group I and Group II Delegations to Agencies/IHEs. The differences between the two are different dollar thresholds for the types of acquisition methods used to obtain Goods and Services (including construction Services). The dollar thresholds can be found in the Procurement Rules located at: <http://www.colorado.gov/dpa/dfp/spo/index.htm>.

The OSA/State Buildings issues Delegations for acquisitions regarding the selection of architectural and engineering Services based on design needs while actual construction Bids are regulated in the Procurement Code.

### 3. BID INFORMATION AND DISTRIBUTION SYSTEM (BIDS)–CRS §24-102-202.5

#### A. What is BIDS

The Colorado Bid Information and Distribution System (BIDS) is an electronic notification system using commodity categories to notify interested Vendors of State bidding opportunities.

#### B. When to Use BIDS

BIDS is mandated by State statute and must be used for all purchases where competition is solicited. It is permissible to notify Bidders who are not in the system and allow them the opportunity to compete only when the Purchasing delegate believes competition may not be available through BIDS and that belief is clearly stated in the Solicitation document. If, however, adequate competition is received from registered Bidders, only their responses may be considered.

Bidders can register in BIDS by contacting the SPO or using the website:

[www.gssa.state.co.us/VenRegister](http://www.gssa.state.co.us/VenRegister).

**C. Continuing Development**

BIDS has features developed by the SPO since its inception in 1997 and contains tools to assist Purchasing Agents in conducting Solicitations effectively. The SPO has a committee to investigate and discuss the needs of the Vendor community, the State, and the capabilities of the BIDS system. The SPO intends to continue to develop the system as requirements are identified.

**D. Requests for Information**

Requests for Information (RFI) are a tool available in BIDS to assist Purchasing Agents prior to Solicitation and Vendor selection. RFIs help (i) facilitate the gathering of information from Vendors regarding Agency requirements, (ii) with specification writing, (iii) decide how to best proceed, determine potential Costs, and/or (iv) determine feasibility.

**E. Access to BIDS**

Access to BIDS is provided through the SPO. Access to the system shall not be given to individuals other than those approved by the SPO, and user names and passwords shall not be shared.

**4. VENDOR SELECTION METHODS-PROCUREMENT RULES: PART 2 OF ARTICLE 103**

Meeting with program staff to understand their needs is necessary to select the appropriate Solicitation method, which helps to ensure such needs are met. The Procurement team should check that all necessary approvals are received prior to any Solicitation (see Chapter II §9, *Planning – Approvals*, of this Manual). The Procurement team should contact the delegated Purchasing office or the SPO (all non-delegated Agencies/IHEs) and/or view the Procurement Rules online at:

<http://www.colorado.gov/dpa/dfp/spo/index.htm> with questions about dollar thresholds and any Agency/IHE specific Policies. See Chapter IV, *Contract Formation, Drafting, and Approval*, of this Manual and Fiscal Rule 2-2, *Commitment Vouchers*, (available at <http://www.colorado.gov/dpa/dfp/sco/>) for OSC established dollar thresholds above (Agencies/IHEs may establish lower limits) and specific Commitment Vouchers (PO, Contract, or other for small dollar purchases) requirements. Construction Procurements have requirements defined by DPA/SBP (see [www.colorado.gov/dpa/dfp/sbrep/](http://www.colorado.gov/dpa/dfp/sbrep/) or contact DPA/SBP for details). The specific types of permissible Procurement methods are listed below.

**A. Exempt Entities and Procurements-CRS §24-101-105**

The Procurement Code applies to all publicly funded Contracts entered into by all governmental bodies of the State executive branch, with the exception of:

- i) Highway and bridge construction;
- ii) Contracts where public funds are not expended (includes Revenue-generating Contracts);
- iii) Grant specified Contracts, i.e., Contracts where the Vendor is specified in the Grant or gift, unless the Grantor requires that State Procurement Rules apply;
- iv) Procurements by Legislative and Judicial Branches and the four elected officials in the Executive Branch: Governor, Treasurer, Secretary of State, and Attorney General. This exemption is personal to the elected official and may not be used by departments, offices, or Agencies under their direction;
- v) Contracts for Professional Services (Ex. architects, engineers, surveyors, landscape architects, and industrial hygienists). Although exempt from the Procurement Code, competition for such Services must be conducted through the use of a Request for Statements of Qualification (RFQ) per CRS §24-30-1403. RFQs are published on BIDS and Advertised in at least one daily newspaper of general circulation. Price cannot be used as a consideration in the Award (see Chapter III.4(H), *Statements of Qualification/Request for Qualifications (RFQ)*);
- vi) Items bought for resale to the public as determined in writing by heads of Agencies/IHEs Purchasing offices;
- vii) Intergovernmental purchases, (i.e. another State Agency or IHE, political sub-divisions, federal government agencies, counties, cities, other states, or foreign countries);
- viii) Law specified, i.e., Procurements where Vendor selection criteria are specified in law);
- ix) Public printing (excepting Remedies under CRS §24-109), which is covered by CRS Title 24, Article 70, Part 2, *Public Printing*. The SPO has oversight Jurisdiction for the purchase of public printing under CRS §24-70-202;

- x) State Board of Land Commissioners expenditures from its investment and development fund;
- xi) Child support enforcement Procurements by DHS;
- xii) Colorado State Fair Authority purchases; and
- xiii) Federally funded purchases which mandate the application of federal law, rules, and regulations.

**B. When Formal Competition Required—R §24-103-201 & R §24-103-204**

Purchases under the thresholds set forth in R §24-103-204-02 do not require formal competition. Commodities costing between \$10,000 and \$150,000 and Service and construction projects costing between \$25,000 and \$150,000 may be purchased using the document quote process under R §24-103-204-03. The Procurement Rules require formal Solicitation of competitive Bids for Procurements in excess of \$150,000 using the IFB method unless the RFP method is determined in writing by the Purchasing delegate to be the appropriate selection method. Because the above-referenced thresholds are based upon Procurement Rules in effect on October 2009 and may be modified subsequently by the SPO, the Procurement team should confirm the accuracy of the appropriate threshold with the SPO. Note that the threshold for formal competition under the Procurement Rules and the threshold for the required use of Contracts under the Fiscal Rules are different.

**C. State Price Agreements (SPAs)—R §24-102-202-01**

SPAs, also known as State Awards, are Contracts for Goods and Services throughout State government. Solicitations for these Contracts are usually conducted by the SPO with the resulting SPAs available for use by all Agencies/IHEs. Agencies must refer to OIT standards when using SPAs for IT Goods and Services. SPAs require Personal Services review and approval by the State Personnel Director or delegate, unless specifically stated otherwise therein.

Prior to making a purchase of Goods or Services, Agencies/IHEs should check to see if Goods and Services are available through SPAs, which eliminates the need for additional Vendor selection and allows issuance of a PO or Contract under their SPO Delegation Agreement. Delegation alone does not eliminate the requirement for use of SPAs. There are two types of SPAs:

- i) **Permissive SPAs**—Agencies/IHEs are not required to use permissive SPAs; however, SPO recommends their use because: (i) they save time (no Solicitation, publication, or Bid review time) and money (often SPA Vendors have already negotiated a good rate based on guaranteed sales); and (ii) pre-negotiated terms and conditions are already in place. Goods or Services available through a permissive SPA, which are procured through another method, must be submitted for competition as required by the Procurement Rules.
- ii) **Mandatory SPAs**—Agencies/IHEs must use mandatory SPAs unless their Purchasing Directors have requested and received a Waiver from the State Purchasing Director prior to the purchase of Goods or Services covered by a mandatory SPA.

**D. Small Dollar Purchases (Discretionary)—R §24-103-204-02**

Small dollar purchases are below the Procurement Rules' threshold requirement for competition. This threshold varies depending on the Agency/IHE's level of Delegation and the type of purchase being made (Goods, Services, or construction).

**E. Documented Quotes (DQs)—R §§24-103-204-03**

Purchases over established thresholds require formal competition. Procurements above the dollar threshold requiring competition, but below the dollar threshold requiring formal competition, may use an informal bidding process called "Documented Quotes." DQs may be used for Goods, Services or construction (see OSA/SBP website regarding construction) at: <http://www.colorado.gov/dpa/dfp/sbrep/sbhome.htm>.

The thresholds for the use of DQs are provided in R §24-103-204-03 of the Procurement Rules. All DQs are required to be published in BIDS, with quotes received from Vendors either by hand, mail, telephone, facsimile, or email. BIDS also allows for online quoting.

The time allowed to respond to Solicitations for DQs varies depending on the amount of time Vendors need to prepare quotes and the needs of the Agency/IHE; however, three working days is the minimum. Agencies/IHEs may develop minimum timeframes for DQs and a prescribed format for quotes or any other requirements determined necessary to accommodate their particular business processes.

**F. Competitive Sealed Bidding/IFBs–R §§24-103-202a & R §24-103-202b**

Competitive Sealed Bidding is used for construction, commodities, and Service purchases when Solicitations can be defined in such a way that price is the final determining selection factor. Competitive Sealed Bidding is required for Procurements in excess of \$150,000 (again, Agencies/IHEs may establish lower dollar thresholds) when objective criteria can be written to qualify Vendor responses based on technical requirements (multi-step bidding may be included) after which only those Vendors responding who meet the requirements submit pricing. Competitive Sealed Bidding includes advertising an IFB. IFBs are handled by Agency/IHE Purchasing offices or by the SPO. Procurement team members should contact them or view the Procurement Rules online at <http://www.colorado.gov/dpa/dfp/spo/index.htm> with questions about dollar thresholds and other Agency/IHE specific Policies. IFBs must be advertised for a minimum of 14 calendar days. The requirements for Competitive Sealed Bidding for non-construction Procurements are covered by R §24-103-202a. The requirements for Competitive Sealed Bidding for construction Procurements are covered by R §24-103-202b.

**G. Competitive Sealed Proposals/RFPs– R §§24-103-203**

Competitive Sealed Proposals are used when Procurement officers determine in writing (R §24-103-203-02) that use of Competitive Sealed Bidding is either “not practicable” or “not advantageous” to the State. Competitive Sealed Proposals are generally used when factors other than price will be evaluated, or when objective criteria cannot be written. Unlike Competitive Sealed Bidding, Competitive Sealed Proposals use RFPs to solicit Vendor response. RFPs allow discussions conducted by central Purchasing offices with Vendors prior to Award for the purpose of clarification and/or to obtain a Best and Final Offer (BAFO). Agency/IHE Purchasing offices are responsible for the RFP process and must assist in preparing the RFP and conducting evaluations. A minimum of 30 calendar days are required by Procurement Rules for advertisement of Competitive Sealed Proposals. There may be a need to use the RFP process for construction related requirements.

For the RFP process in general, Agencies/IHEs' Purchasing offices will perform the following tasks and the following procedures apply:

- i) Meet with all interested Parties, which may consist of the Procurement team (See Chapter II.2, *Planning - Procurement Team*), affected program staff, Human Resources, other Agencies/IHEs, political subdivisions, or affected DPA divisions, e.g., Central Services. If Services being outsourced directly impact the State personnel system, i.e. Services are currently or have historically been performed by State classified staff, then the Personal Services Business Case and Cost comparison instructions must be included in the Solicitation.
- ii) Prepare the Solicitation document. This includes not only standard Contract provisions but a complete SOW with detailed Specifications, which are critical to the success of the entire project and the core of any resulting Contract. See Chapter II.14, *Planning – Writing Statements of Work (SOWs) and Specifications*, and Chapter VII, *Supplemental Materials*, of this Manual for specific guidance on writing SOWs. There are also many superb publications available from various sources outside the State that provide excellent guidance, instruction, and examples.
- iii) Conduct pre-Procurement data gathering and obtain any required pre-approvals. See Chapter II.9, *Planning- Approvals*, of this Manual.
- iv) Draft RFP, including a sample model Contract, a Procurement timeline, a narrative description of evaluation factors (including price) and their relative weights, and provisions requiring submission of Cost or pricing data in support of the Proposal if required (see R §§24-103-403-02).
- v) Furnish the RFP to Parties whose approval is needed, make needed changes and finalize and prepare to publish the RFP on BIDS.
- vi) Establish an evaluation of SMEs in the area(s) detailed in the SOW and Specifications.
- vii) Meet and review the evaluation process, including conflict of interest disqualifications, with committee members.
- viii) Publish the RFP Solicitation on BIDS, at which time, all further contact with potential Vendors must be conducted by Agency/IHE Purchasing offices.

- ix)** Conduct pre-Proposal conference, if any.
- x)** Collect questions from potential Vendors and prepare and post written answers to inquiries, if any.
- xi)** Receive and time stamp proposals and identify and flag any confidential data.
- xii)** Verify Proposal compliance with mandatory Solicitation requirements, including BIDS registration.
- xiii)** Conduct Proposal evaluations with the designated committee, including site visits, if any.
- xiv)** Obtain Proposal clarification, if needed.
- xv)** Prepare and distribute rejection letters for “Non-Responsive Bidders” meaning those Bidders who submit unacceptable Proposals, which are Proposals that are not reasonably capable of being made acceptable to the State through discussions, e.g., those requiring Substantial or major revisions or rewrite.
- xvi)** Select finalists based on the committee’s evaluations. For purposes of this Section, “Finalists” are those Bidders submitting Proposals within the Competitive Range. The Competitive Range consists of those Proposals determined to be most responsive to requirements and reasonably qualified to be selected for Award.
- xvii)** Prepare and distribute Finalist notification.
- xviii)** Conduct oral or written discussions with Finalists:
  - (a)** For purposes of this Section, “discussion” means communication between the State and Finalists with the purpose of clarifying Proposals, and ensuring they are responsive to the Solicitation requirements while verifying that Finalists fully understand the State’s needs. Adjustments in Services to be performed and in Costs and/or prices are permitted. All Finalists must be accorded fair and equal treatment in the discussion and revision of their Proposals.
  - (b)** Discussions may be written or oral. Discussions may, and often do, consist of written notice of deficiencies, oral presentations, system demonstrations, and face-to-face meetings with Finalists.
  - (c)** Auction techniques are prohibited. Auctions include disclosure of competing Finalists’ Costs/prices; indicating to Finalists a Cost or price that must be met to obtain further consideration; advising them of their price standing relative to other Finalists; or successive rounds of requests for the best and final offer with the primary objective being to obtain price concessions.
  - (d)** Technical leveling and technical transfusion are also prohibited discussion techniques. Technical leveling means helping Finalists to improve their proposals through successive rounds of discussion and can include pointing out weaknesses resulting from a Finalist’s lack of diligence, competence, or inventiveness in preparing the proposal. Technical transfusion means disclosing technical information or approaches from proposals to other Finalists in the course of discussion.
- xix)** Finalists must be given equal opportunity to discuss and submit revisions to proposals. Normally, this is accomplished by formally requesting receipt of BAFOs on a set date after the conclusion of discussions. BAFOs can include discussions of Finalists’ exceptions to the State’s Contract provisions in order to determine responsiveness. Finalists should be advised that Substantial Proposal revisions not adequately identifying the changes and explaining the scope, risk, and reasons for the revisions (as well as the impact on price/Cost) may be unfavorably considered during the final evaluation. Commonly, Proposal revisions are submitted by “Change Page” and not by complete republication of the Proposal.
- xx)** Collect BAFOs on the date established for their submission.
- xxi)** Evaluation committee prepares report and recommendation which identifies the winning Finalist and has written determinations regarding the Waiver of any technical irregularities, etc.
- xxii)** Committee chair presents report to Procurement officials. Purchasing Director approves or denies recommendation for Award. See R §24-103-203-11.
- xxiii)** Publish the results on BIDS.
- xxiv)** Prepare appropriate Commitment Vouchers, usually Contracts.



**H. Statements of Qualification/Request for Qualifications (RFQs)-CRS §24-30-1401--1404**

Contracts for Professional Services (architects, engineers, land surveyors, landscape architects, and industrial hygienists) generally use a Request for Qualifications process. Although exempt from the Procurement Code, competition is conducted and Award is based solely on Vendor qualifications. Price cannot be used as a consideration in Award.

**I. Sole Source Procurement—CRS §24-103-205**

Sole Source Procurements are allowed by the Procurement Code when only one Good or Service will meet the need of the State and when only one Vendor can supply that Good or Service. If a proprietary item is required, a sole source circumstance may exist where:

- i) The compatibility of equipment, accessories, or replacement parts is the paramount consideration and the items are only available from one Vendor;
- ii) A sole supplier's item is needed for trial use or testing; or
- iii) Public utility Services are procured, as in the case of a monopoly.

Competition must be solicited if doubt exists whether a Sole Source Procurement is appropriate. A best practice is for Purchasing Agents to post an intent-to sole source on BIDS to assist in the determination. All Sole Source Procurements exceeding discretionary dollar limits must be approved by the State Purchasing Director or the delegated Agency /IHE Purchasing director, as appropriate. The Procurement team should contact the appropriate Agency/IHE Purchasing office to request a sole source form and to discuss the need before holding discussions with potential Vendors or negotiating Contracts and before Vendors sign Contracts. The Purchasing official may not agree the Vendor is the sole source, and instead require competition be solicited.

Insufficient time for Solicitation of Bids is not a sufficient reason to justify a Sole Source Procurement. All sole source Contracts will be tracked in CMS and be made publicly available under the provisions of CRS §§24-102-205.

**J. Emergency Procurements—CRS §24-103-206**

CRS §24-103-206 allows the State Purchasing Director, the head of Agencies/IHEs, or a designee of either officer, to authorize emergency Procurements “when there exists a threat to public health, or safety under emergency conditions, as defined by rules.”

An emergency condition, is defined by R §24-103-206-01 as a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failure, or such other reasons as may be proclaimed by the Executive Director of DPA, the head of an Agency/IHE, or a designee of either officer. Such conditions must create an immediate and serious need for Goods, Services, or construction that cannot be met through normal Procurement methods and the lack of which would seriously threaten:

- i) The functioning of State government, or its programs;
- ii) The preservation or protection of property; or
- iii) The health or safety of any person or persons.

Emergency Procurements must be made with such competition as is practicable under the circumstances. Only the Quantity of Goods or Services necessary to alleviate the emergency may be purchased under emergency conditions. When practical, approval by the State Purchasing Director, or an Agency's/IHEs Purchasing director, must be obtained prior to the Procurement. Agencies/IHEs shall notify the State Purchasing Director or their head of Purchasing on the next business day if emergencies arise after normal business hours. A written determination of the basis for the emergency and for the selection of the particular Vendor must be prepared and placed in the Contract file.

**K. Competitive Negotiation—R §24-103-208-02**

This selection method may be used with IFBs and RFPs if:

- i) Agencies/IHEs conducted a Solicitation and a winning Vendor was not identified;
- ii) Low Bids exceed available funds; or
- iii) Not enough Vendors exist to establish “adequate competition.”

Under any of these circumstances, Agencies/IHEs may negotiate directly with qualified, interested Vendors. Agencies/IHEs must conduct the discussions without revealing the content of any discussions to any other Party. The Vendor selected is the one making the best offer. After selection, the Agency/IHE must then document the discussion and the basis for making its determination.

**L. Competitive Sealed Best Value Bidding—CRS §24-103-202.3**

This selection method is a variation of an IFB that allows Agencies/IHEs to request Bidders to include objectively quantifiable alternatives, enhancements, and options in addition to “base Bids.” Bidders must meet the minimum specifications and may then try to convince Agencies/IHEs that their Bid provides the best value by offering these alternatives, enhancements, and options.

**5. CAPITAL CONSTRUCTION—R §24-103-202(b)**

Capital construction uses many of the Procurement methods described above; however, it also requires use of specific procedures and forms. For further information and assistance, contact Agency/IHE Purchasing offices or the OSA/SBP via phone or through their website at: [www.colorado.gov/dpa/dfp/sbrep/](http://www.colorado.gov/dpa/dfp/sbrep/).

**6. REAL ESTATE LEASES—CRS §24-30-1303(a)**

Real estate Leases use many of the Procurement methods described above; however, they also require the use of specific procedures and forms. For further information and assistance, contact Agency/IHE Purchasing offices or the OSA/REP via phone or through their website at: [www.colorado.gov/dpa/dfp/sbrep/](http://www.colorado.gov/dpa/dfp/sbrep/).

**7. STATUTORY AND REGULATORY REQUIREMENTS**

**A. The Controller Statute—CRS §24-30-202(2) and FR 3-1 §9.3**

Pursuant to CRS §24-30-202(2) and FR 3-1 §9.3, the OSC or delegate examines Contracts to determine if prices or rates are “fair and reasonable.” The OSC usually defers to Agency/IHE expertise when making this determination; however, it is not required to do so and may require evidence in addition to the Solicitation method; although this is rare if there is price competition (see Chapter III.9, *Purchasing – Price Analysis – Contracts*). Additionally, some Procurements are required to have certain types of evidence (e.g., appraisals for some real estate purchases).

**B. Procurement Statutes**

CRS §24-103-403 requires Vendors to submit and certify Cost or pricing data prior to the pricing of some Contracts Awarded by Competitive Sealed Proposals or pursuant to sole source authority, or the pricing of Change Orders or Contract Modifications over \$500, unless:

- i) The Contract price is based on adequate price competition;
- ii) The Contract price is based on established catalog prices or market prices;
- iii) The Contract price is set by law or rule; or
- iv) Determination has been made in writing (with a basis in Procurement Rules), stating that the requirements of the statute may be waived, and clearly stating the reasons for the Waiver.

**C. Federal Grant Contracts**

The Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments, referred to as the “Common Rule” and codified by the GSA in 41 CFR §105-71, establishes the Cost principles applicable to Grants funded with federal money. In general, the Common Rule requires the following:

- i) A State must expend and account for Grant funds in accordance with State laws and procedures for expending and accounting for its own funds. *Id.* at §105-71.120(a).
- ii) OMB Cost principles, Agency/IHE program regulations, and Grant and sub-Grant provisions should be followed in determining the reasonableness, allowability, and allocability of Costs. *Id.* at §105-71.120(a)(5).
- iii) Grant funds may be used only for the allowable Costs of the Grantees, Subgrantees and Cost-type Vendors, including allowable Costs in the form of payments to fixed-price Vendors, and reasonable fees or profit to Cost-type Vendors. *Id.* at §105-71.122(a).
- iv) Grantees and Subgrantees must perform a Cost or Price Analysis in connection with every Procurement action, including Contract Modifications, to determine the reasonableness of proposed Contract prices and, if there is not any price competition, a profit that is “fair and reasonable.” *Id.* at §105-71.136(f).

Other than GSA, the codification of the Common Rule used by each federal agency should be used when using grant funds from such agency. In addition, should a Grant be with IHEC or another non-

profit organization, OMB Circular A-110 and the applicable federal agency's codification of rules for that type of Grant should be consulted.

## 8. CONTRACT PRICING

A principal objective of Purchasing is to obtain Goods or Services at fair and reasonable prices. "Contract pricing" is the term commonly used to describe the process for analyzing prices and/or Costs to determine whether they are fair and reasonable. The method of Contract pricing will differ depending on the nature of the Service and the availability of competition. This section of this Manual refers generally to commercial Contract pricing principles. Cost Analysis of Grant Contracts is somewhat different, resembling more closely the Cost Analysis in "cost reimbursement" Contracts, where the analysis of specific Cost elements (not an overall price) is most important. Pursuant to CRS §24-103-501, Cost-reimbursement Contracts may be used only when a determination is made in writing and approved by an Agency/IHE Purchasing director or controller, that such Contract is likely to be less costly to the State than any other type of Contract.

Other economic considerations include the following:

### A. Life Cycle Costs

The actual price (dollar value) of a Good or Service is only one aspect of its total Cost. The total Cost of ownership can include Costs such as transportation, storage, administration, Warranties, and post-delivery Costs such as maintenance, defects, and lost productivity.

### B. Best Value in Source Selections

Other economic considerations are used to evaluate which Bidders propose the best combination of technical superiority and Cost. Pricing considerations and Cost Analysis offer the State additional opportunities not only to achieve a fair and reasonable price, but to assess whether the Bidder understands the nature of the requirement and is proposing a reasonable, comprehensive technical approach.

### C. Contract Types

Related to price/Cost Analysis concepts is the initial consideration when conducting competitive Procurements of choice of Contract type, e.g. fixed-price or Cost reimbursement. For a thorough discussion of Contracts types and the risks associated with each, see Chapter IV, *Contract Formation, Drafting, and Approval*, of this Manual. For a discussion of the impact of Contract type on Contract Management, see Chapter V, *Contract Administration*, of this Manual.

### D. Environmentally Preferable Purchasing (EPP)

EPP is derived from CRS' definition of "Environmentally Preferable Products", which are "products or services that have a lesser or reduced adverse effect on human health and the environment when compared with competing products or services that serve the same purpose." CRS §24-103-207(5) states: "When purchasing any product with public funds, the executive director or any purchasing agent shall be authorized to purchase products or materials with recycled content, that have been source-reduced, that are reusable, or that have been composted, unless one or more of the following conditions exist:

- i) The product is not available within a reasonable period of time;
- ii) The product fails to meet existing purchasing rules, including specifications; or
- iii) The product fails to meet federal or state health or safety standards, as set forth in the Code of Federal Regulations or the Colorado Code of Regulations."

## 9. PRICE ANALYSIS-CONTRACTS

Unless there is adequate price competition, some form of Price Analysis is required for any purchase of Goods or Services. How the Price Analysis is conducted depends on the value of the purchase and the circumstances surrounding it. Price Analysis is defined as examination of the Bidder's price Proposal or Bid by comparing it with reasonable criteria and without examining and evaluating separate elements of the Costs (e.g. Overhead and profit) making up the price. Price Analysis focuses on a comparison of the total price against objective indicators of reasonableness, such as competitors' prices, catalog or market prices, prices of similar work, etc.

Where adequate competition exists, as in IFBs and most RFPs, submission of competing offers or Bids satisfies the need for Price Analysis. Generally, where there are at least two qualified, responsive sources

responding to a Solicitation, or only one Bidder responds but the nature of the requirement does not give an unfair advantage to that competitor, the lowest Bid or Proposal normally provides a "fair and reasonable" price. Some other means for assessing price reasonableness may also assist in Price Analysis, depending upon the situation.

**A. Other Methods of Price Analysis.**

Price Analysis is easier when competition exists. However, this will not always be the case. When a Contract is a Sole Source Procurement, or conditions are otherwise not favorable for competition, then other means of Price Analysis must be found. The following are additional methods of Price Analysis:

**i) Established Catalog and Market Prices**

Prices widely publicized in catalogs or price lists, such as the GSA Federal Supply Schedule, may serve as a basis for Price Analysis for Goods and Services that are similar in nature. The Procurement team should consider requesting from Vendors recent sales summaries establishing that the prices being offered to the State are also offered to a significant number of other Buyers. In some industries, there may be established or well known market prices for certain Goods or Services not unique to one seller.

**ii) Prices Set by Law or Regulation**

Regulated prices, e.g. utilities, may also serve as a benchmark for measuring the reasonableness of similar Goods or Services.

**iii) Historical Prices**

Agencies/IHEs may have had similar Goods delivered, or Services performed, by the same or other Vendors. When comparing historical prices, the Procurement team should consider:

- (a)** How/if conditions have changed;
- (b)** Whether there are "mobilization," or other one-time setup or non-recurring charges;
- (c)** The effect of inflation or deflation; and
- (d)** Whether Vendors can use "learning curves" to achieve efficiencies.

**iv) Independent Cost Estimates**

If Agencies/IHEs have the expertise or resources, they may be able to develop independent Cost estimates against which they can evaluate proposed prices. These estimates require an expert analysis of the Quantity and nature of labor and material that will go into the Contract performance, and application of expected Cost rates such as those for Indirect Costs, Overhead, and profit. The Procurement team should contact the Agency/IHE's budget/finance office for assistance and direction.

**B. Documenting Price Analysis**

Where "full and open competition" is not an adequate basis for Price Analysis, the Procurement file must document the Price Analysis supporting the price is fair and reasonable conclusion. An abstract of Bids received is sufficient if competitive bidding existed. Documentation supporting Price Analysis should include:

- i)** Information considered;
- ii)** Weight given to the considered information and why; and
- iii)** An explanation of why the considered information led to the conclusion that the price was fair and reasonable.

**C. Relationship between Price Analysis and Negotiation**

The absence of information from which to analyze price reasonableness may necessitate fact-finding during Negotiations where "full and open competition" is lacking; for example, in the instances of Sole Source Procurements, Intergovernmental Contracts, or competitive Solicitations with two or more Bids/Proposals. If information adequate to support Price Analysis cannot be obtained, Procurement teams should request Cost or pricing data required by the Procurement Code in order to conduct a Cost Analysis. Fact-finding may include the following questions:

- i)** Do Vendors have price lists or catalogs?
- ii)** Can Vendors identify a market price or rate that is readily identifiable?
- iii)** How can Vendors otherwise support the reasonableness of the rate or price?

## 10. COST ANALYSIS-CONTRACTS

Cost Analysis, an evaluation of actual or anticipated Costs, is used to determine whether the price offered the State is fair and reasonable if market conditions are not suitable for Price Analysis (e.g. Sole Source Procurements, pricing of Contract Modifications, Cost reimbursement type Contracts, etc.), where Costs tend to vary among companies, based on a wide variety of factors; for example, management capabilities, labor efficiency, and subcontracting Quality and Quantity. Therefore, Cost Analysis requires application of experience, Knowledge, and judgment to data to forecast expected Contract Costs and judge an appropriate profit.

### A. Analyzing Specific Cost Categories

This level of Cost Analysis presumes having the necessary data, either through Vendor submission of Cost or pricing data or availability of an audit done recently on a Vendor.

#### i) Variable Costs/Direct Costs

Costs, such as labor and materials, which vary directly in relation to the Quantity, Quality, and scarcity of the Good or Service being ordered, are generally referred to as variable Costs or Direct Costs (the terms are used interchangeably). Usually, Direct Costs are priced as being incurred specifically for Contract performance, do not otherwise benefit the Vendor, and are specifically traceable to the work being performed. Reductions in Direct Costs benefit the State more than any other Cost element, and often are the basis for Indirect Costs. For example, Vendors calculate Overhead as a percentage of Direct Costs.

#### ii) Recognizing and Evaluating Variable/Direct Costs:

- (a) Direct Costs are products of Quantity and price, both of which should be analyzed and estimated by the State. For example, proposed Costs for a material may include a Contingency for rework. Similarly, the Cost of labor varies depending on the number of hours of labor being proposed.
- (b) The Procurement team should try to determine how much of the Vendor's Direct Costs are being proposed for "mobilization" or "set up." These are one time Costs associated with beginning performance and are often negotiable.
- (c) Labor Costs are related to the skill/education of labor being employed; therefore, the Procurement team should ensure the labor skills assigned are appropriate for the work being proposed. In Contracts involving repetitive labor operations, team members should look for "efficiencies," such as the use of learning curve analysis.
- (d) Location affects the rates for labor and materials. Procurement team should make sure rates are reasonable in the locale where the work will be performed. The Colorado Department of Labor and Employment/Labor Market Information office or the Bureau of Labor Statistics provides current wage rates for different job categories in different geographical areas.
- (e) The Procurement team should evaluate Costs for capital equipment, special tooling, or equipment, etc., and provide State equipment if it will save money and not raise Independent Contractor issues.
- (f) The Procurement team should be wary of "internal charges" or "markups" on subcontracted work or materials, or internal transfers of labor or material, where the additional Cost proposed is not reasonably related to actual Vendor Costs.

#### iii) Indirect Costs

Indirect Costs can account for 30% or more of total Costs. Commonly charged "Indirect Cost pools" are general and administrative Overhead, engineering Overhead, materials Overhead, manufacturing Overhead, and selling expenses. These Indirect Costs vary in the way they are allocated and recovered in Vendor pricing; however, they are generally, categorized as

- (a) Those benefiting Vendors as a whole, and
- (b) Those benefiting Vendors' specific operations.

#### iv) Fixed Costs/General and Administrative Overhead

Fixed Costs, sometimes referred to as "sunk costs," are Costs that do not change with volume of Contract performance or specific product/Service lines. Home office expenses, facilities Costs, corporate officer and home office salaries, some utilities, depreciation expenses, advertising, and research and development are examples of Costs commonly considered fixed Costs. These Costs are typically recaptured using "Overhead markup,"

applied as a percentage of Direct Costs and other Indirect Costs. Most Vendors have an established Overhead rate based on previous financial performance.

**v) Semi-Variable Costs/Other Indirect Costs**

Costs cannot always be categorized solely as direct, indirect, variable, or fixed. Some are more closely associated with a specific Service or manufacturing activity(s). How they are allocated is dependent on accounting or "cost accounting" systems. Usually, these other Indirect Costs are equitably allocated against a unit of production or Service, such as hours of labor or units of manufacturing, and per unit variable Costs are dependent on the volume of manufacturing or Service production.

**vi) "Reasonableness" and "Consistency" in Cost Allocation**

There is no single, common method of allocating all Indirect Costs/Overhead. Although familiarity with an industry may provide ranges of expected Indirect Costs rates, each Vendor has different accounting systems and different rates. Despite differences, looking for reasonableness and consistency in the allocation of all Indirect Costs should be part of Vendor Cost Analysis. The Procurement team should challenge any known allocation systems that require the State to pay for Indirect Costs in an Overhead pool that is (or appears to be) inconsistent with Cost allowability rules in the Procurement Rules or federal standards governing Grants. For example, fines and penalties are a common category of Cost that is "unallowable."

**B. Requesting Cost or Pricing Data**

The Procurement team should ask Vendors for relevant data to use in Cost Analysis during the Purchasing stage or before making Contract Modifications. In Solicitations, Cost or pricing data is required of Vendors as part of RFPs. Data requested varies from simple budget submissions showing projected expenditures, to detailed factual descriptions of historic indirect and Overhead rates, salary and benefit breakdowns for all categories of labor, materials, Costs, Subcontractor quotes, etc. In high-value Contracts, Vendors should submit applicable Subcontractor quotes, historical Employee salary rates, and material Costs. The following is a simplified example of Cost or pricing data that might be requested:

**Table III-1-Example of a Simple Cost Analysis**

Costs for computer installation/software development:	
<b>Direct Costs</b>	
Equipment	\$10,000
Labor (1,000 hours)	\$40,000
Subcontractor	\$ 3,000
<b>Indirect Costs</b>	
10% (Equip. handling)	\$ 1,000
10% (Sub markup)	\$ 300
<b>Subtotal</b>	<b>\$54,300</b>
<b>20% Overhead</b>	<b>\$10,860</b>
<b>Total Costs</b>	<b>\$65,160</b>
<b>Profit</b>	<b>\$ 6,516</b>
<b>TOTAL PRICE</b>	<b>\$71,666</b>

The following provides an example of a Solicitation clause requiring Vendor submission of certified Cost or pricing data:

**Text Example III-1**

Offerors shall submit cost or pricing data with their proposals. "Cost Data" is factual information concerning the cost of labor, material, overhead, and other cost elements which are expected to be incurred or which have been actually incurred by vendors, such as vendor quotations, non-recurring costs, and unit cost trends, and which can reasonably be expected to contribute to the soundness of estimates of future costs. "Price Data" is factual information concerning prices for supplies, services, or construction substantially identical to those being procured, including offered or proposed selling prices, historical selling prices, and current selling prices of such items, which can be reasonably expected to contribute to the soundness of estimates of future costs. Successful offerors may be required to promptly certify that, to the best of their knowledge and belief, the cost or pricing data submitted was accurate, complete, and current as of a mutually determined, specified date prior to the date of [conclusion of negotiations] [submission of best and final offers] [submission of the proposal]. Such certificate shall contain a provision that the price to the State, including profit or fee, will be adjusted to exclude any significant sums by which such price was increased because vendors-furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between the Parties.

**C. Profit**

Profit is the final large component of total price. Vendors are entitled to a "reasonable profit"; however, what is reasonable is not susceptible to a fixed formula and varies greatly depending on the type of Procurement, the State of the economy, and the Vendor's motivation to obtain State business. Profit may appear to be negotiated away at times, but in fact be buried in a conservative Cost estimate. A common baseline is a 10% profit for commercial, Fixed-Price Contracts having moderate risk and only incidental amounts of Subcontracting.

Some general considerations in evaluating and negotiating profit include:

- i) Vendors assuming higher risks, for example, highly technical and/or high up-front Costs, are entitled to more profit, while those merely passing through another's efforts should receive less, or no, profit;
- ii) Higher profit is justified per unit on low volume sales versus larger orders, particularly where mobilization or setup risk exists;
- iii) Vendors in high-tech, rapidly developing, and changing technologies are entitled to greater profit, because they have higher training and development Costs to stay competitive;
- iv) Vendors who make Substantial capital investments during performance are entitled to a higher profit;
- v) Consistently higher Quality justifies higher profit.

**D. Cost Plus Percentage Cost Contracts—CRS §24-103-501**

"Cost plus percentage Cost" Contracts compensate Vendors based on the Costs incurred plus a percentage markup on such Costs. These Contracts are prohibited under CRS §24-103-501, the theory being that Vendors lack incentive to restrain Costs. By contrast, Contracts are commonly negotiated, and Negotiation objectives established, using profit as a percentage of total estimated Cost, i.e. computing the "return of the investment" of time and money. The important distinction is that the profit or fee is fixed once the Negotiation is finished and price Agreement reached.

**11. PRICE ANALYSIS-GRANTS**

Chapter III §7, *Purchasing-Statutory and Regulatory Requirements*, of this Manual lists federal mandates related to price and Cost Analysis, which require formal Cost or Price Analysis when Grantees are procuring property and Services under a Grant.

Although requirements, generally applicable to Grants, are found in the Common Rule, individual programs are more often governed by more specific federal requirements in the Code of Federal Regulations, e.g. 34 CFR Part 80 (Education), 45 CFR Part 92 (Health and Human Services), 24 CFR Part 85 (Housing and Urban Development), 29 CFR Part 97 (Labor), 44 CFR Part 13 (Federal Emergency Management Agency).

**A. Cost Analysis Considerations**

Analysis of Grant or sub-Grant proposals tends to be more like Cost Analysis than Price Analysis because Subgrantees are typically local governments or political subdivisions with diverse organizations and financial management systems.

Apart from Procurements of Goods and Services, financial management requirements for financial assistance Grants focus on "expenditures" consistent with cost accounting standards. Unlike most commercial Contracts, Grant payments are typically based on actual Costs incurred. The audit oversight and Cost allowability rules will help to assure the "reasonableness" of expenditures. In order to do Cost Analysis or budget analysis, the Procurement team should at least have a working familiarity with applicable cost accounting standards for Grants. To be payable, Costs generally have to be reasonable, "allocable" to cost objectives, and not "unallowable" (e.g. fines and penalties, entertainment expenses, etc.). The Procurement team should involve program staff and technical experts in Proposal analysis as they can assess the reasonableness of proposed Costs and apply federal cost accounting standards to proposed work or projects. The cost accounting standards governing federal Grants are:

- i) OMB Circular A-87, *Cost Principals for State, Local, and Indian Tribal Governments*;
- ii) OMB Circular A-122, *Cost Principals for Non-profit Organizations*; and
- iii) OMB Circular A-21, *Cost Principals for Educational Institutions*.

Up-front analysis of budget or other Cost proposals should include Direct Costs, e.g. labor Costs and/or supplies/materials Costs. Evaluate whether pay levels and experience/education requirements are appropriate for the nature of work being performed, and whether the projected numbers of hours/FTE are appropriate for the level of effort.

The Procurement team should be aware that besides evaluating the Quantity and Cost of supplies/materials, the Common Rule specifies different disposition and title vesting provisions for equipment (supplies with useful life of more than one year and acquisition Costs of over \$5,000).

Indirect Cost rates are often negotiated by granting federal agencies, and if there is an approved rate, Agencies/IHEs are not required to evaluate them.

**B. Matching Requirements**

Unlike commercial contracting, Cost or budget analysis in Grants must include the evaluation of the "matching" or "cost sharing" rules governing that program. Matching funds provide an added incentive to Grantees to satisfactorily perform since some of their money is at risk too. See the Common Rule, 41 CFR §105-71.124, *Matching or Cost Sharing*.

**C. Purchases under Grants:**

The Common Rule also establishes pricing requirements similar to those in the State Procurement Code for procuring Goods and Services.

**i) Cost and Price Analysis**

Grantees must perform a Cost or Price Analysis in connection with every Procurement action, including modifications. The method and degree of analysis is dependent on the facts surrounding each Procurement situation.

- (a) Grantees must make independent estimates before receiving Bids or proposals.
- (b) Cost Analysis must be performed when Vendors are required to submit elements of its estimated Cost, e.g. Professional Services or consulting Contracts.
- (c) Cost Analysis is necessary for Sole Source Procurements, and when adequate price competition is lacking. This includes Contract Modifications and Change Orders, unless price reasonableness can be established based on:
  - (01) Catalog or market prices of commercial products sold in Substantial quantities to the general public; or
  - (02) Prices set by law or regulation.



**ii) Profit**

Profit must be negotiated as a separate element of price for each Grant where there is inadequate price competition or when a Cost Analysis is performed. The Common Rule requires consideration of:

- (a) Complexity of the work to be performed;
- (b) The risk borne by Vendors;
- (c) Vendor investment;
- (d) The amount of Subcontracting;
- (e) The Quality of the Vendor's record of past performance; and
- (f) Industry profit rates in the surrounding geographical area for similar work.

**iii) Cost plus percentage**

Cost plus percentage of cost methods of Grant contracting are not permissible (the same prohibition as in the State Procurement Code). See Chapter III.10(D), *Purchasing-Cost Analysis-Contracts-Cost plus Percentage Cost Contracts*, of this Manual for a discussion of the State Procurement Code treatment.

**12. PRICE NEGOTIATION IN COMMERCIAL CONTRACTS—CONSIDERATIONS**

Prices may not be negotiated with the successful Vendor in IFBs, but are permissible with RFPs prior to submission of BAFOs, and significant in Sole Source Procurement Negotiations.

Vendors usually build flexibility into their initial Bids which probably will not contain the "bottom line" price, allowing for price to be adjusted once SOWs are clarified. Vendors generally want to recover their Direct Costs and usually seek to recover a "fair share" of Indirect Costs. However, depending on a specific Service's or Good's profitability, flexibility may exist in negotiating Indirect Costs.

In summary, the Procurement team should:

- Challenge assumptions in pricing proposals as most prices can be negotiated;
- Ask for Cost and pricing data, if required by Procurement Rules (State and federal) or as necessary to perform adequate Price/Cost Analysis;
- Obtain a comprehensive understanding about the basis and motivation for Vendor price proposals;
- Request information on direct rates for labor, e.g. what rates were used and how they were priced;
- Understand and evaluate Vendor labor hour estimates for key aspects of the work, and have an estimate prepared by people who understand the State's requirements;
- Evaluate whether the experience/education for labor categories are appropriate for the work being performed;
- Determine the Direct Costs, which must be recovered, and Indirect Costs, which may be negotiated;
- Seek assistance from someone familiar with a Vendor's Indirect Cost/pricing practices, or with industry standards;
- Obtain information on and critically evaluate "markup" on Goods and other Subcontractor work/Services;
- Evaluate the sources, Costs, and quantities of key supply/material elements of a Proposal;
- Determine Vendors' proposed profit margin and negotiate a lower profit margin, if appropriate;
- Ask Vendors to show how pricing proposals integrate "efficiencies", e.g. learning curve analysis, if appropriate;
- Consider using State-supplied equipment/Services to lower Costs, while analyzing Independent Contractor issues especially regarding sole proprietors and one-person entities;
- Determine how much is being paid for unspecified "mobilization" Costs;
- Evaluate how much Contingency is being proposed;
- Determine availability of "Quantity discounts", "seasonal discounts", or "cash discounts" paid to customers who pay "in full";
- Understand all Vendor Cost categories in Cost reimbursement-type Contracts;
- Formulate pricing objectives after Price/Cost Analysis to integrate into Contract Negotiations;
- Consider options available from trading price or Cost for delivery times, Quality, and Warranty coverage; and
- Ensure that Contract provisions reflect Agreements on price, type of Contract, and payment terms.

## CHAPTER IV. CONTRACT FORMATION, DRAFTING, AND APPROVAL

### 1. AUTHORITIES

- CRS §§24-30-202, *Procedures – vouchers and warrants – rules - penalties*
- CRS §§24-101-103, *Supplementary general principles of law applicable*
- Fiscal Rule 2-2, *Commitment Vouchers* (1 CCR 101-1 State Fiscal Rules, Chapter 2, *Disbursements*)
- Fiscal Rule 3-1, *State Contracts* (1 CCR 101-1 State Fiscal Rules, Chapter 3, *Contracts*)
- Fiscal Procedures Manual Chapter 1, §4, *Encumbrance Issues*
- OMB Circular A-133, *Audits of States, Local Governments, and Non-Profit Organizations*
- OSC Contract Completeness Checklist
- OSC Policies, including:
  - *Content – Mandatory Provisions in State Contracts*
  - *Effective and Made Dates*
  - *Modification of Contracts – Tools and Forms*
  - *Monitoring Reviews-OSC Delegation*
  - *Routing of Contracts*
  - *Vendor Agreements*
  - *Vendor Signature Authority*
- Procurement Rules (1 CCR 101-9)

### 2. PREFACE

Drafting successful Contracts requires a basic understanding of what Contracts are and what they contain on the part of all staff involved in Procurements. This Chapter provides general rules regarding Contract formation; however, many Contract variations exist, and advice from the OSC or appropriate legal counsel should be obtained when questions or uncertainties exist.

### 3. DEFINITION OF CONTRACTS

Contracts are promises enforceable in court by the Parties. Contracts can be oral or written; however, the State is required by law to enter into written Contracts if the expenditure of State funds is involved. Written Contracts are always best in any event as it is often difficult to prove the provisions of Oral Contracts. Contracts are often called Agreements, and the terms are generally synonymous. Grants, Purchase Orders, Leases, etc are all Contracts; the names simply denote specific types of Contracts.

### 4. ELEMENTS OF CONTRACTS

The elements necessary to form a legally binding and enforceable Contract are Offer and Acceptance; Legally Enforceable Promises (legal purpose/objective); Mutuality of Obligation; Certainty of Subject Matter; Time of Performance; Consideration; and Competent Parties.

#### A. Offer and Acceptance

All Contracts require an offer by one Party (sometimes called “offeror”) and acceptance by another Party (sometimes called “offeree).

##### i) Offer

An offer is a promise communicated by one Party to another to perform an act conditioned on a return promise of performance by the other Party. For example, when IFBs are published, the State is offering to pay for Goods or Services from Vendors selected under the rules of the Solicitation. Once a legal offer has been made, the offering Party is bound to its terms if the other Party accepts. Therefore, the offering Party must clearly indicate whether the Solicitation is an offer, which is binding if accepted, or some other communiqué, such as an invitation to negotiate. The offering Party, however, may stipulate certain terms of

acceptance, such as time limits, and even withdraw the offer before the other Party accepts. All of this information should appear in the Solicitation documentation. Courts look for evidence of intent to contract on the part of offerors when issues regarding offers arise.

**ii) Acceptance**

Acceptance is agreement by offerees to the terms proposed by offerors. Acceptance must not change the terms, including acceptance methods. If it does, the offer is rejected. If offerees make their own offer in the rejection, this constitutes a counteroffer, which must be accepted by the other Party. Acceptance can be made in writing or by simply performing. Courts look for evidence of intent to contract on the part of offerees when issues regarding acceptance arise; for example, Vendors who do not accept in writing but perform the requested Obligations will probably be deemed to have accepted an offer; otherwise why did they perform.

**iii) Issues**

Issues regarding Offer and Acceptance most often arise when a Party does not want to perform and asserts it is not obligated under a Contract because it did not make an offer; it did not accept an offer; or it made an offer which was not properly accepted. State Purchase Orders are issued by the State without obtaining Vendor signatures; therefore, they can sometimes be an offer and sometimes be an acceptance. For example, POs constitute acceptance when issued under Price Agreements (the State accepts the Vendor's terms) while unsolicited POs sent to Vendors are offers (their performance constitutes acceptance).

**B. Legally Enforceable Promises**

Contracts must be for a legal purpose to be legally enforceable. For example, a Contract for murder or to violate any other law is not enforceable in court because the purpose is not legal.

**C. Mutuality of Obligation**

Parties entering into Contract must have a "meeting of the minds", which means that contracting Parties are agreeing to the same thing, in the same sense, at the same time. This determination is based on an objective standard of what was actually said and done, and not their subjective ("this is what I meant") state of mind. All Parties involved in the Procurement process should clearly express their needs in Contracts or Contracts may fail. For example, a meeting of the minds does not exist and the Contract may not be enforceable if the State thinks it is buying Vendor-hosted software and the seller believes it is State-hosted, and the Contract merely mentions "hosting".

Courts look to communications between the Parties and to the acts and circumstances surrounding them to determine if mutual assent is present. The terms of offers must be clear and definite and there must be a clear and definite acceptance. If a meeting of the minds is contested, the existence of a Contract is a question of fact (not of law). If fact finders determine a reasonable inference of a promise from the other's conduct, it will be enforced.

Parties must agree on Material terms at the time of contracting; if they are left open, Contracts are unenforceable. Parties may agree to finalize non-Material terms later and still have an enforceable Contract (Master Contracts with Task Orders issued later are an example). However, the best practice and norm for most State Contracts is to agree on all Material terms in advance.

Contracts lacking mutuality of obligation are "illusory". For example, if a Vendor promises to perform Services for a year but reserves the right to resign earlier without any reason, such promise is not binding. Therefore, mutuality is lacking, and the Contract is unenforceable.

For State Procurements, any understanding between Parties that differs Materially from the original offer is open to legal challenge. If any aspect of Negotiations begins to differ Materially from the original offer, it should cease. If the component in question is critical, issuance of another offer incorporating it may be necessary.

**D. Certainty of Subject Matter**

Contractual provisions must be sufficiently defined to enable courts to understand the Parties' Obligations. Courts require Material terms to be reasonably certain in order to find that Parties knew to what they agreed. Agreements to enter into Negotiations for a Contract are not enforceable Contracts. While courts may imply or supply non-Material missing terms to enforce Contracts, this is a discretionary act, and it is a far better practice to include all terms.

**E. Consideration**

Consideration is an essential element, without which Contracts are unenforceable, even if all other elements are present. Consideration often is, but is not necessarily monetary. It consists of either a benefit to the Party receiving the promise or a detriment to the Party making the promise. It may consist of some right, interest, profit, or benefit accruing to one Party, or some forbearance, loss or responsibility that is undertaken or incurred by the other Party.

**F. Competent Parties**

Parties to a Contract must have legal capacity to contract. This excludes minors, persons who have disabilities for whom a guardian has been appointed, and anyone else the law deems legally unable to contract, e.g., entities such as Corporations which were not properly created. This is a different issue from apparent or actual authority to enter into a Contract (see OSC Policy, *Vendor Signature Authority*), which is important, but is not an essential element of Contract formation.

**5. COMMITMENT VOUCHERS-CRS §24-30-202 AND FR 2-2**

Under FR 2-2 §3, Agencies/IHEs shall not disburse funds unless the disbursement is supported by a Commitment Voucher or small purchase documentation.

Under FR 2-2 §4, a Purchase Order, a type of Commitment Voucher, is required for all commitments above \$5,000, and a State Contract for all Personal Services commitments above \$100,000.

Commitments to expend State funds, made in excess of or for any expenditure not authorized by appropriation are Statutory Violations and the person(s) involved are personally liable for such Obligation, unless it is ratified by the State Controller. See CRS §24-30-202(3), FR 2-2 §7, and OSC Policy, *Statutory Violations*. See also Chapter IV.24(D)(iii), *Contract Formation, Drafting, and Approval-Accounting Procedures-Other Accounting Issues-Statutory Violations*, of this Manual.

**6. TYPES AND CLASSIFICATION OF CONTRACTS**

In general, what the State is buying, known as the State's "requirements," can be characterized as **Goods** (supply Contracts), where a specific item or system is delivered on a delivery date; for example, office supplies; **Services** (Services Contracts), where the predominant value to the State is labor or some intangible; for example lawn mowing; or **Mixes** of Goods and Services; for example, computer installation with support Services. Consider the following differences between these types of Contracts:

**A. Goods (Supply) Contracts**

**i) Statutory System**

Contracts for Goods are governed by the State's version of the UCC, found at CRS Title 4. Articles 1 and 2 govern Goods/supply Agreements and provide terms for inspection, acceptance, rejection, interpretation, and Remedies for Default in the absence of other Agreement between the Parties. Note: the Parties can agree to other terms; the UCC merely supplies missing terms. Purchase Orders (which contain little, if any, language about Remedies) are commonly used for Goods Procurements.

**ii) Payment**

Payment usually is due after delivery, inspection, and acceptance of the Goods/Deliverable.

**iii) Delivery Date/Performance Period**

Frequently the time for performance is expressed as a delivery date.

**iv) Inspection and Acceptance**

Inspection is usually performed by examining Goods and comparing them against testing standards, or by visually examining and comparing them to Contract Specifications or industry standards. Acceptance is final except for a limited UCC right to revoke acceptance after discovery of Substantial latent defects not discoverable by normal inspection.

**v) Acceptable Performance**

Under the UCC, there is a "perfect tender" rule (with limited exceptions). In general, Vendors must deliver the promised supply by the contractually specified time or the Buyer has the right to reject and not pay, unless the Contract specifies otherwise.

**vi) Warranties**

The UCC grants implied Warranties of merchantability and fitness for a particular purpose that may be waived by Agreement of the Parties.

**B. Service Contracts**

**i) Agreement of the Parties**

The UCC does not apply to Service Contracts and they do not have a like statutory scheme to supply missing terms (while the common law, i.e., judicial decisions, may supply some terms, its application is often unclear and it may not protect the State's interests). Therefore, Service Contracts must contain all terms necessary to define rights and Obligations of the Parties. Service Contract provisions are also subject to any laws specifically applicable to a Contract, for example, usury limits on interest rates.

**ii) Payment**

Payment can be made at regular intervals as Services are performed, e.g., monthly or quarterly, or upon completion, and should be based on invoices detailing Services performed and any additional Costs incurred.

**iii) Performance Period/Delivery Date**

Service Contracts usually use the term "period of performance" to define the time within which Services must be performed.

**iv) Inspection and Acceptance**

Services may be difficult to inspect and examine. This is often performed by selecting representative samples and examining them to determine Acceptability of performance. There is more reliance on invoices and relying on Vendor affirmations, especially if payment is based on the number of labor hours.

**v) Acceptable Performance**

Usually Substantial performance (not perfect performance) obligates the State to pay, even though the State may sue for Damages caused by deficient performance. Thus, it is important to define the State's rights, e.g. payment withholding, for deficient Vendor performance in Service Contracts.

**vi) Warranties**

Implied Warranties do not exist, and all Warranties must be specified in the Contract.

**C. Mixed Contracts**

The provisions in Contracts having Goods and Services apply to both unless otherwise stated; however, the UCC will supply any missing terms applicable to the Goods portion.

**7. CONTRACT CATEGORIES AND SUB-CATEGORIES OF CONTRACTS**

State Contracts are also classified as Expenditure Contracts, Revenue Contracts, and other Contracts (see FR 3-1 §3). These categories and their respective sub-categories are as follows:

**A. Expenditure Contracts**

- i)** Capital construction Contracts;
- ii)** Employee voluntary separation Agreements;
- iii)** Fund management Services Agreements;
- iv)** Goods Contracts;
- v)** Information Technology Contracts;
- vi)** Investment advisory Services Agreements;
- vii)** Outsource Contracts—third-Party payor;
- viii)** Personal property Leases/Licenses - State as Lessee or licensee;
- ix)** Personal Services Contracts;
- x)** Personal Services review exempt Contracts;
- xi)** Professional Services Contracts;
- xii)** Real property Leases/ Licenses – State as Tenant or licensee;
- xiii)** Real property purchase Agreements—State as Buyer; and
- xiv)** Settlement Agreements.

**B. Revenue Contracts**

- i) Franchise Agreements;
- ii) Real property Leases/Licenses – State as Landlord or licensor; and
- iii) Real property sales Agreements – State as seller; and..

**C. Other Contract Types**

- i) Debt Contracts;
- ii) Grant Contracts;
- iii) Interagency Agreements;
- iv) Intergovernmental Contracts;
- v) Loan Contracts;
- vi) No Cost Contracts/non-cash Contracts;
- vii) Price Agreements;
- viii) Sale of securities Agreements; and
- ix) Sponsored projects Agreements.

**8. PURPOSE AND FORMATION OF CONTRACTS**

Contracts benefit society by facilitating cooperation and trust necessary for sophisticated transactions, commercial and otherwise, by allowing Parties to pursue common purposes with reasonable certainty that an impartial authority will enforce the Obligations they contain.

The fundamental purpose of written Contracts is to memorializes the terms of Agreements reached between Parties thereby preventing misunderstandings and conflict later on as memories fade and/or circumstances changes. They provide a basis to enforce contractual provisions. As such, clarity of terms and completeness of the issues addressed are of primary importance. Contract drafters must know the subject matter and concerns of the Parties thoroughly enough to anticipate and address potential areas of disagreement and specifically address them. Given the breadth of Knowledge required for transactions, contract and project managers often must work together.

Creating Contracts for the State is an art requiring the balance of conflicting interests such as State requirements, Fiscal constraints, statutory requirements, and Vendor requirements. The primary concern should, however, always be the benefit to the State (and the taxpayers) as a whole.

The best Contract for the State does not necessarily mean squeezing Vendors for every possible advantage. While onerous provisions may be legal, they may have negative future consequences that outweigh initial gains. Vendors who feel they have been aggrieved by the State are less likely to provide Quality Service, are more apt to engage in legal action and may decide not to Bid on future State projects, thus limiting future competition. In addition, Vendors who know about bad experiences with the State may make more demands on future Contracts to offset perceived risks and trouble.

**9. DRAFTING CONTRACTS**

Contracts usually include a variety of provisions often referred to as 'boilerplate' or 'standard'. The OSC Model Contracts contain many of these deemed important to protect the State's interests in most situations. Contracts also require non-standard provisions describing the Parties' actual Agreement, which always include SOW/Obligations and term (start and end) and which typically include provisions relating to administration, financial, allocation of risk, Dispute resolution, and if applicable, rights and ownership of work product and Intellectual Property.

**A. Deciding Which Contract**

Deciding which Contract to use should begin early in the Procurement process. A best practice is to include draft Contracts with Solicitation documents so that Bidders respond knowing in advance the contractual provisions. Procurement teams should allow adequate time to negotiate and draft Contracts if is impractical to provide drafts in advance.

When reviewing similar Contracts to decide which to use, teams should never automatically adopt provisions without thoroughly reviewing and understanding how they relate to the current Procurement. Preparing outlines containing headings for provisions may help to highlight issues and reveal questions requiring legal and/or other professional counsel.

**B. Form of Contracts**

Evidence that Parties have reached Agreement can be documented in different formats, including but not limited to a “four-corner contract,” a Purchase Order, or performance by the Parties. Each form of Contract described herein has its own advantages and disadvantages. Part of determining which format is appropriate should be based on an assessment of the risks involved in Contract interpretation.

**i) Four-corner Contracts**

Four-corner Contracts are single documents that include all provisions within the pages (four-corners) of the Contract and provide are the best choice for major and/or complex transactions as they have detailed provisions and can be tailored to precisely spell out the Parties’ respective Obligations. The trade off is they require more time to draft.

**(a) State Models.** The OSC has developed a number of Model Contracts. These Model Contracts are incorporated into CMS. Their use provides consistency in form (which speeds up review), and the provisions are more protective of the State while being fair and reasonable for Vendors. Use of the Model Contracts is strongly recommended. Discussions with the OSC should begin early in the contracting process if Agencies/IHES determine use of a Model Contract will not fit their needs.

**(b) Vendor Agreements** (See OSC Policy, *Vendor Agreements*). These are Agreements (in any form, including online Agreements) provided by Vendors containing contractual provisions relating to the Goods and/or Services they provide. Their use is discouraged and the following are impermissible provisions required to be stricken from Vendor Agreements unless approved in advance by the OSC or an OAG reviewing attorney:

**(01) Price Increases.** Provisions putting the State at risk for payment of more than the agreed price for Vendor performance. Vendor Agreements may, however, specify reasonable cancellation provisions or other commercially reasonable terms, including, but not limited to, Liquidated Damages, rights, or Obligations because of breach or Termination (unless terminated for cause) of the Agreement.

**(02) State’s Indemnity.** Hold harmless and other any provisions the effect of which is to require the State to Indemnify or hold harmless the Vendor from or against third-Party claims regardless of how phrased; e.g., stating “the State shall be responsible for” in place of the “the State shall indemnify”, does not change the meaning. Also, adding the phrase “to the extent provided by law” does not make indemnities permissible.

**(03) Choice of Law.** Provisions providing for Choice of Law or Venue in any state other than Colorado. If the Vendor insists on alternative locations, the State Agency/IHE shall obtain approval from the OSC or the Attorney General or designated reviewing Assistant or Special Assistant Attorney General or Chancellor before agreeing to such provision.

**(c) Purchase Orders (POs).** POs are Contracts which use a “layered” approach, i.e., the Purchase Order often relies on a number of other documents that, in combination, comprise a total Contract. The documents comprising Offer and Acceptance are the evidence of the Agreement. Agencies/IHES may publish Solicitations with technical Specifications, receive responses, issue Awards to successful Vendors, and then issue POs to finalize the transaction.

**C. Drafting Tips (See also Chapter VII, *Supplemental Materials*)**

Contract drafting is not an exercise in creative writing; the purpose is to memorialize Agreements so that the Parties, or third-Parties such as judges, can easily understand what was agreed to as memories fade or changes. Well-drafted Contracts are clear, direct, and precise, not reflective, provocative, or entertaining. They reduce the likelihood of litigation and reduce litigation costs and time if it does occur. When drafting Contract provisions (including SOWs), the following tips will assist in making them clear and understandable (an invaluable and concise reference tool containing 60 tips is located at [http://www.ncmahq.org/files/Articles/B50B6\\_CM\\_Apr06\\_p62.pdf](http://www.ncmahq.org/files/Articles/B50B6_CM_Apr06_p62.pdf)):

**i) Simple, Declarative Sentences-Active Voice-Brevity**

Make statements using simple, declarative sentences in the active voice, avoiding superfluous words. This shortens Contracts and makes them easier to read. For example, this sentence, “The contract provisions related to performance of the obligations belonging to

the vendor under this contract, shall be performed by the vendor under the timelines created in the contract”, is shorter, clearer, more precise, and has the same meaning when written as follows: “Vendor shall complete performance as set forth in §5 and Exhibit A.” Save space in long Contracts by reducing use of the words “the, a, an, and other articles” before “Vendor” and other similar nouns. Use the word “if” in place of phrases such as “in the event of”.

**ii) Nomenclature, Jargon, and Terms of Art**

Use plain English when possible; however, nomenclature, jargon, and terms of art specific to industries, professions, businesses, or government are often used in Contracts as a shorthand way of expressing concepts, ideas, methods, things, etc. (do not use legal terms unless absolutely clear on their meaning and purpose). Only use them if they are commonly and consistently used by those in the industry, profession, business, or government. It is a best practice to define them once in the Contract for ease of reference for laypersons, and once used, capitalize the first letter of any words associated with them; for example:

- (a) Parties to Contracts can be referred to as “Parties” with a capital P to distinguish them from the generic use of the word.
- (b) When referring to this manual, call it the Procurement Manual to differentiate it from the generic use, which would be: “the State may develop a procurement manual for training purposes.”

**iii) Consistent Naming**

Use the name of a thing, person, Entity or Service consistently and define that name on its first use if using a shortened reference; for example, “XYZ, Inc, (hereinafter called “Vendor”) shall provide teenage peer counseling services, (hereinafter called “Teenage Services”)”. Avoid calling the same thing, person, Entity, or Service by more than one term or name. If this is necessary (rare), state that the different terms or names refer to the same thing, person, Entity, or Service. Changing terms and names causes unnecessary confusion at best, and may cause unforeseen results if a judge decides the several terms and names do not refer to the same thing, person, Entity, or Service.

**iv) Shall and May**

Contracts should clearly and precisely state what Parties are required to do or refrain from doing and what they have discretion to do or refrain from doing. Contracts lacking mandatory provisions are not enforceable (see Chapter IV §10, *Content of Contracts and Modifications*, below). Contracts are not the place for soft, friendly language. Only use shall (for mandatory or required acts, omission, Obligations, etc) and may (permissive or discretionary acts, omission, Obligations, etc) in Contracts. Do not use will, must, or should in place of shall (at least when referring to Vendor Obligations as opposed to those of the State) as they do not have the same unequivocal meaning; furthermore, judges and lawyers are clear on what “shall” means. It is not necessary to state, “It shall be the responsibility of the vendor to ...” Save space and merely say, “vendor shall”.

**v) Unnecessary Phrases**

The following are examples of introductions or preambles often found in Contracts that do not add any substance, make Contracts longer than they need be, and may cause confusion by placing undue emphasis on certain clauses; therefore, please avoid using them:

- (a) **Acknowledges/Agrees.** Contracts are Agreements, thus it is not necessary to preface clauses with the phrase, and the Vendor (or the State) acknowledges and agrees.... For example, the following sentence, “With respect to the Books, the State acknowledges and agrees that Vendor has the right to modify and/or delete certain material as follows:” would be better stated as follows: “Vendor has the right to modify and/or delete certain material in the Books as follows:”
- (b) **Unless the Parties mutually otherwise agree.** Parties may modify any part of any Contract by mutual Agreement at any time (even if they originally agreed not to); although several approvals may be needed on the State’s behalf; for example, the State Office of Risk Management must approve changes to insurance provisions.

**vi) Do Not Repeat Provisions**

Do not repeat the same provision. Say it once, otherwise, small (or significant) differences in the way it is restated can have unforeseen consequences if it is necessary for judges to resolve Disputes and interpret language.



**vii) Cohesion**

Put related provisions together; this provides a logical flow and ease of reference.

**viii) Statements of Work (SOWs)/Obligations**

SOW is a term often used by the State usually referring to any Vendor Obligations, which are crucial to Contracts. They should be separately and carefully drafted using Vendor responses to Solicitations or Grant applications as a basis. It is a bad practice to merely attach Solicitations, Grant applications, and Vendor responses as SOWs as they often contain extraneous and non-precise verbiage that can be problematic if Disputes arise.

**10. CONTENT OF CONTRACTS AND MODIFICATIONS**

The following provisions shall be included in all State Expenditure Contracts, Grants where an Agency/IHE is the Grantor and provides funds from State, federal, or other sources to the Grantee, Intergovernmental Contracts where the State provides funds to the other governmental entity, debt Contract, and Price Agreements (see FR 3-1 §5 and OSC Policy, *Content–Mandatory Provisions in State Contracts*):

- Identification of the Parties;
- Effective Date;
- Appropriated and non-appropriated spending authority (except for IHEs);
- Statutory authority (except for IHEs);
- SOW (see Chapter II.14, *Planning-Writing Statements of Work (SOWs) and Specifications*, above, and Chapter VII.2, *Tips, Charts, and Checklists*, below);
- Payment terms;
- Maximum dollar amount of the Contract;
- Performance period;
- General terms and conditions;
- Special provisions (most current version);
- Signature page;
- If there are exhibits or other attachments, a separate section listing and identifying them; and
- If the Contract is a Phase I Waived Contract, it shall identify the Contract as such and state the Waiver number assigned to it by the OSC in the header, footer, or Recitals.

Contract Modifications should contain most of the above depending on their purpose. See OSC Policy, *Modification of Contracts–Tools and Forms*.

**11. PAYMENT TERMS**

Cost and price ceilings apply to all State Contracts. This section provides a discussion of Contract payments within the context of Contract Management. For a more complete discussion, refer to Chapter III, *Purchasing*, of this Manual. Payments required by different types of State Contracts are as follows:

**A. Firm, Fixed-Price Payments**

Contracts provide for firm, fixed-price payments when Vendors are entitled to payment of the agreed price upon successful delivery and acceptance of the Goods or Services, regardless of how much performance costs them. They have the following attributes:

- i) They are the easiest payment type to administer; there is no need to conduct an audit or require Vendors to account for Direct and Indirect Costs;
- ii) They are low risk to the State since the amount to be paid is stated in the Contract; and
- iii) They require Vendors and the project manager to have advance Knowledge of price, conditions for payment (e.g. delivery and acceptance), and standards of Acceptability for Goods or Services provided.

**B. Cost Reimbursement Payments**

Cost-reimbursement payments are the most complex payment type to manage, of highest cost risk to the State, and are rarely used by the State except in Grants. They have the following attributes and issues:

- i) OMB circulars, in the case of federal Grants, and CRS §24-103-501, for State Grants, require written determination that the use of Cost-reimbursement Contracts will likely be less costly to the State;
- ii) These payments require defined standards for cost accounting. See R §24-107-101-01 for guidance on Cost principles;
- iii) They are difficult from a Contract Management perspective as audits are the primary tool used to Monitor Costs. In addition, Contract performance is difficult to project, rendering customary Contract approaches for breach/Termination for Default unworkable;
- iv) Payment for Costs can be denied where unallowable or where Costs are unreasonably high for performance of the work if provided for contractually. This is often a difficult burden of proof for the State. See R §24-107-101-05(f);
- v) Agencies/IHEs should always seek to set a "not-to-exceed" ceiling for materials and supplies, and to define the scope of reimbursable supplies and materials; and
- vi) Cost-reimbursement Contracts require the State to pay Vendors' "reasonable, allowable, and allocable" Costs.
  - (a) Allowable: Those Costs that are "allocable" to Goods or Services provided under the Contract and are not prohibited by the contractual definition of allowable Cost (e.g. the cost of fines and penalties cannot be reimbursed, even if directly related to performance of the work).
  - (b) Allocable: The Cost being claimed was for the purpose of Contract performance. This may be difficult to determine when dealing with Indirect Costs (e.g. Overhead) that benefit not only Contract performance, but also provide other benefits to Vendors.

**C. Time and Material/Labor Hour Payments**

Time and material/labor hour payments are used where Service level is the primary component of the work, or it is difficult to otherwise price the Deliverable; for example, emergency Services when prior research is impossible. When using these Contracts, the Procurement team should consider the following:

- i) Use agreed upon per hour labor rates that include Direct and Indirect Costs and profit;
- ii) Include a maximum amount payable, which program managers should Monitor;
- iii) The Contract should contain a provision making Vendors responsible for immediate reporting when Costs have exceeded a certain percentage of the Contract ceiling, which allows the Parties to adjust Services before funds are depleted;
- iv) Include clear definitions of the scope of reimbursable supplies and materials; and
- v) Management of these types of payments requires an examination of invoices specifying labor hours and materials, some validation that Goods were purchased or Services were performed, and inspection of Services performed or Goods delivered.

**D. Indefinite Delivery Payments:**

Indefinite delivery payments are used when the Quantity of Goods and Services to be provided cannot be defined at the time of contracting. This situation requires the Parties to agree on a rate of payment upon delivery or completion. These types of payment Contracts are generally referred to as "open-ended," and are often priced on a "per unit" basis where the specific Quantity (e.g. hours of computer programming Services), is not known.

**i) Types**

Two types of Contracts containing these indefinite delivery payments are the following:

- (a) "Estimated Quantities" Contracts are indefinite delivery Contracts that set a minimum Quantity order for the State, and may also set maximum quantities and limits on each individual order issued; and
- (b) "Requirements Contracts" also use indefinite delivery and may require the State to satisfy all its needs using that Contract; if it does, the State is in breach if it uses a different Vendor. This type of Contract often provides the State more favorable prices but requires the State to satisfy its requirements through a single Vendor. An example of this type of Contract is a mandatory state-wide Price Agreement.

**ii) Duties**

Contract and project manager duties when using indefinite delivery Contracts include:

- (a) Knowing and ordering the minimum Quantity specified in the Contract;
- (b) Limiting the amount ordered to the maximum Quantity allowed or other specific limits;
- (c) Ensuring the provisions of the Contract are upheld such that the requirements are not satisfied outside of the Contract (such as by buying from another Vendor); and
- (d) Inspecting Goods and Services and validating receipt of the Goods or Services listed on the invoice as delivered.

**E. Maximum Dollar Amount**

FR 3-1 requires a maximum dollar amount in all Contracts depending on the Contract type. In brief:

- i) Fixed-Price Contracts obligate Vendors to complete performance for a specified amount;
- ii) Cost reimbursement Contracts are generally "best efforts" Agreements. Vendors do not guaranty to complete performance for a fixed amount; however, the Cost cannot exceed the maximum amount; and
- iii) Labor hours Contracts should clearly state whether Vendors are to complete performance for the maximum amount or if they are to stop work when and if they reach the maximum.

**12. TIME PERIODS AND DATES OF CONTRACTS**

**A. Effective Date**

The Effective Date is the later of the date the State Controller or delegate signs a Contract or another date specified therein. CRS §§24-30-202(1) makes this is the date that the Contract becomes valid and performance under the Contract may begin. Consequently, performance and payment Obligations may need to be adjusted to reflect the Effective Date. See OSC Policy, *Effective and Made Dates*.

**B. Statutory Violations**

Statutory Violations occur when performance begins before the Effective Date. To avoid Statutory Violations, State Contracts should contain a Contract provision providing that the Effective Date is the later of the date stated in the Contract or when signed by the State Controller or delegate.

Exception: the only exception is federal Subrecipient Grants where Vendors may be paid for performance starting before the Effective Date if all other requirements in the OSC Policy, *Grant Contracts - Federal Subrecipients*, are met.

**C. Five Year Maximum**

Contracts governed by the State Procurement Code may not exceed five years (including Options) unless approved in writing by the State Purchasing Director (R §24-103-503). Regarding Options, R §24-103-503 states, "Specifications for multi-year contracts shall contain conditions of renewal or extension, if any. Methods used to determine any price escalation/de-escalation shall be part of the original specifications and made a part of the contract. Contracts shall only be renewed or extended if funds are available for the new contract period."

**D. Performance Period**

There are instances where the Effective Date is not the date the actual Services will/can begin, in which case, Contracts must clearly define when Vendors are expected to perform. For example, a Contract may be signed on July 20, 2009, but work under the research study cannot begin until October 1, 2009 while data will be collected and a report submitted by April 30, 2010. The initial term of the Contract can be July 20, 2009 to July 19, 2010 (one year), but the actual performance period falls within the Contract term.

**13. GENERAL PROVISIONS**

Often called "boilerplate" or "standard", these provisions, which are set forth in the Model Contracts, create a basic framework providing acceptable protections for the State balanced against the needs of Vendors. Model Contract provisions should not be changed without good reason, a determination by Agencies/IHEs that that the benefits outweigh the risks, and, OSC approval unless such approval authority is granted to Agencies/IHEs (see OSC Policy, *Model Contracts*). For example, Vendors may seek to change the Indemnification provision in the Model Contracts. The OSC allows Agencies/IHEs to modify this provision if the latter determines that the risks are of doing so are small and the benefits of entering into the Contract are Substantial.

## 14. INDEMNIFICATION BY THE STATE-PROHIBITED

Agencies/IHEs are prohibited from and shall not Indemnify and/or hold harmless another Party against any liability incurred as a result of the acts or omissions of such Agency/IHE (see Constitution of Colorado, Article V §33, *Disbursement of public money*, and Article XI §1, *Pledging credit of state, county, city, town or school district forbidden*, and FR 3-1 §5). This holds no matter how the indemnity is worded, e.g., a clause that says, "...the State shall be responsible for..." may be providing an Indemnification even if the latter word is not used. The only exception is CRS §§24-30-1510(3)(e), which authorizes a limited Indemnification of an owner of property leased to Agencies/IHEs for State purposes to be paid out of the risk management fund.

## 15. LIMITATIONS OF LIABILITY

Vendors are increasingly seeking to limit their exposure for Damages via contractual provisions that limit their liability. This increases the State's risk and they should be carefully examined regarding their effect.

### A. OSC Fiscal Rule and Policies

The presence of such limiting provisions makes Contracts automatic high-risk requiring OSC review for Agencies (see OSC Policy, *Review and Approval of State Contracts-Delegated Agencies*) and IHE reviewing attorneys for IHEs. OSC FR 3-1 §5.3.2 states as follows:

#### Quote IV-1-FR 3-1 §5.3.2

#### 5.3.2 Limitation of Liability

**5.3.2.1 Limitation of Vendor's Liability - Bodily Injury and Property Damage.** An Agency or Institution of Higher Education shall not limit the vendor's liability for claims or damages, including consequential damages, arising out of bodily injury (including death) and damage to tangible property, if tangible risk is inherent in the nature of the contract.

**5.3.2.2 Limitation of Vendor's Liability - Other Types of Damages.** An Agency or Institution of Higher Education may accept commercially reasonable limitations of liability and/or remedies provisions, or the exclusion of consequential damages, if the benefits are deemed to outweigh the risks and this determination is documented in the contract file. Such action requires approval of the State Controller or other individuals specified in a delegation letter from the State Controller, and may include a Reviewing Attorney, or an Agency procurement or contracts officer.

### B. Examples

The following are examples of common limitations Vendors are proposing, which may be used separately or combined:

#### i) Limits on Types of Actions

Limitations of the types of actions for which they have liability; e.g., "vendor shall not be liable for infringement claims" or "vendor shall not be liable for claims in tort".

#### ii) Exclusion of Warranties

Exclusion of non-express (implied) Warranties; e.g., Warranty of fitness for a particular purpose. Providing very restricted express Warranties or none at all.

#### iii) Limits on Types of Damages

Limits on the types of Damages for which they are liable, typically via excluding consequential/special Damages.

#### iv) Limits on Amounts of Damages

Limiting the amount of recoverable Damages (often to the amount paid under Contracts or even paid in any given period in them).

#### v) Source of Damages

Limiting the source from which Damages are paid (becoming common in real estate Leases); e.g., "only to the extent of landlord's interest in the property", which may be heavily mortgaged.

## 16. INTELLECTUAL PROPERTY (IP)

### A. Overview

Some of the most valuable aspects of Goods and Services are not the actual supply, software, report, etc., but the rights to possess, use, copy, publish, display, transfer, and prepare derivative works related to Goods or Services, including the right to allow others to use Goods or Services in specified manners through licensing.

IP is a complicated and specialized area of law and requires careful scrutiny. OSC, OAG, and OIT (for IT Procurements) assistance are advisable in this area whenever Agencies/IHEs are changing Model Contract provisions or receive unfamiliar terms from Vendors.

### B. Intellectual Property Types

IP refers to creations of the mind; it is the physical or tangible result of original thought: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. The types of IP likely to be encountered in State contracting are:

#### i) Patents

The Patent Act (35 USC 101 et seq.)(Patent Act) protects novel ideas. Patents grant inventors the exclusive right to make, use, sell, license, assign, and/or import their patented invention in the United States for twenty years. Design patents offer more limited protection more akin to copyrights. Remedies for patent infringement are applicable whether or not the infringement was intentional.

#### ii) Copyrights

The Copyright Act (17 USC 101 et seq.)(Copyright Act) protects “original works of authorship.” The Copyright Act protects the expression of ideas, but not the ideas themselves. The holder of a copyright has the right to copy, distribute, prepare derivative works; i.e., modify, and publicly display the work. Although copyright protection exists under common law, the protection is more limited than that provided under federal statute. Remedies for patent infringement apply whether or not the infringement was intentional.

#### iii) Trademarks

Protections for trademarks and service marks exist under federal law through the Trademark Act of 1946 or Lanham Act (15 USC 1051 et seq.), State law (CRS §7-70-101 et seq. and CRS §18-5-110.5) and common laws. Trademarks and service marks identify and distinguish Goods or Services in commerce. They can be visual or auditory. Trademarks grant owners exclusive rights to use within a defined geographical area (which can be worldwide) and within defined markets (which can be all) as long as they are in use, protected, and do not become a generic noun (aspirin used to be a trademark). Nike’s swoosh, McDonald’s golden arches, and the Olympics’ five interlocking rings are trademarks while “An Army of One” is registered service mark.

#### iv) Trade Secrets

Trade secrets are categories of information legal afforded protection. CRS §7-74-102 defines a trade secret as “the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses or telephone numbers, or other information relating to any business or profession which is secret and of value.” Examples include manufacturing techniques, software programs, cost ad pricing data, marketing techniques, customer lists, and food recipes. Vendors should be required to clearly identify trade secrets (or confidential and proprietary information) if they propose nondisclosure provisions and should be advised that the Colorado Open Records Act (CRS §24-72-203 and 204) requires disclosure of certain information despite contrary contractual provisions.

### C. Intellectual Property Rights in Software

The OSC and OIT may develop provisions defining the duties and rights to the data and documents delivered or produced pursuant to Contracts. Contracts should specify exactly what documentation (e.g. software) must be delivered as a standard clause stating that the State “owns” all rights in documentation delivered under the Contract means little if the Contract never requires delivery of software documentation.

Computer software programs have patents if they meet the requirements of the Patent Act. In addition, federal courts have classified computer software as a literary work under the Copyright

Act and protected source and object code. The original work issue often arises regarding databases as they are a compilation of data, raising questions about original authorship, i.e. what creative effort went into arranging or selecting the contents. Copyright protection has been extended to the selection and arrangement of the data, not the contents or the discrete facts. An issue also arises regarding authority of the State to reproduce additional copies of Vendor-developed materials, e.g. training materials that are furnished in limited numbers, original work and reproduction issues should be addressed in Contracts.

The State must decide whether to develop software in-house, Contract to develop custom software, or buy a License to use existing software. The State usually retains ownership rights to software and documentation developed in-house or by Contract. Vendors should deliver them to the State at Contract Termination, and may be prohibited from otherwise using them without the State's permission.

Vendors retain ownership rights and the State obtains a use License when Purchasing commercial off-the-shelf software. At a minimum, License provisions should clearly identify the following:

- i) The term of the License-usually perpetual;
- ii) The Cost of the License;
- iii) That other entities on behalf of the State may modify and use the Licensed software; and
- iv) All of the rights the State wishes to retain, including the right make archival copies and to modify at least the portion of the software customized for the State's use.

## **17. INSURANCE**

As a matter of Policy, the State requires that its Vendors (with some exception for Contracts with non-State public entities) maintain certain types and minimum levels of insurance. This ensures that Vendors have the financial capability to defend the State from lawsuits and to pay claims where liability exists while continuing to perform Services. The State requests additional insured status on all policies (excepting auto) as it offers protection under Vendor insurance policies if the State is sued in conjunction with Vendors based on Vendors' fault. The State has its own liability coverage for claims alleging the State is at fault.

The standard types of insurance a State Vendor should have are commercial general liability (CGL), commercial automobile liability, and workers' compensation. Additionally, depending on the nature of Contract performance, the Vendor may be required to have: umbrella liability, professional liability, environmental impairment liability, and employee dishonesty/crime (if Vendors have control of State funds). Additional or special liability insurance is usually required for unique operations such as those involving the use of aircraft or watercraft.

The types of insurance coverage and certificate of insurance normally requested in State Contracts are discussed below. The liability limits required in the Model Contracts were provided by DPA's Office of Risk Management and are derived from the State's maximum liability exposure under the Colorado Governmental Immunity Act, CRS §24-10-101 et. seq. If Contracts have exposures outside of the standard insurance provisions in the Model Contracts, please contact the State Office of Risk Management for assistance in determining appropriate insurance coverage or for any insurance related issues.

### **A. Commercial General Liability**

CGL is the standard insurance policy issued to business organizations to protect them against liability claims for bodily injury and property damage arising out of the operation of their business such as premises operations liability, products and completed operations, advertising, and personal injury. Personal Injury includes: false arrest; detention or imprisonment; malicious prosecution; wrongful eviction; slander; libel; and invasion of privacy.

### **B. Commercial Automobile Liability**

Commercial automobile liability coverage protects against loss arising from automobile-related injuries to others or property damages. Do not omit this coverage unless Vendors will not use an automobile as part of Contract performance. Even limited use of a Vendor's automobile to "run errands" during performance of Services may involve the State in a lawsuit if an accident occurs.

**C. Umbrella Policies**

Umbrella policies provide protection against catastrophic losses excess of primary policies such as CGL, auto liability, and the employer's liability section of a workers' compensation policy. They provide increased limits of liability when the limits of underlying policies are exhausted.

**D. Professional Liability**

Professional liability policies protect traditional professionals (e.g. physicians, attorneys, architects, engineers, accountants, etc.) and quasi-professionals (computer programmers, real estate brokers, insurance Agents, etc.) against liability incurred as a result of errors and omissions in performing Professional Services. Most professional liability policies cover economic losses suffered by others. Policies also cover bodily injury and property Damage risks for certain professions such as physicians, architects, and engineers; however, most other professionals, bodily injury and property damage losses are covered under CGLs.

**E. Environmental Impairment Liability**

Liability for the contamination of the environment by pollutants is normally excluded to some degree by other liability policies and requires special environmental liability insurance covering liability and sometimes cleanup costs. The Procurement team should consult with the OAG and/or the State Office of Risk Management if Contracts involve environmental issues.

**F. Occurrence vs. Claims-Made Policies**

Liability insurance may be written on an "occurrence" or "claims made" basis. There is a significant difference between the two and the former is preferable from the State's perspective.

**i) Occurrence**

Occurrence based policies cover losses occurring during the policy period, regardless of when claims are reported to the insurance company. Most CGLs are written on occurrence forms.

**ii) Claims-Made**

Claims made insurance pays when the claim is both made against the insured and reported to the carrier during the policy term. Claims made policies are commonly used for professional and environmental liability risks. A key provision is that coverage ends when the policy expires. To ensure coverage for claims arising out of the Services performed that manifest after the Expiration of the policy, the Procurement team should require an "extended reporting provision" (also know as a "tail"), which keeps the policy in force after Contract Termination or Expiration for a period equal to the applicable statute of limitations on lawsuits, normally two years. As an alternative, the Procurement team can also request that similar coverage, with a "prior acts" provision, be kept in place for a period also equal to the statute of limitations after the end of the Contract.

**G. Workers' Compensation Insurance**

Required by State statute, workers' compensation provides no-fault statutory benefits from employers to Employees due to job-related injuries or death resulting from accident or occupational disease.

**H. Crime Insurance**

Crime insurance can cover losses arising from Employee dishonesty, theft of money, securities or personal property, safe burglary, forgery, robbery, computer fraud, and funds transfer fraud. It should be requested if Vendors will have control of or access to the State's funds, other negotiable instruments, or personal property. The State should be added as a "Loss Payee" on the policy to ensure that the State has a right to file a claim directly with the insurance company in the event of a loss. The most common use is for janitorial Contracts.

**I. Surety Bonds**

Surety bonds (Surety Bonds) are a guarantee, in which the Surety guarantees the principal (Vendor) named in the bond will perform the Obligation stated in the bond on behalf of the obligee (State). If a Vendor fails to perform the Obligation stated in the Surety Bond, both the principal and the Surety are jointly and severally liable; however, the Surety's liability only extends to the "Penalty or Penal Amount", which is the upward limit of liability on the bond. Common types of Surety Bonds include:

**i) Bid Bond**

The Obligation in the bond is that the principal will honor the Bid.

**ii) Performance Bond**

The Obligation in the bond is that the principal will complete the project.

**iii) Payment Bond**

The Obligation in the bond is that the principal will properly pay Subcontractors and suppliers.

**J. Insurance-State of Colorado Policies**

The State self-insures the majority of its liability exposures, meaning that the State provides its own defense and pays the ultimate liability in most cases from the risk management fund administered by the State Office of Risk Management. The State Office of Risk Management will, upon request by a Vendor, issue a certificate showing State CGL coverage. The risk management fund covers only the liability of State Agencies/IHEs and Employees and no one else may be named as an additional insured. Further, the State may not promise to use self-insurance to contractually meet any liability except in property Leases covered under CRS §24-30-1510(3)(e).

The State has a commercial insurance policy covering damage to its property on an "all risk" basis, subject to specific exclusions. The Procurement team should contact the State Office of Risk Management before, not after, delivery of Goods or Execution of a real property Lease to have such property listed on the State's policy if asked to carry insurance on leased real or personal property or property purchased on an installment plan.

**K. Insurance-Governmental Vendors**

Model Contracts provide special treatment for "public entity" Vendors within the meaning of the Colorado Governmental Immunity Act, CRS §24-10-101, et seq., which applies only to Agencies and political subdivisions created under the law and/or the State Constitution. It does not apply to agencies or political subdivisions of the federal government or other states, which usually have their own governmental Immunity statutes, self insurance, or other alternatives to insurance. These are often cited by those entities as reasons to not comply with standard State insurance requirements, and deletion of such requirements in federal/other state Contracts may be acceptable as the risk of the State being liable for the actions of federal/other state entities is often minimal.

**L. Certificates of Insurance**

Model Contracts do not require certificates of insurance until seven business days after the Effective Date of Contracts. This reflects the reality that in some situations, Vendors will only incur the expenses of obtaining insurance after a Contract is Effective; however, if possible, the Procurement team should obtain a certificate of insurance before entering into a Contract as this provides the best protection for the State and obviates the necessity for Agencies/IHEs to engage in post-Execution verification. The Procurement team should ensure that the insurance is Effective during the Contract term and that limits comply with State Office of Risk Management guidelines, that the "Insured" name at the top of the form matches the name of the Vendor. During the review, the team should pay close attention to the way the way the boxes at the bottom of the form entitled "Description of Operations/Locations/Vehicles/Special Items", "Certificate Holder", "Cancellation", and "Valid As Of" are filled out.

Figure 1 on the next page is an example of a satisfactory certificate of insurance form (often called an "ACORD" form-the example says "MARSH").



**STATE OF COLORADO PROCUREMENT MANUAL**

**Figure VI-1-Insurance Certificate**

<b>MARSH</b>		<b>CERTIFICATE OF INSURANCE</b>			CERTIFICATE NUMBER SEA-000821688-06	
<b>PRODUCER</b> MARSH USA INC. 1225 17TH STREET, SUITE 2100 DENVER, CO 80202-5534		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER OTHER THAN THOSE PROVIDED IN THE POLICY. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES DESCRIBED HEREIN.				
86100 -01245-CAS-01/02		<b>COMPANIES AFFORDING COVERAGE</b>				
<b>INSURED</b>		COMPANY <b>A</b> ROYAL INDEMNITY COMPANY				
X, Y, Z, INC. 105 PLEASANT STREET ANYWHERE, CO 80000		COMPANY <b>B</b> FIREMANS FUND INSURANCE CO.				
		COMPANY <b>C</b> PINNACOL ASSURANCE				
		COMPANY <b>D</b> LEXINGTON INSURANCE COMPANY				
<b>COVERAGES</b> This certificate supersedes and replaces any previously issued certificate for the policy period noted below. <span style="float: right;">6</span>						
THIS IS TO CERTIFY THAT POLICIES OF INSURANCE DESCRIBED HEREIN HAVE BEEN ISSUED TO THE INSURED NAMED HEREIN FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THE CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, CONDITIONS AND EXCLUSIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.						
CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A	<b>GENERAL LIABILITY</b>	1234	07/01/01	07/01/02	GENERAL AGGREGATE	\$ 1,000,000
	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY				PRODUCTS - COMP/OP AGG	\$ 1,000,000
	<input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR				PERSONAL & ADV INJURY	\$ 1,000,000
	<input type="checkbox"/> OWNER'S & CONTRACTOR'S PROT				EACH OCCURRENCE	\$ 1,000,000
					FIRE DAMAGE (Any one fire)	\$ 50,000
					MED EXP (Any one person)	\$ 5,000
B	<b>AUTOMOBILE LIABILITY</b>	1234	07/01/01	07/01/02	COMBINED SINGLE LIMIT	\$ 1,000,000
	<input checked="" type="checkbox"/> ANY AUTO				BODILY INJURY (Per person)	\$
	<input type="checkbox"/> ALL OWNED AUTOS				BODILY INJURY (Per accident)	\$
	<input type="checkbox"/> SCHEDULED AUTOS				PROPERTY DAMAGE	\$
	<input type="checkbox"/> HIRED AUTOS					
	<input type="checkbox"/> NON-OWNED AUTOS					
	<b>GARAGE LIABILITY</b>				AUTO ONLY - EA ACCIDENT	\$
	<input type="checkbox"/> ANY AUTO				OTHER THAN AUTO ONLY:	
					EACH ACCIDENT	\$
					AGGREGATE	\$
	<b>EXCESS LIABILITY</b>				EACH OCCURRENCE	\$
	<input type="checkbox"/> UMBRELLA FORM				AGGREGATE	\$
	<input type="checkbox"/> OTHER THAN UMBRELLA FORM					\$
						\$
C	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b>	1234	07/01/01	07/01/02	<input checked="" type="checkbox"/> W/C STATUTORY LIMITS <input type="checkbox"/> OTHER	
	THE PROPRIETOR/PARTNERS/EXECUTIVE OFFICERS ARE: <input type="checkbox"/> INCL <input type="checkbox"/> EXCL				EL EACH ACCIDENT	\$ 100,000
					EL DISEASE-POLICY LIMIT	\$ 100,000
					EL DISEASE-EACH EMPLOYEE	\$ 100,000
D	<b>OTHER</b>	1234	07/01/01	07/01/02	EACH CLAIM \$1,000,000 DEDUCTIBLE _____	
<b>DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS</b> CERTIFICATE HOLDER IS NAMED AS ADDITIONAL INSURED. ABOVE POLICIES SHALL BE PRIMARY AND INCLUDES A WAIVER OF SUBROGATION IN FAVOR OF THE STATE OF COLORADO, ITS OFFICERS, AGENTS, EMPLOYEES AND VOLUNTEERS.						
<b>CERTIFICATE HOLDER</b>			<b>CANCELLATION</b>			
COLORADO DEPARTMENT OF _____ DIVISION OF _____ (ADDRESS) _____			SHOULD ANY OF THE POLICIES DESCRIBED HEREIN BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE INSURER AFFORDING COVERAGE WILL ENDEAVOR TO MAIL <u>45</u> DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED HEREIN, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER AFFORDING COVERAGE, ITS AGENTS OR REPRESENTATIVES, OR THE ISSUER OF THIS CERTIFICATE. <b>MARSH USA INC.</b> BY: _____ <b>MM1(3/02)</b>			
			VALID AS OF: 11/16/04			

## 18. HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT

HIPAA refers to the Health Insurance Portability and Accountability Act of 1996. Included in HIPAA are the Privacy Rule, which provides national standards to protect the privacy of protected health information (PHI) held by a covered entity, and the Security Rule, which provides national standards to protect the security of PHI in electronic form (ePHI) that is created, received, used, or maintained by a covered entity.

A covered entity is defined as a health plan, a health care clearinghouse, or certain health care providers. PHI is individually identifiable health information that relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and either identifies the individual who is the subject of the information, or there is a reasonable basis to believe the information can be used to identify the individual. PHI does not include individually identifiable health information in education records covered by the Family Educational Rights and Privacy Act (FERPA), or in employment records held by a covered entity in its role as employer.

A “business associate” is a person or entity, not a member of the covered entity’s workforce, that performs a function or activity on behalf of the covered entity involving use or disclosure of PHI (e.g., claims processing or administration; quality assurance; and benefit management), or provides services to the covered entity involving use or disclosure of PHI (e.g., legal, accounting, consulting, and management services). Business associates are required to maintain the privacy and security of PHI to the same extent as that of the covered entity. A covered entity may only disclose PHI to a business associate and allow the business associate to create or receive PHI on behalf of the covered entity if the covered entity and business associate enter into a written contract or agreement (a “business associate agreement”). These contracts require that business associates comply with certain HIPAA privacy and security requirements.

The Health Information Technology for Economic and Clinical Health Act (HITECH Act) is part of the American Recovery and Reinvestment Act of 2009 (ARRA). The HITECH Act amends HIPAA by expanding the scope of privacy and security protections, increasing potential legal liability for non-compliance, and providing for more enforcement. Prior to HITECH’s enactment, HIPAA only applied to business associates indirectly through contractual obligations with covered entities and business associates did not have direct HIPAA liability. The HITECH Act legally obligates business associates to comply directly with certain HIPAA requirements pertaining to the privacy of PHI, the security of ePHI, and the reporting of breaches of unsecured PHI.

## 19. SPECIAL PROVISIONS

Special Provisions shall be included in all Contracts excepting Interagency Agreements and sponsored project Agreements, and shall not be modified, except as provided in FR 3-1 §5, which states,

### Quote IV-2 FR 3-1 §5

“An Agency/IHE contracting with governmental entities outside of the State shall not agree to modify the Special Provision requiring the governance of Colorado law, but, if requested, may agree to strike the Choice of Law Special Provision, resulting in contractual silence as to governing law. Any other change to the Choice of Law Special Provision shall require the prior written approval of the Office of the State Controller and a Reviewing Attorney.”

## 20. EXHIBITS

Exhibits (also called attachments-the Model Contracts use the term “Exhibit”) are documents attached to Contracts for a variety of purposes; for example, schedules, charts, and forms, as well as substantive provisions (SOWs are often attached as Exhibits to State Contracts). Exhibits may be attached merely for reference, for example, a sample form. In this case, use the language, “Exhibit D (Payment Request) attached hereto for reference.” Exhibits attached to affect Contract terms should be referred to as follows: “Exhibit A (Statement of Work), attached hereto and incorporated by reference herein.”

Exhibits should be clearly identified and their use or purpose should be stated in the body of the Contract. For example, “Exhibit A (Statement of Work).” Once identified, a reference to “Exhibit A” suffices and saves space.

Documents referred to in a Contract that affect Contract terms should be attached as Exhibits; for example, building regulations in real property Leases. Exceptions include: Price Agreements which may be referred to by RFP or Award numbers; published laws (statutes, rules, regulations, etc) which may be cited; and voluminous policies or manuals which apply to the Contract, may be Incorporated by reference by citing the title of the document, its date, and other identifying information. When the State leases office space and the Lease requires adherence to building rules and regulations, these must be attached to the Lease, properly identified as an Exhibit, and Incorporated into the Lease.

Provisions in Exhibits should be carefully compared with the language of the Contract and any inconsistencies or ambiguities clarified (do not rely solely on an "Order of Precedence" provision). If a clause in an Exhibit is not applicable or problematic for the State, it should be crossed out, with all Parties initialing the change.

Exhibits meant to modify, supplement, or replace an earlier Exhibit should state its purpose and clearly identify the prior Exhibit. When possible, it makes sense to draft new Exhibits to completely supersede original Exhibits thus removing any need to review the latter.

## **21. AUTHORITY TO SIGN CONTRACTS**

Under agency law persons signing Contracts on behalf of Vendors must have authority to do so in order to bind the Vendor (principal). As signatory authority to bind Vendors is a question of fact, there are no hard and fast rules, and the Procurement team should exercise sound judgment to ensure that reasonable indications of reliability are present. Depending on the circumstances, a title may suffice, some investigation may need to occur, and/or documentary proof may be requested. See OSC Policy, *Vendor Signature Authority*.

There are two types of authority, and signatories may have one or both. A Vendor's lawyer does not have actual or apparent authority to bind a Vendor merely by virtue of the attorney-client relationship, unless they are in-house counsel.

### **A. Actual Authority**

Actual authority means the signatory has authority (usually written) to sign. The extent of such authority, general or limited to certain types of Contracts, can be ascertained by reviewing the basis for the authority; for example, governmental resolutions, corporate resolutions, Partnership Agreements, powers-of-attorney, and operating Agreements. The powers of all State officers are set by law. They should only act within the limits of their authority as only those persons having actual, not just implied, authority can bind the State in a Contract.

### **B. Apparent Authority**

Signatories may have apparent authority to bind Vendors. Apparent authority exists if third-Parties reasonably believe signatories have authority to bind Vendors based on acts or omissions of Vendors, not just those of the signatory (Agent). This is a question of fact and apparent authority ranges from limited to expansive. For example, a mechanic may have apparent authority to quote a rate to repair a particular State car, but not commit the shop to repair all State cars at a set rate for the next five years.

#### **i) Exception**

Apparent authority cannot be claimed if the State knows, or reasonably should have known, that signatories lack authority. For example, if the State has been told that only the owner can sign Contracts or if there is a public sign stating the same, there is no apparent authority.

#### **ii) Ordinary Course of Business**

Apparent authority only exists if a signatory is acting in the ordinary course of business. For example, the Procurement team should obtain a written basis for a car mechanic's authority to sign a CDPHE healthcare Agreement, while that is not necessary for the president of Kaiser.

**C. Examples**

The following is a list of commonly encountered entities and the positions in them that normally have authority to bind their respective entities (unless the State has actual Knowledge to the contrary):

**i) Corporations-For Profit**

Corporate officers (CEO, CFO, president, vice-president, treasurer, secretary), members of the board of directors, any position specifically authorized in the corporate by-laws. Officers of large Corporations sign only the largest dollar Contracts; most Contracts will be signed by others such as “Regional Sales Manager”.

**ii) Corporations-Non-Profit**

The same rules as for-profits apply; however, non-profits often use different nomenclature, such as director or executive director. Non-profits often neglect to add Inc., Corp., or other designations indicating that they are Corporations.

**iii) Partnerships**

Any general partner can bind a general or limited Partnership. A Partnership is the association of two or more people to carry on a business for profit.

**iv) Limited Liability Corporations (LLCs)**

Managers can bind LLCs. Members can only do so with specific authority, although in small LLCs, it is common for members to also be managers.

**v) Sole Proprietorships**

Individuals who do not have any formal business structure can bind themselves as Sole Proprietorships. If they have a Trade Name, they should sign individually for the Trade Name, for example, “Joe Dean, DBA, Joe’s Sign Shop.”

**vi) Governmental Entities**

**(a) Counties.** Chairperson or vice-chair of the Board of Commissioners.

**(b) County/ District Boards of Health.** President.

**(c) County/ District Boards of Social Services.** Chairperson or vice-chair of the Board.

**(d) Cities-Statutory-Not Home Rule.** Mayor for cities with mayoral form (CRS §31-4-102). City council usually delegates to the city manager or mayor for cities using the city manager form under CRS §§31-4-207.5 and 208.

**(e) Cities-Home Rule.** City council usually delegates to the city manager or mayor. City charter may have additional requirements.

**22. SIGNATURES ON CONTRACTS**

Signature pages should contain the following information (many errors occur on the signature page):

**A. Vendor Name**

In the signature block for the Vendor, the full legal name should appear as it appears on page 1 of the Contract. The Secretary of State (SOS) Vendor information controls.

**B. Agency/IHE Name**

The signature block should include “The State of Colorado, by and through (insert name of Agency/IHE)”; for example, “the Department of Natural Resources, Division of Wildlife.”

**C. Original Signatures**

Original signatures are preferred. Copies are allowed on a case-by-case basis with prior approval by the CCU. Electronic signatures using digital keys are not yet accepted by the State.

**D. Names and Titles of all Signatories**

Names and title of all signatories should be printed out as most signatures are not legible.

**E. Vendor Signatory Authority**

Authority, actual or apparent, must exist to bind the Vendor. If questionable, obtain evidence of authority, such as a corporate resolution or Delegation letter. See OSC Policy, *Vendor Signature Authority*, and Chapter IV §21, *Contract Formation, Drafting and Approval-Authority to Sign Contracts*, above.

**F. State Signatory**

See OSC Policy, *Signature Authority Delegation*.

## **23. FUNDING OF CONTRACTS**

### **A. Funding**

The State Controller or delegate reviews funding sources to ensure funds are available to pay contractual Obligations and that the funds have been properly encumbered for each Contract. The Procurement team should review funding sources (funding may come from one or multiple sources) early in the process in order to determine if any time limits or other restrictions exist and take actions necessary to comply with them. The Procurement team must know if additional funds are available and how to secure them if they become necessary due to changes.

### **B. Funding Obligation Authority**

Vendors may be required to provide all or part of the funding, e.g., a match requirement in a Grant. Before Contract Execution, Agencies/IHES should verify that the total amount of such funds available and obligated or set aside exclusively for the Contract purpose if Agencies/IHES will be performing or contracting with a third-Party to perform all or part of the contractual Obligations in reliance upon such funding.

Such action is a good practice regardless of the type of Vendor. It ensures complete performance by protecting against claims by third-Party Vendors resulting from termination due to lack of such funding. In addition, such action may also be required with certain types of Vendors in order to ensure a valid Contract. For example, Article X §20 of the State Constitution (TABOR) prohibits any local political subdivision from creating, by Contract, a multiple-Fiscal Year financial Obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future Fiscal Years. Contracts requiring funding from such a political subdivision beyond the Fiscal Year in which they were executed may be Void and unenforceable unless Vendors have obligated and set aside upfront all of its funding needed for the Contract.

### **C. Financial Administration**

Post-Execution administration includes ensuring payments are made in accordance with payment provisions, expenses are paid from the proper funding source(s), and that an available funding balance is maintained. Contracts should not be closed until Contract Managers, in consultation with project managers, have determined all requirements and Obligations have been satisfactorily performed and completed.

### **D. Federally Funded Contracts**

Federal Grants have specific Contract requirements. Agencies/IHES should ask the federal agencies administering Grant programs to identify essential and mandatory provisions used in the State's Subrecipient Agreements. Grants are typically Cost reimbursement payments, and the cost accounting rules are contained in OMB circulars. Per FR 3-1 §5.2.2.2, all Intergovernmental Contracts with the federal government shall be reviewed by the OSC or an OAG reviewing attorney.

## **24. ACCOUNTING PROCEDURES**

### **A. Encumbrances**

Portions of budgets must be reserved for future commitments made by Agencies/IHES. This is done by recording an Encumbrance on the Agencies/IHES' accounting systems, which prevents a certain amount of the budget from being spent. When Vendors have performed and payment is due, the Encumbrance is liquidated and that portion of the budget may be spent.

Statutes and OSC Fiscal Rules prohibit Agencies/IHES from overspending or over-committing their budgets; therefore, Contracts and modifications must be encumbered prior to approval by the State Controller or delegate. Agencies/IHES using COFRS for accounting should send a screen print of the Encumbrance for the Contract when routing the latter for approval. Acceptable COFRS Encumbrance documents are a PO transaction and a State Contract transaction. The encumbrance requirements for Agencies/IHES using other accounting systems are determined on a case-by-case basis by the OSC and Agency's/IHE's State Controller delegate. Agencies/IHES not using COFRS must include Encumbrance documentation in their Contract files.

**B. Expenditure and Unencumbered Balance**

The following tasks ensure expenditures do not exceed unencumbered balances:

**i) Set up the Encumbrance:**

FR 3-1 §10.1 requires all Contracts and modifications to be encumbered prior to approval by the State Controller or delegate. OSC's Fiscal Procedures Manual Chapter 1, §4, *Encumbrance Issues*, has instructions for encumbering the next Fiscal Year's Contracts prior to the July 1 start of that Fiscal Year. A complete copy of the Fiscal Procedures Manual can be obtained through OSC's website at:  
[http://www.colorado.gov/dpa/dfp/sco/FiscalProcedures/Cur/manual\\_cur.htm](http://www.colorado.gov/dpa/dfp/sco/FiscalProcedures/Cur/manual_cur.htm).

**ii) Check unencumbered balance:**

Prior to approval, the State Controller or delegate must verify that the amount of Encumbrances for the Fiscal Year do not exceed the unencumbered balance of the appropriation. For Agencies/IHEs using COFRS, approval occurs in the SUSF table, unless COFRS shows an error, in which event, approval occurs after the error is fixed.

**C. Adjust the Encumbered Balance**

At the end of a Contract, also called "Contract close out", Agencies/IHEs accounting staff adjust the encumbered balance to equal actual expenditures. Unexpended funds are made available for other uses funded by that appropriation.

**D. Other Accounting Issues**

**i) Advance Payments-FR 2-2 §8:**

Contracts and other Commitment Vouchers shall not provide for Advance Payment for Goods supplied, Services performed, and/or for any other contractual Obligation, except as permitted in FR 2-2 §8.3.

**ii) Outsource Contracts-FR 3-1 §10.2:**

Agencies/IHEs are required to record all gross Revenues and expenditures for each outsource Contract in the State financial system and shall not net expenditures against Revenues, unless specifically exempted by State statute.

**iii) Statutory Violations:**

See CRS §24-30-202(3), FR 2-2 §7, and OSC Policy, *Statutory Violations*. Statutory Violations occur when liabilities are incurred or payments made on the State's behalf without a Commitment Voucher having been properly approved in advance when required. Under CRS §24-30-202(3), any person(s) who incurs, orders, or votes for an Obligation or makes a payment which creates a Statutory Violation is personally liable for such Obligation, unless the Statutory Violation is ratified by the State Controller.

**25. REVIEW BY STATE CONTROLLER OR DELEGATE**

FR 3.1 §9.3.1 requires the State Controller or delegate to approve all Expenditure Contracts. Review of the following items is required before approval to determine if:

**A. Expenditures**

- i)** Are authorized by the appropriation to which charged;
- ii)** Do not exceed the unencumbered balance of the appropriation;
- iii)** Comply with applicable constitutional and statutory provisions, SPO Rules, and OSC FRs and Policies; and
- iv)** Are encumbered.

**B. Prices or Rates**

- i)** Are in accordance with State law and administrative rules; and
- ii)** Are fair and reasonable.

**C. Form and Content**

Are sufficient and appropriate for the Parties and subject matter under applicable State and federal laws, and OSC FRs (including FR 3.1 §5) and Policies.

**D. Risks**

Are outweighed by their benefits.

## 26. BREACH OF CONTRACT

Breach of Contract occurs when one or more Parties fail to perform their respective Obligations or do perform in a manner inconsistent with their terms. Material Breaches, i.e. those that are Substantial and important, give rise to actions for Damages and/or rescission. The Party alleging a breach has the burden of proving it. Failure to perform in a timely manner may or may not be a Material Breach. If it is, it is advisable to include a “time is of the essence” provision in Contracts, and an explanation if unusual.

Contracts often provide that notice of breach and a time to cure the breach be sent to the breaching Party before further action is taken. This is purely a contractual right unless a mandated by law, for example, consumer protection acts. It is important to closely follow such provisions before attempting to exercise any Remedies.

## 27. DEFENSES TO BREACH OF CONTRACT

Remedies available for Breach of Contract can be lost if the breaching Party is able to establish certain defenses. The most common defenses are the following:

### A. Waiver

Waiver is an intentional and voluntary relinquishment or renunciation of a known right, claim, or privilege. Waivers of Breaches of Contract cancel any remedial rights arising from the breach. Depending on the circumstances, Waivers may be limited to a single instance or applied to the remainder of the Contract. Waivers can be express, i.e., the result of an affirmative act or implied, i.e., inferred from the conduct of the Parties. Telling Vendors, “That’s OK, finish up next week,” expressly waives any claim for Damages if the work should have been finished today, whereas not saying anything, but paying for the work when invoiced is an implied Waiver.

### B. Laches

Laches is an equitable doctrine stating that an unreasonable delay in asserting a right may bar relief for the non-breaching Party if the breaching Party has changed their position such that their interests are prejudiced due to the delay. This is a highly technical, fact-based legal doctrine that is easily avoided by promptly informing Vendors of defects in performance.

### C. Estoppel

Estoppel is an equitable doctrine allowing a breaching Party to avoid an otherwise valid claim due to act or inactions of the non-breaching Party upon which the breaching Party detrimentally relied. For example, if State Employees know better, yet watch a Vendor neglect to mix cement properly, say nothing, and allow the cement to be used, courts will “estop”, the State from asserting a Damage claim for cracking. Estoppel may also be applied if the State was complicit in or had a part in furthering a breach.

### D. Lack of Notice

Lack of notice is failure to follow notice and cure processes set forth in Contract or law.

### E. Impossibility

Parties may be excused from performing, in whole or part, if through no fault of their own, performance is impossible. This often is contractually covered in force majeure (acts of god) provisions. The latter is not a mandatory provision and has been removed from OSC Model Contracts/Grants as it does not normally provided benefit to the State as its Obligation is usually limited to paying. The relief granted varies with the nature of the impediment, and range from total or partial relief from performance to a mere extension of time. Examples of impossibility include, but are not limited to: war, fire, flood, pestilence, epidemics, strikes, embargos, illegality, and unusually severe weather (which must be very unusual, for example, a three-foot snowstorm in Denver in June as opposed to January).

### F. Avoiding Defenses to Breach

To avoid the application of these defenses:

- i) Limit express Waivers to the current issue and specify what is being waived and for how long;
- ii) Comply with any notice requirements;
- iii) Do not issue Change Orders or other directives after Defaults until a Remedies decision has been made;
- iv) Seek facts from Vendors regarding breaches without directing continued performance (unless desired); and
- v) Expressly address them in contractual provisions.

## 28. REMEDIES-SOURCES

Remedies for breach are available by law and as specified in Contracts. Their purpose is to provide the non-breaching Party with the benefit of its bargain and to be put in as good a position as it would have been had the Vendor performed, i.e., to receive what it expected; however, not every breach causes compensable Damages and many are not worth pursuing. Remedies are a highly specialized area of law and legal guidance is recommended.

Any contractual Obligation may be subject to breach. Examples include failure to perform in terms of Quantity, Quality, or timeliness; improper Delegation of duties; failure to provide reports; and lack of notice. In addition, Warranties are specific types of promises to perform which may be included in Contracts or exist outside of them; therefore, the term "breach of Warranty" is virtually synonymous with Breach of Contract. Unless prohibited by law, Contracts can specify any Remedy; therefore, to the extent necessary to obtain desired results, they should be specified. If they are not, various statutes and common law Remedies will apply, sometimes creating unanticipated results.

### A. Remedies in Contracts

The Parties can agree to any Remedy they choose or can devise, unless illegal or Void against public policy. For example, a Remedy allowing cancellation of home purchases on the basis of ethnicity is not enforceable.

### B. Goods Contracts-Remedies Not Specified-UCC

The UCC provides detailed Remedies for "transactions in goods" (sales and Leases) covering instances where Contracts are silent (the Parties can generally agree to contravene UCC provisions if they mutually agree). Therefore, some Goods Contracts provide minimal detail other than naming the Parties and specifying the Goods, allowing UCC provisions to supply the remaining terms. Whether the UCC applies to Contracts involving Goods and Services depends on whether the Contract is predominately one for Goods (as in hardware installation) or Services (as in hardware maintenance involving installation of spare parts). The State's version of the UCC is found at CRS Title 4, Articles 1, 2, and 2.5. These provisions and Remedies can be complicated, and legal advice should be obtained before exercising any of them.

#### i) Issues Addressed

Issues addressed in the UCC include:

- (a) When Contracts must be written in order to be enforceable;
- (b) How Contracts are to be interpreted, i.e., rules of construction;
- (c) How missing terms in Contracts are "filled in";
- (d) How to resolve issues involving "battle of the forms" and conflicting terms;
- (e) What Warranties apply and how they are excluded;
- (f) Buyer's and seller's Obligations during performance; and
- (g) Remedies for Breach of Contract.

#### ii) Buyer Rights

The State, as the Buyer of Goods, unless otherwise agreed, has rights under the UCC, including:

- (a) To inspect Goods prior to acceptance at any reasonable place and time, and in any reasonable manner (CRS §4-2-513).
- (b) To reject the Goods if they fail to conform in any respect to the Contract, including on-time delivery, subject to a limited Vendor's, or seller's, right to cure a defect. This is known as the "perfect tender" rule (CRS §§4-2-508 and 601), which is a right of rejection, not reduction in payment. Only if Vendors agree to a payment offset in exchange for acceptance of non-compliant Goods is reduction allowed.
- (c) To "seasonably" (defined as the time agreed by the Parties in the Contract, or if none is specified, a "reasonable" time) notify Vendors of its decision to reject the Goods, and hold them with reasonable care at the State's place of business to permit Vendors to remove them (CRS §4-2-602). If the State fails to notify Vendors of the reasons for the rejection, it cannot later rely on the defects to justify rejection or establish breach (CRS §4-2-605).



- (d) Following acceptance of Goods or implied acceptance (e.g. use of the Goods after delivery), Buyers are limited to the remedy of "revocation of acceptance", which is only permitted if:
- (01) Revocation is done within a reasonable period of time after Buyer discovers or should have discovered the defect and before any substantial change in condition of the Goods which is not caused by their own defects;
  - (02) The value of the Goods is "substantially" impaired by the defect; and
  - (03) The Vendor assured that the defects would be cured and they have not been "seasonably" cured or, without Buyer's discovery of the defects, Buyer's acceptance was reasonably induced by the difficulty of discovery of the defects or by Vendor's assurances. CRS 4-2-608.
- (e) To cancel where no delivery is made or Vendors repudiate the Contract, and give Buyers the right to "cover", i.e., recover excess Costs and other Damages, and in some cases obtain Specific Performance of the Contract (CRS §4-2-711).

**C. Personal Services Contracts-Remedies**

Personal Services Contracts do not have a UCC equivalent providing a comprehensive code, and all terms, including those involving Remedies, should be specified. There are three places to find Remedies related to Personal Services Contracts:

- i) The Contract's provisions;
- ii) Applicable statutes, for example, real property interests exceeding one year must be in writing; and
- iii) "Common law," judicial decisions.

**D. Warranties**

Warranties are a special type of promise by Vendors that Goods, Services, or other performance will meet certain standards, such as Quality, durability/duration, applicability, etc. They often specify what remedial actions Vendors will take if a breach of Warranty occurs, although they may be silent. Warranties may be issued by primary Vendors or third-Party Vendors, and therefore may be part of a Contract, or may be an entirely separate Contract, or both. For example, computers may have a manufacturer Warranty of one year and the State may buy an extended Warranty from a third-Party. Warranties are only as good as the Vendors issuing them. There are several types of Warranties:

**i) Express Warranties**

Express Warranties are expressly stated by the Parties. For example, "The computers shall operate error-free for 90 days from the date of purchase." Absent a specific statute, these are the only type of Warranties available for Personal Services Contracts.

**ii) Implied Warranties**

Implied Warranties apply to Goods sold by Merchants even if Contracts are silent. The Warranty of merchantability (CRS §4-2-314) defines merchantable Goods. Caution: implied Warranties are not "failure free" guarantees; they only imply a standard of Quality, making them most useful in transactions in fungible Goods. For example, nails should withstand hammer blows.

**iii) Fitness for Particular Purpose**

Fitness for a particular purpose is set forth in CRS § 4-2-315, which states that "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied Warranty that the goods will be fit for such purpose." For example, if purchasing cameras to use in low-light conditions from a specialty camera store and the State has conveyed to store personnel that such is the purpose of the cameras, the cameras sold may have an implied Warranty that they are able to be used in low-light conditions.

**29. REMEDIES-TYPES OF**

Remedies fall into two broad categories: legal and equitable, each containing several subcategories. The distinction is not important for purposes of this Manual, but lawyers will often use the terms, so a brief explanation is warranted. Legal Remedies generally involve the award of monetary Damages while equitable Remedies ask courts to order a Party to act or not act.

**A. Monetary Damages**

The State is entitled to the benefit of its bargain and to be put in as good a position as it would have been had Vendors performed, i.e., to receive what it expected. The State has the burden of proving Damages, and the types the State would normally seek to recover are:

**i) Actual/Direct Damages**

Actual/direct Damages naturally flow from the breach and are available for every breach. For example, the State hires XYZ for \$100 to collect tolls. XYZ fails to do so and the State hires ABC for \$110. The State is entitled to collect \$10 from XYZ.

**ii) Consequential/Special Damages**

Consequential/special Damages flow from the breach and are necessary to make the State whole and do not occur in every breach. They must be caused by the breach, the amount must be reasonably certain, and they must have been reasonably foreseeable. In the XYZ example, the toll Revenue lost during the time the State it took the State to hire ABC would be consequential Damages. Vendors are frequently attempting to limit or eliminate these Damages via contractual provisions.

**iii) Reliance Damages**

Reliance Damages reimburse the State for Costs it expends relying on Vendors to perform which cannot otherwise be used. These will not be available for every breach. In the XYZ example, the State could recover the Cost of printing signs stating that XYZ would be collecting tolls. Reliance differs from restitution as it does not require a Vendor benefit.

**iv) Liquidated Damages**

Liquidated Damages are monetary Damages contractually provided for specifying a certain sum or method for calculating Damages in the event of a breach. Unless contractually specified otherwise, the right to assess Liquidated Damages ends upon Substantial completion (the moment when the Deliverable is capable of being used for its intended purpose). Actual Damages cannot usually be recovered in addition to Liquidated Damages.

Courts do not favor Liquidated Damages provisions and enforce them only if Damages are difficult to accurately calculate or prove at the time a Contract was entered into or upon breach, and they are reasonably proportionate to the harm anticipated when the Contract was made and not merely a "penalty". CRS §4-2-718 codifies this rule for Goods Contracts.

Liquidated Damages are common in construction Contracts, but not in most other State Contracts. R §24-106-101-07 provides an example of a Liquidated Damages provision. Examples of enforced Liquidated Damage provisions are lost opportunity due to late performance (sales lost when a credit card processing terminal is down) and earnest money in a real estate Contract.

**B. Non-Monetary Damages**

**i) Inspection**

Inspection rights similar to the UCC perfect tender rule must be contractually specified for Personal Services Contracts. If important, provide the State a right to inspect Services at reasonable times and places, to require re-performance, and to equitably reduce payments if re-performance is unfeasible.

**ii) Restitution**

Restitution is a complicated Remedy used to cure a wide variety of breaches and wrongs, the purpose of which is to restore the non-breaching Party or wronged Party to the position it occupied before the breach or wrong and/or to prevent unjust enrichment under quasi-contract theories. It may involve payment of money, return of property, or both. One use of restitution is in situations where one Party has conferred a benefit on another Party but cannot collect payment because the Contract is defective or no Contract exists. For instance, assume that X builds a barn on the property of Y by mistake, no Contract or Agreement exists, Y watches X work but says nothing and then refuses to pay X for the barn. Despite the absence of a Contract, a court can order Y to pay X the cost of the labor and materials.

**iii) Rescission**

Rescission of a Contract terminates liability and restores the Parties to their former positions by requiring each Party to return whatever benefit they received, the effect of which is to extinguish the Contract. The rescinding Party is entitled to restitution. When faced with a Party who has rescinded a Contract, courts first determine whether the rescinding Party's election to rescind was justified, i.e., did the rescinding Party have proper legal justification for rescinding, and second, they adjust the equities between the Parties by granting to each Party the relief to which that Party is entitled. Grounds for rescission include the following:

- (a) Fraud;
- (b) Mistake or misrepresentation;
- (c) Duress, menace, or undue influence;
- (d) Void Contract;
- (e) Illegal Contract;
- (f) A Party is a minor;
- (g) Insufficient Consideration;
- (h) Material Breach of Contract; and
- (i) Material breach of Warranty.

**iv) Reformation**

Reformation is an equitable Remedy in which a court modifies or revises a Contract, deed, or other written instrument to make it conform to that which the Parties understood or agreed. Reformation is most likely to occur when the Parties have entered into a binding Contract and some related writing does not conform to their Contract, either due to mistake or fraud. For example, if you agree to sell two acres of land and the deed you deliver covers only 1.5 acres, the court would likely reform the deed to cover the full two acres.

**v) Specific Performance**

In most cases, money Damages are imposed as a substitute for performance. However, actual performance may be required in instances where there substitution is inadequate; usually only involving things or Services that are unique or irreplaceable. Examples include rare cars, the Services of a famous photographer, and real estate (all real estate is unique).

**vi) Termination**

Termination relieves the Parties from further performance except as may have been otherwise provided in Contracts or mutually agreed to by Parties at Termination. This is an extreme Remedy that should be used cautiously and infrequently for both legal and practical reasons.

**(a) Early Termination in the Public Interest**

The "Early Termination in the Public Interest" (formerly called "Termination for Convenience) provision in OSC Model Contracts/Grants allows the State to terminate Contracts, in whole or in part, at any time in its sole discretion, if it ceases to further the public policy of the State. This clause is not based on Default by either Party, and states that its exercise shall not constitute a Default by the State. Please review this provision for and the "Breach" and "Notice" provisions in current Model Contracts for details regarding notice, payments, and other rights and Obligations. For example, the State may terminate a Contract to hunt wolves if it determines the latter are beneficial.

**(b) Termination for Cause and/or Breach**

The "Termination for Cause" and/or "Breach" provision in OSC Model Contracts/Grants allows the State to terminate Contracts, in whole or in part, at any time in its sole discretion, if Vendors are in breach of any provision. This is a discretionary right, and should only be exercised after determining it would be in the State's best interests to do so. Factors to consider before terminating for cause and/or breach include:

- (01) Have Agencies/IHEs done everything they are required to do to assist Vendors in curing any breach?
- (02) Were Agencies/IHEs complicit in or have in any way responsible for the breach?
- (03) Have all Contract provisions and applicable laws been followed?
- (04) How serious were the breaches and how reasonable were Vendor explanations?
- (05) The probability of Vendors performing within a reasonable time vs. urgency of the need for immediate performance and the availability of alternate performance.

- (06) The benefits and/or disadvantages of continued performance vs. re-soliciting to get a new Vendor.
- (07) What funds/resources are available to re-purchase if such Costs cannot be recovered from the delinquent Vendor (having a right to recover and recovering are two different matters)?

**(c) Notices of Termination**

Notices of Termination should contain the following information:

- (01) The Contract number (assigned in CMS);
- (02) The Effective date of Termination;
- (03) Reference to the Contract provision or law under which the Contract is being terminated;
- (04) A concise, accurate statement of the facts justifying the Termination (legal review is recommended); and
- (05) A statement that the Goods or Services being terminated may be re-procured and the Vendor held liable for any additional Costs incurred due to the re-purchase. Note: Before including this statement, the Contract should be reviewed to determine whether the right is available under the Contract.

**C. Mitigation of Damages-Rule of Avoidable Consequences**

Parties are under an affirmative duty to mitigate Damages and cannot recover Damages that could have reasonably been avoided. For example, Landlords must attempt to re-lease property if Tenants vacate early, a homeowner should ask a painter apply the wrong color to stop when they first notice rather than at the completion of work, and State Employees should place a bucket under a leaking roof to prevent further damage rather than passively watching while waiting for repairs.

**30. SUBCONTRACTS**

Subcontracts are created when Vendors engage third-Parties to perform some or all of the Vendors' Obligations set forth in Contracts/Grants. The modifiers "principal", "prime", or "general" are often used to denote Vendors with whom the State Contracts and third-Parties are usually called Subcontractors, Subgrantees, etc.

**A. Privity of Contract**

The State has contractual relationships, called Privity of Contract, with Vendors with whom it Contracts, but not with those with whom Vendors subcontract. The State therefore looks to Vendors for performance, and they are responsible for ensuring performance of Subcontractors, absent some contrary contractual provision. Vendors are free to subcontract all or part of their performance absent contrary contractual provisions.

**B. State Control Over Use of Subcontractors and Subcontracting**

It may be important for the State to exercise partial or complete control over or prohibit subcontracts; for instance, hiring someone with unique talents, such a painter, to create a mural. If so, this should be covered in the Solicitation and Contract drafting stages of the Procurement process. For example, the State might require that any Subcontractors be identified in a Solicitation response or contractually provide a right to approve any in advance.

State disapproval of subcontracts or Subcontractors must be done in good faith and based on legitimate State concerns. Unless directed by law, the State is prohibited from directing the use of any particular Subcontractor. It can merely withhold consent to a particular Subcontractor, or any subcontracting at all. Unreasonable withholding of State consent to steer subcontracting opportunities to perceived "State favorites" may constitute a Breach of Contract and may also violate CRS §18-8-307 prohibiting public servants from directing selection of Vendors and Subcontractors.

**C. Applicability of State Contract Provisions to Subcontracts**

Provisions in Contracts between Vendors and the State are not included in subcontracts, unless so specified, and even then, the if Vendors fail to state as much in subcontracts, the State's only Remedy is for Breach of Contract against the noncompliant Vendor. As a practical matter, this is generally only important to the State in certain types of Contracts and/or for certain provisions as Vendors are responsible for their performance. Instances in which it may be important include the following:

- i) Audit right provisions which might be rendered ineffectual otherwise;
- ii) Intellectual Property (copyrights, patents, trademarks) Contracts to ensure State use of creations and protection from infringement claims by third-Party holders of Intellectual Property rights; and
- iii) Grants where Subgrantees actually perform many of the Obligations and/or where specified by the federal government or other Granting entity.

**D. Breaches and Subcontractors**

Absent a contrary contractual provision, Vendor Breach of Contract due to the Default of Subcontractors is not excusable, and Vendors remain liable. This can change if the State exercises direct contact or control over Subcontractors. Such contact and control should therefore be avoided, and, if necessary, clearly define the scope thereof and copy Vendors in on all directions and communications.

**31. ASSIGNMENTS**

Assignments normally involve Vendors assigning part or all of their rights and interests (usually a right to payment) in Contracts to third-Parties (assignees); for example, manufacturers often assign their right to payment to their lender. The State normally does have reason to interfere with Assignments of payment rights; however, it should not make payments to anyone other than Vendors until receiving satisfactory notice thereof.

On occasion, Vendors seek not only to assign their contractual rights and interests, but their Obligations. In this case, the State has an interest in approving assignees as it may affect performance. Like subcontracts, Assignments of Obligations can be total or partial (rare); however, unlike subcontracts, unless otherwise specified in the State's consent to Assignment, Vendors are no longer responsible for the assigned performance as the assignee is substituted in their place.

Assignment in real estate Leases means the Tenant assigns its right to occupy for the remaining Lease term (subletting is for any time less), and is virtually always subject to prior approval, with the word, "which shall not be unreasonably withheld" added. The latter phrase was required by case law dealing with real estate Leases and is not required in, and is often inappropriate in, other types of Contracts.

**32. FILES FOR CONTRACTS**

Complete Contract files should contain the documents listed below, and Agencies/IHEs shall ensure that such documents are available for review by the OSC/CCU upon request. See OSC Policy, *Monitoring Reviews – OSC Contract Approval Delegation*.

**A. Central Approvers**

Copies of any necessary Central Approver approval documents (please note as completed tasks in CMS when done), including the following (see Chapter VII §1, *Supplemental Materials-Central Approver Roles*, for more details):

- i) OIT certifications for IT Contracts;
- ii) Personal Services Certification Form, supporting business case, applicable costing information, and any other supporting documentation;
- iii) SPO Director approval to extend Contracts beyond a 5-year term limit;
- iv) DPA Procurement Sole Source Waiver; and
- v) OSA/State Buildings or Real Estate Programs approval.

**B. CMS #**

A print screen of the CMS Contract details page showing the CMS assigned document number.

**C. Contract**

A copy of the Contract (preferably an original and not a photocopy).

**D. Encumbrance**

A copy of the COFRS Encumbrance ready for level 3 approval. Not applicable to any Agency/IHE exempt from using COFRS as their financial system, but any such Agency/IHE may include their own requirement.

**E. Exhibits**

All exhibits, attachments, schedules, tables, etc. referenced in the Contract.

**F. Fair and Reasonable Determination**

Any documentation supporting a “fair and reasonable” determination; for example, an appraisal for purchase of an interest in real property, Vendor Bids, or that an RFP was issued.

**G. Insurance and Bonds**

Documentation evidencing required insurance and/or that bonds have been obtained (please note as completed tasks in CMS when done).

**H. Miscellaneous**

All other Material documentation such as explanations (emails, letters, etc) regarding Contract issues, unusual Contract situations, extenuating circumstances, and Statutory Violations (please note as completed tasks in CMS when done).

**I. Contract Modifications**

In the case of Contract Modifications, a copy of the original Contract and all prior modifications, including Options, funding letters, Amendments, and Assignments.

**J. Risk Analysis**

A copy of any risk analysis performed (please note as a completed task in CMS when done).

**K. Secretary of State**

A copy of applicable Colorado Secretary of State Webpage summary information regarding Vendors (please note as a completed task in CMS when done).

**33. ROUTING FOR OSC APPROVAL-PRIOR APPROVALS-CONTENT OF PACKETS**

Agencies/IHEs shall obtain all necessary approvals and signatures (all non-delegated and high-risk Contracts) for Contracts or modifications requiring approval by the OSC before routing them to the OSC (the OSC always signs last unless the Agency/IHE has received prior approval from the OSC). Contract or modification packets routed to the OSC for approval shall contain the following (see *also* OSC Policy, *Monitoring Reviews – OSC Contract Approval Delegation*):

**A. New Contracts**

Each of the items listed in Chapter IV §26, *Contract Formation, Drafting, and Approval-Files for Contracts*, above, plus at least one originally signed copy of the Contract (with the Contract document number assigned by CMS).

**B. Contract Modifications**

Each of the items listed in Chapter IV §26, *Contract Formation, Drafting, and Approval-Files for Contracts*, above, plus at least one originally signed copy of the Contract Modification, a copy of the original Contract, and a copy of all prior modifications (Options, funding letters, Amendments, Assignments, etc.).

**C. Originals**

The OSC retains one original and returns all other copies and originals, so plan accordingly when deciding how many originals to send.

**D. Delivery and Return**

**i) Interagency Mail or other Carrier**

Agencies/IHEs may send Contracts to the OSC via interagency mail or other carrier. Please include a completed (both “To” and “From” sections completed) return mailing label to receive Contracts back via interagency mail or other carrier. Contracts without return labels will be available for pickup at the OSC’s offices.

**ii) Hand Delivery**

Agencies/IHEs may hand deliver Contracts to the OSC and either pick them up after approval or have them returned via interagency mail or other carrier. Please be aware that the OSC/CCU has set times for hand delivery and retrieval (see OSC website for details). Use of these standard times helps minimize disruption for the CCU and the rest of the OSC. Please use them unless an appointment is scheduled in advance (and please limit such requests).

### **34. FORMATTING OF CONTRACTS**

Proper formatting makes Contract review easier for everyone concerned. This includes the Parties to Contracts and any third-Party reviewing them, such as judges. Best practices include the following:

#### **A. Pagination**

Number all pages using a consistent method throughout, including any Exhibits, attachments, etc. "Page \_\_\_ of \_\_\_" is preferred, but not required. Consistency is the key.

#### **B. References**

- i) **Highlight** (Bold) references to exhibits, attachments, etc and internal cross-references in the Contract (best practice-speeds up review).
- ii) **Cross-References** Exhibits, attachments, etc. should reference back to the Contract (best practice-aids identification if documents get separated).
- iii) **Proofread** all references to Exhibits, including those in Amendments and other modification tools to ensure that they match and are not duplicated. Also, proof section (§) references whenever sections are added or deleted.

#### **C. Strikeouts, Additions, and Changes**

If strikeouts, additions, or changes are made in a Contract, the signatories must initial them, unless they are non-substantive internal references such as CMS numbers.

#### **D. Word Styles and Formatting**

The OSC recommends that all staff involved in drafting Contracts become familiar with using the styles and formatting features of Word. This enables better and easier use of Model Contracts, helps create more easily replicable Agency/IHE-specific templates, and professional looking documents project a professional image for the State.

### **35. INFORMATION AND UPDATES FROM THE OSC/CCU**

The OSC/CCU has several methods of communicating new and updated information, forms, and procedures to Procurement staff. These include the following:

#### **A. CCIT Meetings**

CCIT meetings are held at various locations (usually Camp George West) several times per year. Please check the OSC website for dates, times, locations, agendas, and posting of materials provided and presentations given at the meetings. The OSC highly recommends all Procurement staff attend.

#### **B. CCIT Email List**

The CCU uses the CCIT email list to communicate with Procurement staff. The OSC highly recommends all Procurement staff sign up. Anyone desiring to subscribe to or remove them self from the CCIT email list may do so online at: <http://www.colorado.gov/dpa/dfp/sco/contracts.htm>.

#### **C. OSC/CCU Website**

The Contracts pages of the OSC website contains notices, forms, Policies, Fiscal Rules, CCIT schedules and archives, a link to the CCIT email signup, and training information. Please check it to obtain the latest updates, especially for OSC Policies, Model Contracts, and forms.

### **36. CHANGES-HANDWRITTEN**

Handwritten changes (deletions, additions, and filling in blanks) to contracts are acceptable if done properly, i.e., they will not be challenged if contractual disputes arise.

#### **A. Substantive-Parties Should Initial**

Substantive changes are those affecting contractual provisions (e.g., performance criteria, payments, duties, etc) dates (e.g., contract term, start dates, etc), identification of the parties (e.g., names, titles, type of entity, etc), or dollar amounts (e.g., maximum amounts, interim amounts, etc) should be initialed by all persons who signed the contract. This indicates their agreement to the change. It is impossible to provide a list every instance to which this applies, but use this analysis: if the change is something about which any party would want to know and/or affects them in any way, have all parties initial, or at least the party against whom the change would be enforced (an example of the latter is allowing a signatory to initial a change to their title or date of signature).

**B. Non-Substantive-Parties Need Not Initial**

Non-substantive changes are those not affecting contractual provisions, dates, identification of the parties, or dollar amounts. Examples include adding numbers used for internal routing and identification (e.g., CMS #), made dates in State Contracts (irrelevant as the contract is invalid before the Effective Date), changes to obvious typographical errors in spelling and grammar, and identifying exhibits. If in doubt, err on the side of obtaining initials as the lack thereof may cause issues if contractual disputes arise.

**37. PAGE REPLACEMENT**

Pages should not be replaced or swapped absent written consent of all parties. The best practice is to obtain consent in a signed writing and this should always be done for material changes to important provisions, dates, party identification, and dollar amounts. For less important provisions, emails or other informal writing from contact signatories specifically identifying what is being replaced may suffice. If in doubt, err on the side of obtaining a signed writing as the lack thereof may cause issues if contractual disputes arise.



## CHAPTER V. CONTRACT ADMINISTRATION

### 1. AUTHORITIES

- CRS §4-1-101, et seq., *Uniform Commercial Code*
- CRS §24-30-202, *Procedures – vouchers and warrants – rules - penalties*
- CRS §24-101-103, *Supplementary general principals of law applicable*
- Fiscal Rule 2-2, *Commitment Vouchers* (1 CCR 101-1 State Fiscal Rules, Chapter 2, *Disbursements*)
- Fiscal Rule 3-1, *State Contracts* (1 CCR 101-1 State Fiscal Rules, Chapter 3, *Contracts*)
- Fiscal Procedures Manual Chapter 1, §4, *Encumbrance Issues*
- Procurement Rules (1 CCR 101-9)
- OMB Circular A-133, *Audits of States, Local Governments, and Non-Profit Organizations*
- OSC Policy, *Categories and Identifiers for the Contract Management System*
- OSC Policy, *Modifications of Contracts – Tools and Forms*
- OSC Policy, *Monitoring Reviews - OSC Contract Approval Delegation*

### 2. INTRODUCTION TO CONTRACT ADMINISTRATION

#### A. Administering Contracts – What Does This Mean?

Signed Contracts do not relieve the State of the ultimate responsibility for the Quality and Quantity of the Goods and Services provided. For this reason an individual, or individuals, should be designated as Contract Manager(s). Contract Managers “own” the Contract documentation while interacting with others in Agencies/IHEs, such as the project managers responsible for oversight and reporting of performance and budget staff responsible for payment once performance has been confirmed by the program. Depending on the size of Agencies/IHEs, these positions may be held by one or multiple individuals.

Effective Contract Administration minimizes or eliminates problems, and potential claims and Disputes, ensures requirements are satisfied, Goods and Services delivered in a timely manner, and financial interests of the State are protected.

The extent of Contract Administration varies as much as each project and Contract. It should naturally and necessarily, be consistent with the complexity and level of risk of the Contract, its term, and dollar value.

#### i) Administrative Responsibilities

Administrative responsibilities could be handled by one or more individuals depending upon a contracting unit’s size and organization, although Contract Managers are usually located in the Procurement office and performance of items (d), (f), (g), and (h) below rest there. Actual Monitoring and work with Vendors is typically handled at the program level and often financial reviews also occur within programs. Regardless of the organization, central Contract Managers should be tasked with maintaining Contract files and CMS entries. In general, Contract Administration includes all of the following administrative responsibilities:

- (a) Monitoring Vendor performance;
- (b) Identifying the need for changes, arranging for their implementation in Contracts;
- (c) Monitoring and approving payments;
- (d) Conducting financial reviews and audits during the term of Contracts;
- (e) Working with Vendors to resolve problems that arise;
- (f) Terminating Contracts, if necessary, which includes identifying the breach, documenting efforts to correct it, and recommending Termination to the office that has Termination authority;
- (g) Managing close-out of Contracts; and
- (h) Evaluating Contract results and if the evaluation discloses a systematic problem, recommending corrective action be taken to eliminate the problem.

**ii) Processes and Objectives**

Contract Administration and oversight includes four general processes and three primary objectives:

**(a) Processes**

- (01) Planning;
- (02) Monitoring Vendor performance;
- (03) Payment approval; and
- (04) Contract Modification, i.e., change management.

**(b) Objectives**

- (01) Verify Vendor performance for purposes of payment;
- (02) Identify Material Breach of Contract: performance or non-performance; and
- (03) Determine need for corrective action.

**iii) Statements of Work (SOWs)**

SOWs are the roadmap of Contract Administration, requiring planning for Contract Administration prior to Solicitations. The goal of Contract Administration is to ensure Satisfactory performance and proper discharge of both Parties' responsibilities. It is the Vendor's responsibility to perform and meet the requirements of the Contract; however, at times, they need timely and effective technical direction and approval from State staff. Agencies/IHEs must be careful to not impose additional requirements upon Vendors or manage their operations to the extent that Vendors are relieved of their responsibility to perform. In short, the Procurement team should follow the roadmap set out in the SOW.

**B. Contract Administration – Responsibilities**

**i) Developing a Work Plan**

Careful planning and scheduling of work are keys to successful Contract completion. Use of work plans creating schedules for Goods to be delivered or the Services to be provided by Vendors and Agencies/IHEs is recommended. Schedules may be daily, weekly, monthly, etc. Good work plans reflect all project steps, identify responsible staff, and set forth known due dates for Deliverables. They also facilitate Monitoring, thereby evaluating progress and identifying problems early, so proper attention can be directed toward problem resolution. The more detailed a project, the more detailed work plans should be.

Work plans and schedules can be quite simple and may be prepared by hand for Contracts with few Deliverables. For example, Goods or Services provided on an as-needed basis only need simple work plans.

The specific requirements set forth in SOWs or other Specifications provide the basis for work planning. Drafting work plans begins with listing the major tasks in SOWs or Specifications. The specific objectives of work plans are tasks included in SOWs, Contract Deliverables, or both. Arrange objectives logically, showing both scheduled times for accomplishment and the interrelationships between stated objectives. Arrange work plans to show events that are necessary in order to accomplish requirements. Show the dependent relationship between the tasks when, for example, one task must be accomplished before another can be completed.

Once specific tasks and requirements are developed, schedules can be added. Again remember to use the SOW or Specification review checklists as the starting point, and the time frames included in these items, as well as any in the Contract itself, will serve as the basis for scheduling.

At this point, the developed work plan and schedule provide enough information to determine appropriate reporting points or milestones. Any events critical to the success or performance of Contract tasks are milestones. Generally, milestone events and associated progress reports are the primary focus during Contract Monitoring. Often it is not feasible to continually Monitor Vendor performance; however, by concentrating on milestone events, it can be adequately Monitored for timeliness and early problem detecting, while allowing for interim Contract records updates regarding Vendor performance leading up to final ratings.

Keeping the plan current by ensuring it reflects the best information and work/time estimates available is vital in order for work plans and schedules to remain Effective throughout the Contract process. Plans require revisions to reflect slippage in Vendor performance (inability to timely perform a task) and to reflect excusable delays (those outside of Vendor control).

**ii) Primary Responsibilities**

The primary responsibilities of the Procurement team are:

- (a) Developing the Solicitation and writing the draft documents;
- (b) Monitoring Vendor progress and performance to ensure Goods and Services conform to the Contract requirements;
- (c) Managing any State property used in Contract performance;
- (d) Authorizing payments consistent with Contract terms;
- (e) Exercising Remedies, as appropriate, if Vendor performance is deficient;
- (f) Resolving Disputes in a timely manner;
- (g) Documenting significant events; and
- (h) Maintaining appropriate records.

**C. Monitoring the Contract–Who Does This?**

**i) Activities**

Identifying Procurement staff responsible for Monitoring any given Contract depends on Contract complexity, Agency/IHE's size and structure, type of transaction, and qualifications of the program officials. Generally, field/program managers Monitor Vendor performance, as they know the Good, Service, or project better than Procurement staff. Specific activities for field/program managers may include the following depending on the circumstances:

- (a) Inspection of work;
- (b) Ensuring required permits are obtained;
- (c) Monitoring work performance to ensure conformance to budget and work schedule;
- (d) Reviewing work performance to ensure conformance to safety rules;
- (e) Reviewing Vendor invoices for accuracy and completion;
- (f) Verifying percentage of billing is equal to the percentage of work completed (if the Contract is fixed-price);
- (g) Withholding Vendor funds, if applicable;
- (h) Comparing equipment, rentals, and material charges to Contract provisions and any change notices;
- (i) Comparing invoiced labor rates and charges with Contract provisions;
- (j) Verifying that Services were delivered, material was delivered, and equipment used; and
- (k) Initiating any necessary Change Orders if the SOW of the Contract needs to be modified.

**ii) Roles and Responsibilities**

The number of Contract Managers also varies depending upon the size, level of risk, and complexity of the Contract. Early in the Procurement process, staff should be identified to participate in Contract Administration with assigned roles and responsibilities that include:

- (a) Determining activity sequence, dependencies, required or desired outcomes, and acceptable performance levels;
- (b) Developing a timetable and start and end date for each performance component. Include milestones with accompanying timeframes, and Monitoring and reporting requirements;
- (c) Monitoring Vendor activity on a specified frequency to identify problem areas; for example, one-year Contracts, should have a minimum of 4 reviews;
- (d) Meeting with Vendors on a regular basis to review progress, discuss problems, and consider necessary changes;
- (e) Providing access to state facilities, equipment, data, staff, materials, and information;
- (f) Contacting other staff as necessary to provide equipment and data;
- (g) Establishing scope of authority, clear lines of communication and reporting, and specific individuals who will interact directly with Vendors;
- (h) Establishing control of correspondence, data, and reports;
- (i) Identifying potential problems and solutions;
- (j) Defining terms or conditions of Default; and
- (k) Establishing procedures, designating responsible persons, establishing timeframes for handling non-compliance, and making Contract-related decisions and modifications.

**D. The Road to Contract**

**i) Planning to Buy**

Contract Administration planning should be part of the Solicitation and SOW drafting processes and procedures for Contract Administration should be described in the Solicitation. After the Contract is executed, planning activities focus on general administrative activities including, but not limited to, managing Contract Amendments, by documenting any changes to contractual Obligations, including SOW, schedules, and payments. Proper planning for Contract Administration requires Contract Managers to ensure they thoroughly understand all Solicitation components and Contract provisions, such as:

- (a) Expected Outcome Measures.** Includes staging of Deliverables, if applicable. Significant Deliverables should be tied to the payment schedule.
- (b) Costs.** Total Cost, including any Indirect Cost allocation of Goods and Services.
- (c) Contract Performance.** The when, where, and how related to Goods and Services.
- (d) Acceptance/Rejection Terms.** The State's right to inspect and accept or reject Goods and Services and the conditions of acceptance or rejection.
- (e) Contract Dates.** The Effective Date, completion date, renewal terms, and any additional dates necessary to Monitor Contract performance.
- (f) Addresses.** Where correspondence is to be sent, where payments are to be made, etc.

**ii) Post-Award Conferences**

Clear, mutual understanding of all Contract provisions and requirements is essential to successful Contract performance. Therefore, after Award, but before signature, some form of discussion between the State and Vendors is generally advisable for all but the simplest Contracts to ensure the Parties agree on the performance requirements and the administrative procedures applicable. This may be a formal post-Award conference or a telephone call depending on the Contract complexity, risk, and dollar amount. Emphasize to Vendors that the purpose of post-Award conferences or phone calls are to explain and clarify requirements, not to re-negotiate terms. State Contract Managers should decide what type of discussion is necessary. Factors used to determine the need for a post-Award conference include:

- (a)** Type of Contract;
- (b)** Level of risk associated with the Contract;
- (c)** Contract value and complexity;
- (d)** Length of Contract, period of performance, and/or delivery requirements;
- (e)** Procurement history of the supplies or Services required and expertise of the Vendor;
- (f)** Urgency of delivery schedule;
- (g)** Agency's prior experience with the Vendor;
- (h)** Any special or unusual Contract requirements; and
- (i)** Any special or unusual payment requirements.

Telephone conferences should review the major points of the Contract being drafted with the Vendor (e.g.; amount of Contract, major performance milestones, Deliverables, reports, meetings) and time and place of delivery.

If a formal "post-Award conference" is advisable, all State and Vendor principals responsible for Contract Administration should meet, typically soon after Contracts are Awarded. Post-Award conferences provide an opportunity to identify and resolve existing or potential problems and for the State Contract Manager to set rules for Contract Administration and performance applicable throughout the Contract. Any known issues like reporting, timelines, and Dispute resolution, should be clarified at this time. State Contract Managers should take the lead and other State staff should only provide information and direction to Vendors if requested by Contract Managers. If Contract Managers decide changes are necessary, they must clearly define the justification for, as well as establish the extent of, changes.

Items for discussion include: procedures for obtaining, accounting, and periodic inspection and inventory of any State property furnished to Vendors; clarifying to Vendors and State staff that Vendors are solely responsible for managing its Employees, Agents, and Subcontractors; and if Vendors are performing Services in a State facility, establish working hours, security passes, insurance requirements, and resolve other related issues.

Contract Managers should conduct a preliminary meeting with all State staff who assisted in Procurement, Contract drafting, and who have an interest in Contract performance before any post-Award conference or the issuance of post-Award orientation letters. During this meeting, a detailed review of the Contract and any associated SOW should be conducted to identify all actions required of State staff. The goal is for affected State staff to understand all State and Vendor contractual responsibilities, the capability of affected State staff to perform requirements necessary for Vendor performance, and that all affected State staff agree on goals and objectives, standards of performance, and required Deliverables.

### **3. MONITORING PERFORMANCE**

#### **A. Fiscal Rule 3-1 State Contracts**

FR 3-1 §11.1 and §11.2 (revised 1/1/09) state as follows:

**Quote V-1 FR 3-1 §11.1 and §11.2**

**11.1 Implementation.** In accordance with CRS §24-103.5-101, all Agencies and Institutions of Higher Education shall:

**11.1.1** Designate at least one person who will be responsible for contract monitoring. See CRS §24-103.5-101(3).

**11.1.2** Prior to entering into a personal services contract, the person responsible for contract monitoring shall certify that the proposed performance measures and standards, data sources, and data collection methods provide a valid basis for assessing the vendor's performance. See CRS §24-103.5-101(4).

**11.2 Elements.** Each Agency and Institution of Higher Education shall monitor its contracts with respect to all of the following elements included in CRS §24-103.5-101(3) , as well as any additional elements an Agency or Institution of Higher Education may choose to monitor:

**11.2.1** Compliance with requirements, standards, and measures of the Personal Services Contract provisions in subsection 5.1.2 (Personal Services Contract Provisions) of this Fiscal Rule,

**11.2.2** Completion of the contract according to the contract's performance schedule;

**11.2.3** Satisfactory performance and completion of the contract's scope of work; and

**11.2.4** Extent to which the vendor met or exceeded budgetary requirements of the contract.

#### **B. Purpose and Objectives of Monitoring**

Monitoring Vendor performance is a key function of proper Contract Administration. It verifies that Vendors are performing their Obligations (legal and contractual) in accordance with Contract terms and helps Agencies/IHEs spot and address problems or issues in a timely manner. Careful Monitoring helps avoid misunderstandings and prevents small difficulties from becoming major problems.

Low-dollar and less complex Contracts normally require little Monitoring. This does not, however, preclude the possibility of more detailed Monitoring if deemed necessary by Agencies/IHEs (the general rule is subject to exceptions; for example, even a low-dollar hazmat disposal may warrant Monitoring). While Vendors have primary responsibility for performing their Obligations, Agencies/IHEs should Monitor to protect the State's interests and ensure acceptable levels of performance are provided.

**C. Elements of a Good Monitoring Program**

**i) Vendor Relations**

For all but the simplest Contracts, immediately after signing set up an initial meeting before Vendors begin work, the purpose of which is for key representatives of each Party to meet and clarify any ambiguities or potential issues. Continuous formal and informal interaction after the initial meeting is necessary to exchange information and to provide feedback to regarding performance.

**ii) Contract Provisions**

The most important provisions for Monitoring are specific performance standards, and measures of efficiency and effectiveness that will be applied to evaluate Vendor performance. Non-performance remedy provisions should also be specified.

**iii) Contract Monitor**

This individual generally exists at the program level and requires specific guidelines to ensure the Monitoring process is consistent, effective, and equitable. Contract monitors need detailed performance standards, processing Vendor reports, and payments, to effectively Monitor Contracts.

**iv) Service User Relationships**

Users of Services or others affected by Contracts can affect Contracts in two ways: (a) through a formal complaint system, and (b) through user surveys. Users should know where to send complaints. Vendors should know their responsibilities with regard to complaints, and Contract monitors must see that complaints are processed in a timely manner and notify users of actions taken. Surveys can be an important tool to judge the effectiveness of Vendor performance.

**D. When Should Monitoring Take Place?**

As discussed in detail above, planning for Monitoring should begin during Solicitation and before the Contract is Awarded. It should also occur during the course of delivery of Services. The best form or type of Monitoring to use requires use of judgment by Contract monitors and depends on all of circumstances for each Contract, e.g., work complexity, prior experience with Vendors, length of Contract terms, dollar value, risks, etc. Monitoring may consist of:

**i) Vendor Reports**

Reports such as progress to date, explanation of Costs, problem description, certification that Services meet Specifications, forecasts, and levels of Service provided.

**ii) Inspections and Observations**

Depending on the situation, inspections and observations should be based on complaints, upon completion of work, surprise inspections, and periodic samples. Inspections and observations should have forms to note problems and rate Quality of Service.

**iii) Complaints**

Complaints by beneficiaries of governmental Services are almost always a basic part of Monitoring, although in many cases, they are used only as one source of information. These may be gathered on a formal or an informal basis.

**E. Measuring Contract Performance**

Contracts often specify performance standards such as task completion dates, Vendor payments, performance efficiency and effectiveness measures, and possible Remedies. These standards will assist program managers in completing the quarterly (at least) evaluation tasks required by CMS and result in final Vendor ratings. Standards relating to performance are necessary as meeting completion dates without ways to measure Acceptability of performance is of little value.

Exercise caution only specifying input vs. output measures when defining performance standards. Often input measures or resources consumed are specified, e.g. number and qualifications of personnel assigned and hours committed, which do not measure how well performance satisfies end-users, which often makes it impossible to evaluate actual Vendor performance. Measures of effectiveness and efficiency are important in evaluating the Quality of the Service.

Effectiveness measures involve actual outputs or the impacts of the Service on users or the public. An example in a Contract for custodial Services is, "The restroom must be cleaned, at least, on a daily basis." Efficiency measures are the ratio between inputs and outputs. An example in the same

custodial Contract is: "The restroom shall be maintained in a satisfactory condition." Both of these may be comparative measures. The Vendor's performance can be compared to similar scores when others were providing the Service, or on a year-to-year basis, for the same Vendor, thus making assignment of a rating easier and more objective.

**F. Handling Unacceptable Performance**

The key to handling unacceptable performance begins before Contracts are in place. Contract Managers must specify what constitutes acceptable performance; the more explicit performance standards are, the easier it is to establish unacceptable performance. Contract Managers should also work with Contract drafters to include actions and Remedies available to the State if performance is unacceptable.

**G. Acceptance**

Contract performance Acceptability should be determined by review, test, evaluation, or inspection. Final acceptance by the State concludes Vendor performance, except for any administrative details relating to Contract close-out or post-performance Obligations, such as Warranties. Upon final acceptance, Vendors are no longer responsible for unsatisfactory performance, unless otherwise contractually specified. As such, it is vital that program staff measure Vendor performance against SOWs. Effective Monitoring processes throughout the Contract term places program staff Monitors in a good position to determine if final acceptance is warranted.

**4. SPECIFIC AREAS OF CONTRACT MONITORING**

Contract Monitoring consists of four areas which should be thoroughly explored early in the Procurement process:

- Determining, Monitoring specifics (what/when/where) and the type of Monitoring;
- How to establish expectations so that Vendors and State staff responsible for Contract Monitoring understand what will be Monitored and the criteria that will be used to evaluate Vendor performance;
- How to use risk assessment to determine the level of Vendor review and what subject matter to include; and
- How to use the results of Monitoring reviews.

**A. Determining Monitoring Specifics**

In determining what/when/where to Monitor, the Contract Manager should consider the following two questions: how will monitors know Agencies/IHEs are receiving what they paid for and how will monitors know Vendors are complying with the terms of the Contract?

**i) Monitoring Specifics**

To answer the what/when/where questions, the Contract Manager should review SOWs and other Contract terms, including Vendor compliance requirements. Contract Monitoring should focus on important items and on outcomes. To add perspective to the crucial role Monitoring, evaluation, and Vendor ratings serve in State Contracts, the Contract Manager should also consider if Agencies/IHEs would be concerned about the following issues: .

- (a) Eligible citizens do not receive or receive less Services than they should;
- (b) Eligible citizens receive the wrong or deficient Services;
- (c) Service priorities for eligible citizens are inappropriate;
- (d) Services cost more than they should;
- (e) Money is spent on non-allowable Costs (i.e. gifts, etc.);
- (f) Vendors waste money or does not protect assets purchased with tax dollars; or
- (g) Vendors inaccurately report their progress.

**ii) Payment Provisions**

Payment provisions affect what needs to be Monitored. Consider two examples:

- (a) **Firm Fixed-Price.** Payments based on a firm fixed-price (a specific amount of money for a Good or Service) do not require verification of Vendor expenses as is it irrelevant what they pay for travel, advertising, etc as such Costs are built into the price (a box of pencils for example). Monitors should, at a minimum, ensure:

- (01) The number of units billed is the same as the number of units received;
- (02) The Quantity and price agree with the Contract amounts; and

(03) The units meet or exceed the Contract Specifications.

**(b) Cost Reimbursement.** Cost reimbursement Contracts where Vendors are paid Costs plus a percentage of Overhead and profit, require the following Monitoring assessments:

(01) Was the Good/Service billed really purchased by the Vendor?

(02) Was the Good/Service billed used for Contract purposes?

(03) Was the Good/Service necessary and reasonable for Contract purposes?

(04) Was the Good/Service of the Quality and Quantity specified in the Contract?

(05) Was the Good/Service billed duplicated in either Overhead or profit?

(06) Was the Good/Service listed in the Vendor's budget and approved by the Agency?

**iii) Types of Monitoring:**

There are many different types of Monitoring available, including, but not limited to:

**(a) Site Visit (full and limited scope).** Full scope site visits are typically scheduled visits to Vendor places of business. The visits are based on risk assessment and cover a broad range of Contract compliance and performance issues. Limited scope site visits typically focus on a particular problem.

**(b) Desk Review.** Typically these are reviews of reports submitted by Vendors to Agencies/IHEs. Reports should be reviewed for the following:

(01) Actual performance versus the Contract requirements. Are they in accord?

(02) Actual expenditures versus the approved budget. Are Vendors following the approved budget plan?

(03) Current performance period versus prior performance periods (within the full term of the Contract). Are there any unexplained trends? Is the Vendor performing work significantly different from the last period?

(04) Current Vendor performance in comparison with other Vendor performance doing similar work.

(05) Key components such as: (i) The cost per unit of Service or the percentage of the fees charged by Vendors; (ii) The change in variable Costs compared to the units of Service provided; and (iii) Reported salaries matching staffing plans.

(06) Compare the report with what is known about operating environments. Did a weather emergency in the area recently increase the cost of construction supplies or is the cause of a temporary reduction in Services provided? Look for acceptable explanations, not excuses.

**(c) Expenditure Document Review.** These are reviews of Vendor invoices and expenditure draw requests to determine if the rates and Services are allowable. Ensure supporting documents such as cost reports, third-Party receipts for expenses, detailed client information, etc. adequately support payment requests. If not, and especially if this becomes a pattern, more intensive Monitoring, such as on-site visits, may be necessary.

**B. Establish Expectations**

This subsection explains how to establish expectations so that Vendors and State staff responsible for Contract Monitoring understand what will be Monitored and criteria that will be used to evaluate Vendor performance. Complex Contracts and those Agencies/IHEs perceive as having a higher degree of risk may require both desk reviews and site visits. Site visits can be used to verify actual performance against scheduled or reported performance and to verify that Vendors are dedicating sufficient resources and appropriate personnel to Contract performance. Site visits also reinforce the Contract's importance to the Vendor and provide a valuable opportunity to enhance communications with Vendors. In order to conduct a productive/useful site visit, Contract monitors should:

**i) Checklist**

Develop a comprehensive and objective Monitoring checklist that:

**(a)** Focuses on outcomes, and includes compliance requirements. Monitoring criteria should always tie back to applicable Contract requirement.

**(b)** Assesses Vendor performance the same way. Are any errors considered minor or inconsequential under the Contract? If so, outline these initially for consistent Monitoring. Clarify areas where monitors may exercise judgment in evaluating Vendor work.



- (c) Specifies the sample size to be reviewed, but do not disclose specifics to the Vendor. For example, Agencies/IHEs may state they will review case documents for the month of August, but they should not disclose that they will be reviewing CMS # XXXXX.
- (d) Tailor the Monitoring checklist for each Vendor. Agencies/IHEs may have standard items reviewed for all Contracts/Vendors, however, all Contracts/Vendors should be reviewed for Monitoring requirements unique them. In addition:
  - (01) Review specific Contract requirements to determine if they merit Monitoring.
  - (02) Look for items falling just below an amount that would require additional approval.
  - (03) Consider problems Vendors have had in the past or what is likely to cause problems for them now. Are parts of the Contract new to a Vendor, e.g., are they providing the same Services to a different population?
  - (04) Identify items not needing Monitoring. For example, if Vendors use a database previously found reliable by the State, then this may be a low-risk item not requiring review.
  - (05) Coordinate reviews with other Agencies/IHEs when both State entities share a common Vendor performing common Obligations.

**ii) Documentation Requirements**

Establish clear documentation requirements. Allow space on the checklist to record the results of the site visit. For example, if the Contract monitor reviews 10 case files, documentation should include identification of files reviewed, e.g. the case number, the staff members tested for salary allocations, and the expenditures reviewed. Describe the documentation required to bypass an area of Monitoring, e.g., “No problems identified last year with the compliance requirement: not Monitored this year.” This provides more time to Monitor higher risk areas.

**iii) Sampling and Population Criteria**

Establish sampling and population criteria. Ensure the Service user population is complete by including all relevant files. Vendors should not select review samples.

- (a) If Vendors submit the names of clients as part of normal expenditure draws, then the sample can be selected from the client list. Ensure that the clients on the list are paid for by the Agency/IHE.
- (b) If Vendors cannot locate the sample item selected, it may or may not indicate a problem. Before agreeing to substitute an alternate file, consider the circumstances of the “lost” sample item and determine if the explanation is reasonable or if Vendors did not want the monitor to see the file, i.e. is making excuses.

**iv) Monitoring Reports**

Create Monitoring reports: Site visit reports should stand alone as records of Monitoring. Copies should be sent to Vendors, others who may benefit from it, and attached to the CMS Contract record as support for interim and final Vendor ratings. Monitors should include issues found in reports, even if Vendors correct them, as this is a reminder to check again in the future and to ensure it remained corrected.

**C. Using Risk Assessments to Set a Level of Review**

Risk assessment is a dynamic process that should be updated regularly to reflect the results of Monitoring visits, reviews of payment vouchers, desk reviews, etc. For example, if Vendors fall significantly behind schedule in delivering Services, risk assessments should be updated to indicate the elevated risk and how this impacts how the Contract is Monitored in the future. Likewise, risk assessments related to Vendors ahead of schedule should be updated to indicate the lower levels of risk.

Limited resources require the use of risk assessments; there is not sufficient time to oversee all aspects of most (let alone all) Contracts. As such, effective risk assessment models help Agencies/IHEs focus Monitoring resources on Vendors with the highest risk of noncompliance. Such models take many forms, all generally following the same steps.

**i) Risk Factors**

Identify risk factors. Risk factors indicate the risk of contractual Obligations not being achieved. The following is a list of some common risk factors:

- (a) Vendor past performance (and past performance of similar Vendors);

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- (b) The dollar amount of the Contract;
- (c) Findings from desk reviews and site visits either by the Agency/IHE or another Agency/IHE, such as the variance between expected and actual performance;
- (d) Significant problems with payment requests;
- (e) The length of time since the last Monitoring visit; and
- (f) How experienced Vendors are with Obligations to be performed.

**ii) Assign Weights**

Assign weights to each identified factor. Weights describe how significant each factor is in identifying which Contracts/Vendors require Monitoring; for example, time may be of the essence in completing a roof repair before winter, but not for fixing a dented bumper. Weights can also be given to statutory or policy requirements; for example, if a statute requires site visits every three years, the assigned weight is indicative of the time since the last site visit.

**iii) Rate Vendors**

Rate each Vendor on the identified risk factors. Consider using a three point scale, where 3 is high risk, 2 is medium risk, and 1 is low risk. A sample risk assessment is included below. Assumptions for this sample risk assessment include:

- (a) The Agency/IHE has Contracts with many Vendors providing the same/similar Service. Only three Vendors are rated in this example, but many Vendors are involved.
- (b) The three risk factors used are dollars, experience, and past performance. Normally, there will be many different risk elements. This is a simple example shown for illustration purposes only.
  - (01) **Dollars:** 40% of the Vendors receive less than \$100,000 from the Agency/IHE per year. 50% receive between \$100,000 and \$250,000. 10% receive more than \$250,000.
  - (02) **Experience:** (i) High Risk–The Vendor has never done this type of work before; (ii) Medium Risk–The Vendor has successfully performed a Contract with the State before but not for this type of work; (iii) Low Risk–The Vendor has previously performed a Contract with the State for the same type of work.
  - (03) **Past Performance:** If the Vendor has at least one significant finding from a prior Monitoring or three less significant findings, the Vendor is considered high risk. Agencies/IHEs should define their own past performance risk factors and weights.

**Table V-1-Example - Risk Assessment Analysis**

Vendor	Dollars			Experience			Past Performance			Total Risk
	Amount	Risk	Risk x Weight (0.2)	Results	Risk	Risk x Weight (0.5)	Results	Risk	Risk x Weight (0.3)	
#1	\$300K	3	.6	Held previous Contract with State	1	.5	3 minor findings	2	.6	.6 + .5 + .6 = 1.7
#2	\$75K	1	.2	New to type of work	3	1.5	New – no findings	1	.3	.2 + 1.5 + .3 = 2.0
#3	\$125K	2	.4	Used before – but not for this type of work	2	1.0	Previous year finding re: safety	3	.9	.4 + 1.0 + .9 = 2.3

In this example, Vendor #3 has the highest risk, followed by Vendor #2 and Vendor #1. In the above example, Vendor #3 has been used before but there was a finding regarding safety, a key area requiring close Monitoring. The example used is not limited to use with multiple Contracts, it can also be used for single Vendors to assist in focusing on specific areas of risk within a Contract and to assist Agencies/IHEs in determining which areas in which to Monitor.

**D. Using Monitoring Review Results**

Monitoring is only beneficial if information obtained is used. All reviews, audits, and investigations should be routinely followed up to: ensure corrective actions have been taken; identify common problem areas that might require training; and improve future Contracts.

Simply identifying problems and including them in the Monitoring report is not enough. Agencies/IHEs should design systems that include criteria and defined follow up actions, the goal of which is to bring Vendors back into compliance with Contract requirements as problems do not correct themselves.

Monitoring results should also be used to improve the Contract requirements for future Contracts. Include Agency/IHE staff recommended changes for future Contracts in Monitoring reports, as well as any Vendor recommendations. If there are unnecessary restrictions or insufficient restrictions, this is the time to make a note of the recommended changes so future Contracts can incorporate the changes.

**5. REPORTING**

There are several categories of reports:

**A. Status Reports**

Describe the progress of the work. The content of status reports should be consistent with, and track the organizational structure of, the SOW, i.e. phases, segments, Deliverables, and products. Status reports should list completed and pending work and the status should be contrasted against the schedule. Only work that has been verified as completed or accepted should be categorized as complete. If there are any unresolved issues Agencies/IHEs are contractually obligated to resolve, those issues should be included in the status report and a resolution should be requested. If the SOW has changed, track the original schedule, not a revised schedule, unless an Amendment provides for one. If status is tracked against revised schedules, there is a risk continual changes will render status reports meaningless.

If Contracts do not provide for periodic status reports, Agencies/IHEs should ensure that sufficient progress is being made by requesting a status update from Vendors or conducting site visits. Keeping abreast of the work status makes updating Vendor performance in CMS easy.

**B. Activity Reports**

Describe any activity on the project. Project activity is not the same as a status report as a project may have a great deal of activity without making substantive progress. Regardless, activity reporting can be a core feature of Contract Management, for example, Vendor payments in outsourcing Contracts may be based on the number of completed transactions.

**C. Contract Management System Reporting**

Beginning July 1, 2009, all Agencies/IHEs shall use CMS to track Contracts. Agencies/IHEs shall report information specified in CRS §24-102-205(3)(a) for all Personal Services Contracts with a total value of over \$100,000, except for Contracts listed in CRS §24-102-205(2).

**D. Vendor Performance Evaluation Report**

Agencies/IHEs shall prepare Vendor performance evaluation reports for each construction Contract with a value of \$500,000 or more. See CRS §24-105-102.

**E. Schedule of Expenditure of Federal Awards (SEFA)**

Financial officers of the State are required to correctly report and record the financial transactions and financial condition of the State. The Fiscal Procedures Manual Chapter 3, §5, *Supplemental Information for Statewide Reporting-Exhibit K—Schedule of Federal Assistance*, includes instructions on how to prepare Exhibit K. In order to correctly report on Exhibit K, financial officers must be able to recognize and distinguish between a Subrecipient and Vendor. See OMB Circular A-133, *Audits of States, Local Governments, and Non-Profit Organizations*, for direction on determining the difference between Subrecipients and Vendors.

## 6. PAYMENT

### A. Payment Approval

Invoicing submitted by Vendors should accord with Contract budgets and rate schedules. Agency/IHE budget staff should review invoices to match Vendor billing with Vendor performance, and ensure that performance is not sub-standard. Explanations and justifications should be requested before invoice approval and payment if Agencies/IHEs suspect the request exceeds performance. Payment should be withheld pending verification or Satisfactory performance or remediation by Vendors, as upon payment and acceptance, Vendors may be relieved of further responsibility for the invoiced performance.

Invoices must be approved by program staff prior to payment. Payments must be made in accordance statute requiring correct invoices be paid within 45 days from the date received or receipt of Services/Goods, whichever is later. Interest cannot be paid before the 45th day. Invoices should be reviewed to ensure:

- i) Vendors bill only for Goods or Services received;
- ii) The Goods or Services have been accepted;
- iii) Invoices are correct and comply with Contract provisions; and
- iv) Total payments do not exceed Contract limits.

### B. Withholding Payment

Circumstances may necessitate withholding payments from Vendors to protect the interest of the State. These can be set forth contractually and via CRS §24-103.5-101. Circumstances include, but are not limited to:

- i) Material Breach of Contract by Vendors;
- ii) Invoicing errors and discrepancies;
- iii) Costs invoiced are unsupported or undocumented;
- iv) Previous overpayments on the same Contract; and
- v) Vendor performance is non-conforming or unacceptable.

## 7. CONTRACT MODIFICATIONS

### A. Process to Modify Contracts

Contracts may require modifications, which can be minor administrative changes such as a change of address, or Substantial changes affecting performance. Modifications can be Bilateral (all Parties to the Contract agree) or Unilateral (one Party has the right to modify without the other's consent). Parties affected by Unilateral modifications must have agreed to give the other Party the right to do so in advance of the exercise of that right.

Failure to manage and control modifications can cause many problems, such as unintentional changes to SOWs, schedules, Contract Costs, management controls, and Vendor Accountability. These problems can be reduced by effective management processes, which include, but are not limited to, the following:

- i) Prior written approval of all changes before Vendor performs them. Do not give verbal authorization. Document changes approved or disapproved;
- ii) Evaluation of the impacts changes have on objectives, Deliverables, schedules, Costs, increases in Agency/IHE Overhead, work in progress/completed work, standards, and acceptance criteria;
- iii) Documentation of all changes, no matter how small; and
- iv) Naming single points of contact to recommend or authorize changes (often project leads).

### B. Basis for Modifications

Minor changes can be made informally by the Parties (orally, email, letter, etc). Significant or Material Changes must be one in a writing executed by both Parties.

#### i) Administrative Changes

These are minor changes that are within the scope of Contracts or covered therein (expressly or implicitly) that do not affect or alter the rights or Obligations of the Parties. They can be made as provided for in Contracts or by other reasonable means. Examples of administrative changes include:

- (a) Changes in billing instructions or address;

- (b) Changes in persons and addresses where specified notices are to be sent;
- (c) Corrections of typographical errors not affecting substance (e.g. correcting a CMS tracking number);
- (d) Changes permitted by specific Contract language; and
- (e) Changes in Agency/IHE personnel assigned to the Contract.

**ii) Substantive Changes**

These are substantive changes affecting the rights of one or all Parties. Such changes generally require Bilateral approval. Examples of substantive changes include:

- (a) Changes in price;
- (b) Changes in schedules;
- (c) Changes in Quantity or Quality;
- (d) Changes to Deliverables (i.e. the Specifications);
- (e) Changes of key Vendor personnel; and
- (f) Changes of any contractual provisions.

**iii) Constructive Changes**

Constructive changes (this is the doctrine of quasi-contract) occur without explicit Agreement of the Parties, and can substantially alter Obligations. Courts allow claims for additional compensation under constructive changes if one Party reasonably relies on and acts in accordance with an action or inaction of another Party and it would be inequitable to allow the claim. Examples of actions or inactions that may lead to constructive changes are:

- (a) Accelerating delivery schedules;
- (b) Directing work to be performed differently than stated in SOWs;
- (c) Changing the sequence of work;
- (d) Delay in accepting or rejecting Deliverables;
- (e) Delay in reviewing invoices and approving payment;
- (f) Interfering with, or hindering, performance; and
- (g) Failing to act, e.g., passively watching a Vendor perform and then not paying for it.

**iv) FR 3-1 §6.3**

The use of Contract Modification tools and forms is set forth in OSC Policy, *Modifications of Contracts–Tools and Forms*, which provides:

**Quote V-2 OSC Policy *Modifications of Contracts–Tools and Forms***

All contract modification forms, other than amendments, shall be included as exhibits to the contract they modify. State Agencies/IHEs (IHEs) shall obtain prior written approval from the Office of the State Controller (OSC) to use these forms in a manner not described herein.

Except for amendments, which may be used for any modification, contract modification tools are not universally applicable and were created for specific contracts and scopes of services. Each modification tool shall be used only for its intended purposes, shall not be changed or combined with other contract modifications, and shall only be included in contracts that contain proper references to the specific modification tool. These forms satisfy OSC requirements; however, Agencies or IHEs must still comply with any other applicable statutes and rules governing a contract, including State procurement rules and personal services review by Department of Personnel and Administration Division of Human Resources (DPA/DHR).

**v) Modification Tools and Forms**

The following table outlines the modification tools and their designated uses.

**Table V-2-Modification Tools**

<b>Modification Tool:</b>	<b>Signed By:</b>	<b>Used To:</b>
Options	State	Extend Contract term – renewal; Increase or decrease quantities; Increase or decrease Contract value; or Initiate next phase of Contract.
Grant Funding Letters	State	Change in Grant funding only for federal or State Grants.
Change Orders Do Not Use Change Orders For New Contracts After August 1, 2008	State and Vendor	Within SOW: Change Specifications; Change Contract value using prices established in original Contract; or Change Contract term when change is due to change in Specifications or time of performance.
Task Orders	State and Vendor	Order Goods or Services based on rate and terms established in Master Contracts.
Amendments	State and Vendor	Revise SOW, Contract terms, or any other change. Can be used at any time instead of other modification tools.
Assignments-Consent to	State, Vendor and Assignee	Transfer performance Obligations from original Vendor to another Vendor. Parties change, terms do not, and original Vendor's further rights, duties, or Obligations are defined by the Assignment.

**vi) Approval of Modifications**

In general, all Contract Modifications require review and approval by the same Parties that approved the original Contract, (e.g. the DPA/DHR, SPO Director or a delegate, the Attorney General, and the State Controller or a delegate). See OSC Policy, *Modifications of Contracts – Forms and Tools*.

**vii) Procurement Rules and Approvals Related to Modifications**

Issues with SPO rules may arise with Bilateral Amendments if changes are outside the scope contemplated in the original Solicitation. Significant differences that would be a Material or Substantial change in SOW are not allowed because they were not originally subject to fair competition, i.e. a fair playing field for all Vendors. For example, amending a Contract to buy 10 desks to include 300 file cabinets is a significant, improper change for the following reasons:

- (a) Non-Awarded Bidders did not have the opportunity to compete for the sale of 300 file cabinets;
- (b) Additional Vendors may have competed had they known that file cabinets were being solicited; and
- (c) Such a large Quantity of file cabinets could also have had an impact upon which Vendors competed.

Material and Substantial are key concepts in determining the significance of changes. The number of changes made to the original Specifications is not determinative, rather, the question is would they so substantially alter the original Specifications that not re-soliciting revised Specifications would deny a Procurement opportunity to Vendors who would have been able to respond to revised Specifications. If so, a new Solicitation must occur. The SPO

Director, or a delegate, must make this determination at the time the Contract Amendment is routed for review.

If a change is not significant, Contract Managers must justify why it is acceptable for the Awarded Vendor to receive the increase. Such justification must include documentation explaining what gave rise to the changes and Contract Managers should obtain approval from their Purchasing office or from SPO, as appropriate, before proceeding.

Unilateral changes do not create issues with SPO rules if the changes do not significantly affect the SOW.

**viii) Extensions-Renewal Options and Amendments**

The State is on a Fiscal Year spending cycle and Contracts often begin with a one-year term with Options to renew every July 1st. The State may lose Option rights if the Option is not properly exercised; therefore, Contract Managers should be conversant with their provisions and set up ticklers and tasks in CMS.

The most common type of renewal mechanism is the Option which gives the State discretionary rights to continue performance past the initial Contract term. The Option provision should appear in original Contracts and conform to OSC Policy. Automatic renewals are disfavored by the OSC and are not permitted without prior OSC approval. Term extensions not provided for in Contracts must be accomplished via Contract Amendment. See OSC Policy, *Modifications of Contracts – Forms and Tools*, for details regarding Options and Amendments. If Contracts expire before they are renewed or extended, they terminate and cannot be revived; a new Contract is required.

Some Contracts, typically used in Lease-purchase Agreements, where the Vendor (often a bank) wants some assurance that the Obligation is considered long term by the State will have multi-year terms with automatic renewals subject only to "availability of funds." They often only require the State to deliver evidence of available appropriations to Vendors within some period of time before the beginning of the Fiscal Year, and to specify procedures for Termination if funds are not so appropriated. In this type of Contract, the only reason the State can stop the Contract is for non-appropriation.

**8. DISPUTE RESOLUTION**

In this Manual, "Dispute" means a disagreement or controversy between contracting Parties requiring legal or administrative action to resolve. Usually this means the Parties have contrary and irreconcilable positions, typically involving issues of money, time, and performance.

**A. Dispute Resolution-Definition and Goals**

The goal of Dispute resolution processes is to resolve problems before they escalate and avoid Termination, which should generally be a last resort. To achieve this goal, Contract Managers must respond promptly to all Vendor inquiries. Initial steps to take include:

- i) Identifying the Problem.** Many times what may appear to be a problem can be resolved by providing Vendors with information or clarification.
- ii) Researching Facts.** Obtain all information regarding the potential problem from all relevant sources, including project managers and Vendors.
- iii) Evaluation.** Compare the facts with Contract requirements and provisions, and then take appropriate courses of action.

Proper Dispute resolution is a core skill of successful Contract Management. Early identification of problems and effective communications are key determinants of whether formal or informal resolutions result.

Contracts usually set out Remedies if there is a Breach of Contract or circumstances change. "Inspection and Acceptance" provisions may give the State the right to deduct payments, and a "Suspension of Work" or "Delay of Work" clause may give the State the right to suspend the work. Further, "Termination for Default" and "Termination in the Public Interest" provisions enable the State to terminate Contracts under certain conditions. Exercise of these Remedies often results in Disputes.

**B. Responsibilities in Dispute Resolution**

The first time Vendors ask to discuss a Dispute, Negotiations have started. Agencies/IHEs should seek "reasonable value" for its payments, including those made in settlement of Disputes. Settlement of Disputes or relinquishments of rights must be in State's best interests, and Contract Managers should ensure the State receives value for its payments and does not unnecessarily relinquish its rights.

The primary purpose of competitive bidding is lost if Vendors are permitted to change terms after Award by obtaining additional money, time extensions, or relaxation of Specifications. Not only does the State suffer from not receiving value, the rights of the other non-Awarded Bidders are also compromised. Contract Managers should not resolve Disputes by changing terms unless, after investigation and due consideration of all pertinent facts and circumstances, including review of Contract provisions, they deem it fair and reasonable to all concerned. For example, it may be reasonable to grant time extensions for weather delays on outdoor projects but not for an indoor project.

Factors for consideration of the legitimacy of Dispute resolutions include the following:

- i) What are the arguments for and against the desired resolution of each issue?
- ii) Will the resolution set a bad precedent for future dealings with this or other Vendors?
- iii) Should the Vendor be entitled to more money, time, or relief from Specifications?
- iv) What is the amount of damage or delay, assuming entitlement?
- v) What is the standard for agreement on the Negotiation, e.g. fair and reasonable compensation?
- vi) What is the agreed Negotiation process? "Help me understand the factual basis for the claim" or "I know there are some hard feelings, but put them aside and focus on the problem."
- vii) What are the critical documents, Vendor admissions, and other information relevant to the arguments?
- viii) Is the file organized and are critical documents, facts, and witnesses readily available?

**C. Negotiation**

Negotiation and settlement of Disputes between the Parties is the best available option. The keys to effective Negotiation are investigation, review, and preparation. Contract Managers should be Knowledgeable about all facts and circumstances, and Contract provisions have cogent points and counter points, developed with assistance from other staff and, if necessary, Subject Matter Experts.

**i) Preparation**

Preparation for Negotiations include the following:

- (a) Reading the Contract (the entire Contract).
- (b) Identifying Vendor interest, not only the State's, including State funding constraints, avoiding litigation and associated Dispute resolution costs, providing fair and reasonable compensation for work performed, and fostering a good continuing relationship with Vendors.
- (c) Advocate principled Negotiations. Try to get everyone to focus on all interests and try to reach an Agreement accommodating the interests of both Parties. Ask, "What is the best alternative for the State if negotiations fail?" Use the answer to evaluate alternatives and options. Be realistic in assessments and expectations.
- (d) Decide what documents best support the State's position. Write down the questions that need to be asked of the Vendor, for example:
  - (01) Who authorized the change in reporting format?
  - (02) Was the State notified that this was outside the SOW?
  - (03) Can invoices and receipts be provided showing how much was paid?
- (e) Anticipate Vendor counter-questions such as:
  - (01) Why did we need to provide written notice, the State's representative knew our position?
  - (02) Does the State at least agree that we are entitled to recover something more?
- (f) Determine the funding situation. Are there additional funds available? What is the likelihood there will be other claims or adjustments to the Contract?



- (g) Is a specific opening offer a commitment acceptable to the State? What commitments can be comfortably made at the table, in terms of price, schedule, and relaxation of Specifications?
- (h) How is the State going to handle a request for commitment from the Vendor?
- (i) Written memoranda relating to Disputes are not privileged and are "discoverable" by Vendors in litigation or in "open records" requests.
- (j) Never speculate when writing factual recitals in memoranda. Be objective. Avoid characterizations of events.
- (k) When soliciting descriptions or memos from other individuals, make sure they understand the need to be accurate.

**ii) Process and Tactical Considerations**

What is said in Negotiations can, and often will, be used by the other Party. Have a plan and follow it. This includes planning what statements to make and what to offer and accept. Take the lead. Do not let Vendors take over. The following will assist in developing plans and in communicating effectively:

- (a) Weigh the advantages/disadvantages of where, when and who attends Negotiations and how they are conducted.
- (b) Script opening statements and include some Negotiation process.
- (c) List and organize the issues that need to be discussed. Be prepared for difficult questions or arguments. Prepare in advance, a list of questions to ask the Vendor. Plan answers to difficult questions the Vendor is most likely to ask.
- (d) Focus on and depersonalize issues while eliminating "good guy/bad guy" techniques.
- (e) Build consensus. Ask, "How can disagreements best be handled? Can we agree to disagree and move on?"
- (f) Consider the "continuing relationship" as a goal unless it is obviously not of value. While often difficult for negotiating Parties to admit, this is important to Negotiations and project completion.
- (g) Be sure opening offers are commitments that the State is willing to make. Know what to say if pressed for or confronted with a specific offer. Know the State's "bottom line" prior to Negotiations.
- (h) Plan, discuss, and agree upon commitments.
- (i) Prioritize specific options in terms of delivery schedule, price, relaxation of Specifications, Waiver of Liquidated Damages, etc.
- (j) Recap the meeting by focusing on the State's "misunderstanding" which may limit confrontational atmospheres.

**D. Alternative Dispute Resolution Techniques**

Occasionally Disputes reach a point where further Negotiation is futile. Contracts often contain provisions governing Dispute resolution and these will generally control. If such provisions do not exist, an Alternative Dispute Resolution (ADR) process may be used in an attempt to settle disputes, if the Parties mutually agree. All ADR processes cost money, however, and one of the first issues is payment for the expenses involved. In general, the Parties agree to split the Costs.

Dispute resolution requires Contract interpretation, considerations of litigation, risk, and Knowledge of available judicial Remedies. This summary is not a substitute for legal advice, which should be obtained before agreeing to ADR in Contracts or after Negotiations.

**i) Types of ADR**

There are numerous variations of ADR; however, the most common are Mediation, mini-trials, and arbitration.

- (a) **Mediation.** Mutually agreeing to use a neutral third-Party to mediate, i.e., getting the Parties to agree. Successful Mediation usually results in Agreement but is not binding on either Party.
- (b) **Arbitration.** Choosing an independent third-Party to rule (much like a judge) on Disputes. Arbitration can be non-binding or binding; however, the State will not agree to binding arbitration.
- (c) **Informal Mini-Trials.** Both Parties engage in informal exchange of information and a neutral third-Party facilitates the meeting.

**ii) When to Use ADR**

ADR is recommended when:

- (a) Parties want or need to maintain a good relationship;
- (b) Communication has broken down but both Parties seem committed to settlement;
- (c) Time or limiting Costs of settlement are major factors;
- (d) Emotions or personalities are getting in the way;
- (e) Unbiased appraisals of complex or multiple issues might encourage an objective assessment by the Parties;
- (f) Maintaining confidentiality of facts or positions is important (keep CORA in mind though);  
or
- (g) Party positions are well developed, facts or laws are complex, the amount in controversy is significant, and/or high-level decision makers are necessary for settlement.

**iii) When Not to Use ADR**

ADR is not recommended when:

- (a) It contradicts law or rule (the Special Provisions prohibit binding);
- (b) Definitive and authoritative decisions are needed on an issue likely to be precedent setting, i.e., will impact how other Contracts are written; or
- (c) Established policy must be maintained to avoid variations in implementation and enforcement.

**E. Implementing Dispute Settlements**

If Parties are able to resolve Disputes, appropriate documentation should be drafted to memorialize Agreements. The types of documents necessary depend on the type of resolution. The following are the most common:

**i) Negotiation Memoranda**

This is a memo outlining the history and key points of the Dispute it resolves. It should be signed and dated by all Parties. This is appropriate if (a) good report and trust remains between Parties settling relatively simple Disputes not involving increases in State expenditures, and (b) performance under the Contract at issue continues.

**ii) Contract Amendments**

These should be done in accordance with OSC Policy, *Modification of Contracts – Tools and Forms*. Amendments are versatile and appropriate for resolution of (a) any Disputes, and should be used for any that are not very simple, and (b) where full or partial performance under the Contract at issue continues. Increases in State expenditures, extensions of time, substantive changes in any other provision, including SOWs, or Waivers of any of the State's rights are examples when Amendments are required. Amendments may be coupled with releases of claims if part of a Vendor or State Obligation is permanently terminated.

**iii) Settlement Agreements**

Settlement Agreements require review and approval by the OSC. See FR 3-1 §§2.36 and 5.1.5 and OSC Policy, *Settlement Agreements*. They are formal legal documents that should be drafted by lawyers. They are appropriate to (a) completely resolve all or part of a Dispute, and/or (b) terminate Contract performance in its entirety, or at least with respect to the disputed aspect, if necessary. Employee settlement Agreements and the State's settlement with the original CBMS Vendor are examples.

**F. Rules of Construction, i.e. Interpreting Contracts—What is the Intent of the Parties?**

Courts faced with contractual Disputes seek to glean the intent of the Parties at the time they entered into Contracts. Discovering this intent requires focusing on what a reasonable person familiar with all of the facts and circumstances at that time understood the meaning to be. Courts have created rules of construction to assist them in Contract interpretation. Some of the most common rules are as follows:

**i) Meaning of Words-Dictionary and Terms of Art**

Unless a different intent is apparent, Contracts are interpreted in accordance with the ordinary meaning of terms and words (e.g. dictionary meanings); however, technical provisions and terms of art are generally defined in the context of that business or profession. Words are also construed in the context in which they appear.

**ii) Whole Contract**

Contracts are interpreted as a whole, if possible, in order to give effect to all parts of the Contract. Also, a Contract may be interpreted within the context that it was made and with recognition of the matters to which the Contract relates. If there is more than one Contract relating to a matter, the Contracts may be considered together if they were entered into by the same Parties and can be viewed as relating to a single overall transaction.

**iii) Harmonizing**

An interpretation that avoids conflict between and harmonizes all of the Contract provisions is favored unless there is clear evidence to that such was not intended.

**iv) Specific vs. General-Order of Precedence**

Specific language controls over more general language in the event of conflict, unless otherwise set forth, e.g. "order of precedence" provisions.

**v) Parol Evidence Rule**

Evidence outside Contracts is Parol evidence and will not be considered if the language is clear, plain, and unambiguous. Courts will allow evidence of custom and trade practice to explain Contract terms dependent on the custom and trade practices prevalent in the industry; however, custom and trade practice cannot contradict plain Contract terms as Parties are free to vary from custom and trade practice during performance. The Party asserting trade practice has the burden of proving it. Extrinsic evidence, which is evidence outside of the four corners of Contracts, can only be used to determine intent of the Parties if there is ambiguity in the Contract. Such evidence includes:

- (a) Oral discussions of the issue conducted before the Dispute arose;
- (b) Prior interpretation before the Dispute arose, or performance before the Dispute arose consistent with one Party's interpretation; and
- (c) Custom and/or prior course of dealing between the Parties; e.g., similar transactions prior to this Contract that showed how the Parties interpreted the issue.

**vi) Construction Against the Drafter**

If after applying these rules, there are still two reasonable interpretations, ambiguities are construed against the Party who drafted the Contract (usually the State). However, non-drafting Parties have a duty to clarify ambiguities they knew or should have known, and if they do not, the rule is not applied.

**vii) Bias in Favor of Upholding**

Courts favor constructions that uphold Contracts rather than defeat them unless this would lead to harsh or absurd results.

## 9. ADMINISTRATION FILES FOR CONTRACTS

### A. Planning, Planning, and More Planning

Performance issues are quickly discovered and managed by diligent Contract Monitoring, inspection, and administration, thereby avoiding delays, interruptions, and other adverse effects. The following will assist Contract Administrators performing these tasks:

- i) Plan for Contingencies. Have general approaches to the most frequent causes of delay and interruption.
- ii) Become familiar with the information provided in this Chapter on Monitoring, Inspection, and Remedies.
- iii) Use "tickler" systems to prompt Monitoring or inspections on due dates for delivery of documents, progress reports, supplies, and Services. CMS can serve this purpose well in most cases.
- iv) Inform all personnel who need to know about milestones in Contracts and performance standards.
- v) Identify who has authority to accept and reject work and issue directions at the start.
- vi) Immediately notify Vendors through informal notices, if appropriate, about problems with performance. If needed, promptly follow up informal notice with formal written notification.
- vii) Plan a general approach to these common situations and make them part of SOWs:
  - (a) Vendors miss required progress report dates;
  - (b) Vendors are not making sufficient progress to complete the Contract on time;
  - (c) Problems are observed or complaints are received about Vendor performance;
  - (d) Delivery dates pass without delivery;
  - (e) Vendors claim to have supplier problems and cannot meet a delivery date; and
  - (f) Vendors send letters asking for more time and money due to incorrect assumptions or based on accusations that the State changed the SOW.
- viii) Make prompt decisions concerning Vendor entitlement to more time and money.

### B. File Contents

Keeping one complete master Contract Administration file is critical as it provides a basis for settling claims and Disputes. Depending on the Contract, this file should contain some or all of the following:

- i) Copies of Contracts and all modifications to them (Originals of Contracts and all modifications to them should also be maintained in a central repository);
- ii) Copies of exhibits, Specifications, drawings, or manuals Incorporated into the Contract by reference;
- iii) Reference lists and a list of prior Contracts with specific Vendors;
- iv) Solicitation documents, Vendor responses, evaluation determinations, and notices of Award;
- v) A list of Vendor submittal requirements;
- vi) A list of government furnished property or Services;
- vii) A list of all information furnished to Vendors;
- viii) A schedule of compliance review;
- ix) A copy of all internal and Vendor correspondence related to Contracts;
- x) Originals of all Vendor data or report submittals;
- xi) Copies of all required reports, e.g. sales reports, pricing schedules, approval requests, and inspection reports;
- xii) Copies of all notices to proceed, to stop work, to correct deficiencies, and Change Orders;
- xiii) Copies of all letters of approval pertaining to such matters as materials, Vendor Quality control program, prospective Employees, and work schedules;
- xiv) Copies of records/minutes of all internal and external meetings, including sign-in sheets and/or agendas;
- xv) Copies of all Vendor invoices, information relative to discount provisions for prompt payment, letters pertaining to Contract deductions or fee adjustments; and
- xvi) Copies of all documentation for Vendor payment or progress payment and of any audits.

Confidential or proprietary material should be clearly marked and separated from other Contract documentation to prevent accidental release in the event of an Open Records Act request.

**C. Managing Files**

Contract Administration, Procurement, and the payments files may be combined or separated, depending on organization of Agencies/IHEs. For those that are separate, CMS is helpful as staff in any unit can view information related to Contracts. These files should be retained throughout the Contract term and all subsequent extensions/renewals, as well as during the final payment period and Warranty period. Prior to archiving the Contract file, Contract Managers should ensure that there are no outstanding issues that could result in a lawsuit, an administrative hearing, or other action. The files should be retained for at least six years after Contract completion, and in accordance with CRS §24-80-101 et seq. regarding archiving of records. See OSC Policy *Records Retention Periods for Contracts*.

**10. CLOSE OUT AND EVALUATION OF CONTRACTS****A. Close-Out**

The purpose of the Contract close-out process is to verify that all contractual Obligations are completed, evaluate Contracts and Vendors, and identify lessons learned. Close-out can occur when:

- i) All Obligations are completed and accepted, including reports, Deliverables, notices, documentation, work, etc. This requires comparing actual performance against performance measures, goals and objectives;
- ii) Final payment has been made;
- iii) All issues and Disputes have been resolved;
- iv) All property inventory and ownership issues are resolved including disposition of any equipment or Licenses purchased under the Contract;
- v) Final acceptance from the project manager has been received (if applicable);
- vi) Vendor is in compliance with records retention requirements; and
- vii) Any deficiencies found during the close-out process are documented and communicated to appropriate Parties.

**B. Evaluation**

Effective evaluations of Contract performance determines if full value was received, the results satisfied the needs, and if the experience provides lessons for future contracting. Post-completion evaluation is a necessary and valuable requisite for proper Contract Administration that compliments pre-completion Monitoring.

**i) Approaches to Evaluating Vendor Performance**

There are four primary approaches to evaluating Vendor performance, depending on the magnitude and complexity of the Contract activity.

- (a) Evaluation by an in-house expert (or the Contract Manager);
- (b) Evaluation by another Agency or institution (comparison);
- (c) Evaluation by a Knowledgeable committee; or
- (d) Evaluation by an internal or external auditor.

**ii) Evaluation Questions.**

Evaluations should review the following:

- (a) **Structure.** Were facilities and equipment adequate and timely provided? How well did Vendor personnel and Subcontractors perform, was their skill level appropriate, and were proper staff available when needed?
- (b) **Process.** Were the proper Goods provided and Services rendered. Were they timely?
- (c) **Outcome.** What was the ultimate result of the Contract? Were the original needs/purposes satisfied? Were original expectations realistic?

**iii) Extensions and Re-Solicitations**

It may be necessary to extend or re-solicit Contracts at the end of original performance terms. Contract evaluations should be undertaken at the end of the original term regardless of the method used to extend or re-solicit them.

## CHAPTER VI. GLOSSARY

**A:**

**Acceptability:** The Acceptability of a Good delivered or Service performed is measured by comparison to the Specifications of the order. If the Good or Service meets the Specifications of the Agreement, it is acceptable. Associated Words/Concepts: Acceptable: adjective: agreeable, Satisfactory.

**Accountability:** Relating to contractual performance, this term means the assumption of responsibility for actions, products, and decisions. Associated Words/Concepts: noun: responsibility, duty, obligation.

**Advance Payment:** Per FR §2.1 “payments made for goods or services prior to the receipt thereof.”

**Addendum:** 1. Additions or supplements to Solicitation documents issued prior to the opening date. 2. Additions to Contract documents. Associated Words/Concepts: noun: appendix, attachment, supplement, exhibit.

**Alternative Dispute Resolution (ADR):** Alternative methods of helping Parties to a Contract resolve legal problems before going to court. ADR involves an independent third person, often called a "neutral" who tries to help resolve or narrow the areas of conflict. The use of ADR early in Disputes can result in the more efficient, cost-effective resolution of Disputes with greater satisfaction to the Parties. FR 3-1 prohibits the use of binding arbitration in the resolution of Contract Disputes.

**Advertise:** To make a public announcement of the intention to purchase Goods or Services. Associated Words/Concepts: verb: announce, communicate, inform, notify.

**Agency:** As used in this Manual with a capitalized first letter, means every agency in the executive branch of State government that is required by the State Constitution or State statutes to exercise discretion or to perform judicial or quasi-judicial functions. The term Agency includes, but is not limited to, boards, commissions, departments, divisions, and offices. For example: The DPA or OIT. Associated Words/Concepts: noun: department, organization, establishment, bureau. There is also a branch of law called “agency”, which concerns principal-Agent relations; however, any references to such body of law will be denoted as such.

**Agent:** A person authorized to act for and represent another person or Entity, called the “principal”. For example, a real estate agent. Agents can have actual and Implied Authority to act. A Registered Agent (defined below) has a limited authority to act.

**Agreement:** Frequently used interchangeably with the term Contract. “Agreement” has a broader meaning than Contract, since every Contract is an Agreement; but not every Agreement is a Contract. Contracts formalize Agreements and create legal Obligations. Associated Words/Concepts: noun: understanding, deal, promise.

**Amendment:** A method of making changes to contractual provisions. See Chapter V §7, *Modifications to Contracts*, and OSC Policy, *Modification of Contracts-Tools and Forms* which states, “Amendments shall be used to modify, change, add to, or delete State contracts in any situation not specifically covered in the other modification tools listed in this Policy. Agencies/IHEs may also use them in lieu of any other contract modification tool except Assignments. Amendments are bilateral, i.e., they require the consent of all Parties.”

**Assignment:** A method of changing Parties to a Contract. See Chapter V.7, *Modifications to Contracts*, and OSC Policy, *Modification of Contracts-Tools and Forms*, which states, “Assignments are a special type of amendment used to effectuate a change of parties with the new Contractor (assignee) replacing the original Contractor (assignor) in whole or in part regarding future duties or Obligations under the contract. The consent of all parties is required for an Assignment unless the original contract specifies otherwise”.

**Attestation:** The witnessing of a signature to a document, including signing one's name as a witness to the fact. Usually by performed by a Corporation's secretary or a clerk of a political subdivision.

**Award:** In State Procurements, the acceptance of a Bid or proposal; also refers to issuance of a State Price Agreement.

**B:**

**Best and Final Offer (BAFO):** A term used in Bids to indicate that no further negotiation on the amount or terms is possible. In government contracting, Bidder's final offer following the conclusion of discussions.

**Bid:** An offer submitted by prospective Vendors in response to a Bid invitation issued by a Buyer. Bids are usually non-negotiable and become a Contract upon acceptance by the Buyer (Purchasing authority). Associated Words/Concepts: A submitted price at which one will perform work or supply Goods.

**Bid Deposit:** (i) A check, letter of credit or bond deposited by a Bidder with a Buyer for the purpose of guaranteeing that the Bidder will not withdraw the Bid for a specified period of time, will furnish bonds as required, and will accept a Contract, if Awarded, or forfeit the deposit. A Bidder will forfeit a Bid Deposit if the Bidder fails to satisfy any of the foregoing conditions. (ii) A deposit required of Bidders to protect the State in the event a low Bidder attempts to withdraw its Bid or otherwise fails to enter into a Contract with the State. Acceptable forms of Bid Deposits are limited to: cashier's check; certified check; irrevocable letter of credit issued by a financial institution subject to the laws of Colorado and entered on the United States Department of the Treasury's listing of approved sureties; and a Surety or blanket bond from a company chartered or authorized to do business in Colorado. Associated Words/Concepts: A type of Performance Bond. Often a bond filed in public construction projects to ensure that Bidders will enter into the Contract.

**Bidder:** An individual or Entity that submits a Bid in response to an IFB, RFP, RFQ or other Solicitation document issued by a Buyer. The term includes anyone acting on behalf of the individual or other Entity that submits a Bid, such as Agents, Employees, or representatives. A Bidder is not a Contractor until Awarded a Solicitation/Contract. Associated Words/Concepts: offeror, quoter.

**Bid Information and Distribution System (BIDS):** A web site maintained by the SPO, which is designed to notify interested Vendors of the State's intent to purchase Goods or Services competitively. These notifications are Solicitations. Since the State Procurement process is decentralized, Purchasing Agents at the various Agencies/IHEs post Solicitations on BIDS to alert the public of its intent to buy and/or obtain information. BIDS is a centralized clearing house of bidding opportunities for these Agencies/IHEs. Vendors must be registered with BIDS in order to respond to these bidding opportunities. See <https://www.gssa.state.co.us/VenSols> for a listing of all current bidding opportunities on BIDS.

**Bid Opening:** The formal process in which sealed Bids are opened, usually in the presence of one or more witnesses, at the time and place specified in the IFB. Bid Openings are public events at which the names of the Bidders responding to a Bid Solicitation and prices of the Bidders are read aloud and recorded. The written record is available for public inspection upon request. See also "Proposal Opening".

**Bid Tabulation:** The recording of Bids and Bid data submitted in response to IFBs. A public document listing all responding Bidders, with a list of all items in the Solicitation document, and showing unit prices and extended prices for each Bidder. The Bid Tabulation may also include delivery terms and conditions, evidence of insurance, and other information deemed appropriate. The Bid Tabulation is used for comparison, analysis, and record keeping.

**Bilateral:** Actions requiring all Parties to act; e.g., signing an Amendment. See also "Unilateral".

**Bilateral Contract:** Contracts where all Parties agree in advance, reciprocally exchanging promises and signatures in contrast to a Unilateral Contract, e.g. State PO, where an offer to pay is made by the State and Vendor acceptance is made by completed performance.

**Breach of Contract:** A failure to fulfill contractual Obligations, wholly or in part, without contractual or legal excuse. The failure of any Party to a Contract failing to perform or by performing in a non-compliant manner (outside the Contract's terms) or by interfering with another Party's performance. Associated Words/Concepts: (i) Anticipatory/Constructive Breach: a Party's indication that they will not perform when performance is due, which can be treated as immediate breach by non-breaching Party; (ii) Material Breach: a breach significant enough to permit the non-breaching Party to treat the breach as total and sue for Damages and relieves the non-breaching Party from further performance; and (iii) Partial Breach: a breach less significant than a Material Breach and gives the non-breaching Party the right to Damages, but does not excuse them from performance.

**Buyer:** A purchaser. Can be a reference to the buying Agency/IHE or the State. Also can be a reference to the Employee in a Purchasing office who is appointed to purchase Goods or Services on behalf of the Agency. Associated Words/Concepts: noun (i) Party which acquires, or agrees to acquire, ownership (in case of Goods), or benefit or usage (in case of Services), in exchange for money or other Consideration under a Contract. Also called purchaser. (ii) Professional purchaser specializing in a specific group of materials, Goods, or Services, and experienced in market analysis, purchase Negotiations, bulk buying, and delivery coordination.



**Central Approvers:** The units within DPA (OSC, OSA, and DHR), the OAG, and OIT charged with approving Contracts within their respective statutory purview.

**Central Approver Monitoring:** Review by Central Approvers of delegated Agencies/IHEs to ensure compliance with Delegation requirements.

**Central Contracts Unit (CCU):** The unit within the OSC primarily responsible for review and approval of State Expenditure Contracts, creating Model Contracts, providing Contract training, managing OSC Delegations, and Monitoring Agency/IHE compliance with OSC FRs, Policies, and Delegation letters.

**Change Orders (CO):** See "Contract Modifications" and OSC Policy, *Modification of Contracts-Tools and Forms*. Note: OSC Policy prohibits use of Change Orders after August 1, 2008, except with OSA approved forms related to construction Contracts.

**Choice of Law:** In conflicts of law, the question presented in determining what law should govern. A Choice of Law clause is a contractual provision in which the Parties designate the state whose law will govern Disputes arising out of their Agreement. OSC Model Contracts provide for Colorado law.

**CLIN:** Contract routing and tracking program formerly used by the State. Replaced by CMS July 1, 2009.

**Colorado Contract Improvement Team (CCIT):** The primary method OSC/CCU employs to communicate with Contract staff at Agencies/IHEs, the Governor's Office, the State Legislature, and the State Judiciary. The CCIT email list is used as a general information tool for the CCIT community, including publishing notice of changes in OSC/CCU procedures and Policies, answering questions of general concern, and providing information related to CCIT meetings (location, agenda, cancellations, etc). Anyone who performs Contract related functions is encouraged to sign up on the CCIT email list at <http://mailman.state.co.us/mailman/listinfo/ccit> and attend CCIT meetings.

**Colorado Revised Statutes (CRS):** The laws of the State of Colorado enacted by the Colorado General Assembly.

**Commitment Voucher:** The term used in CRS §24-30-202 to describe authorized forms for obligating State funds such as Contracts, Grants, and Purchase Orders. See also FR 2-2 §2.4.

**Common Rule:** OMB Circular A-102 originally contained the Common Rule for application government-wide; however, in 1987, all federal agencies were directed to adopt the Common Rule agency-by-agency. Citations in this Manual are to the codification of the Common Rule for Grants with state and local governments by the GSA in 41 CFR §105-71. The Common Rule establishes the cost principles applicable to Grants funded with federal money. Should a Grant use funds from a federal agency, other than GSA, that agency's codification of the Common Rule should be consulted. In addition, should a Grant be with IHEC or another non-profit organization, OMB Circular A-110 and the applicable federal agency's codification of rules for that type of Grant should be consulted.

**Competitive Negotiation:** The process of discussion and issue resolution between a Procurement official and a prospective Vendor in order to arrange for the providing of a Good or Service needed by the State. If more than one Vendor is available for such Negotiation, the needs of the State must be clearly defined in advance of any Negotiations, via a Specification that details fully the State's intended Procurement. This process may only be used when the director or head of a Purchasing Agency determines that time does not permit re-Solicitation after an unsuccessful Competitive Sealed Bid or Competitive Sealed Proposal process.



**Competitive Range:** Proposals initially evaluated as most responsive to requirements and reasonably qualified to be selected for Award during a Procurement process. Those proposals not in the Competitive Range are given no further consideration. Associated Words/Concepts: The pre-determined Bid-price range based on the minimum requirements for price, and the Bidder's management and technical capabilities.

**Competitive Sealed Bidding:** The preferred method for acquiring Goods, Services, and construction for public use in which Award is made based solely on the response to the criteria set forth in an IFB. The components of Competitive Sealed Bidding include advertising an IFB, conducting a public Bid Opening and Awarding of a PO/Contract to the lowest responsive, Responsible Bidder in accordance with State law. All Bids remain sealed until the Bid Opening and Bidders are not permitted to discuss or negotiate their respective Bids with the State. Associated Words/Concepts: it is a transparent Procurement method in which Bids from competing Vendors are invited through open advertisement of the scope, Specifications, and terms and conditions of the proposed Contract as well as the criteria by which the Bids will be evaluated. Competitive Sealed Bidding aims at obtaining Goods and Services at the lowest prices by stimulating competition, and by preventing favoritism.

**Competitive Sealed Proposals:** A method for acquiring Goods, Services, and construction for public use in which discussions or Negotiations may be conducted with responsible offerors who submit proposals in the Competitive Range. The components of Competitive Sealed Proposals include advertising a RFP, the evaluation of submitted proposals and Awarding of the Contract. Associated Words/Concepts: public advertisement and Bidders respond with a detailed proposal, not with only a price quotation. Allows for Negotiations after sealed proposals are opened, and the Award of Contract may not necessarily go to the lowest Bidder.

**Condition(s):** Requirement, limitation, provision; Contingency, prerequisite. Often used in conjunction the word "term" as in "terms and conditions" or "Ts and Cs". See *also*, "Provision."

**Consideration:** The reason Parties enter into Contracts. Consideration is an essential element of Contracts, and each Party must give up something of value, e.g. payment, or do or refrain from doing some act, e.g., perform a Service, provide a Good, etc.

**Consultant:** Persons or entities that provide Consulting Services. Persons or entities with education and/or experience that uniquely qualifies them to perform some specialized Service. Associated Words/Concepts: Often referred to as a consulting expert or expert who through education or experience, has developed a skill or Knowledge in a particular subject that can be utilized by the Agency seeking the Service.

**Consulting Services:** Generally, Services of an advisory nature obtained from persons or Entities considered having prerequisite Knowledge or special abilities not available in the State to support Policy development, decision-making, administration, or management of the State. The practice of studying and advising Agencies/IHEs in a manner not involving the traditional employer/Employee relationship. Associated Words/Concepts: major Consulting Services Contract.

**Contract:** Written Agreements between two or more Parties creating enforceable Obligations. The written document expressing the promises between the Parties. A written Agreement to provide Goods or Services in accordance with the established price, terms and conditions. The term is used for all types of written Agreements, regardless of what they may be called, for the obtaining or disposal of Goods, Services, construction, or other performance Obligations. Agreements, POs, Grants, etc are specific types of Contracts. Associated Words/Concepts: used as a verb: to make a promise, to accept and obligate oneself to perform. Two most common forms of a Contract include (i): Bilateral Contract: Each Party exchanges promises and signs the written document. Example: Personal Services Contracts in which one Party promises to pay in exchange for the promise to provide Services. (ii): Unilateral Contract: Only one Party makes a promise to perform and becomes obligated. Examples: a reward offer in which one Party promises to pay if something lost is found, but no one is obligated to search for or find the object. Often used in State Procurements as the exercise by the State of a Unilateral Option, using a State PO or Contract; for example, to extend time, to purchase additional Goods at a predetermined price. However, in the latter event, the right to exercise such Option unilaterally was agreed to in advance by the Parties.

**Contract Administration:** This generally refers to actions that must be taken to assure compliance with the terms of the Contract after Award and signature of the Contract. For purposes of the State, the term is used to define Monitoring activities of the contracting or Purchasing staff with respect to areas such as issuance of an RFP, payment, Grant Award, and Amendment. Associated Words/Concepts: Term is often used interchangeably with Contract Management and Contract Monitoring.

**Contract Administrator:** Individuals who direct Contract activities for the purchase or sale of equipment, materials, Goods, or Services. The individual may also be the one to examine performance requirements, delivery schedules, and estimates of Costs of material, equipment, and production to ensure completeness and accuracy. Also, prepares Bids, process Specifications, test and progress reports, and other exhibits that may be required. Reviews Bids from other Bidders for conformity to Contract requirements and determines acceptable Bids. May also be responsible for Negotiating Contracts with Vendors, requesting or approving Amendments to, or extensions of, Contracts. Associated Words/Concepts: The creator of a Contract record in CMS.

**Contract Advisory Working Committee (CAWC):** The team created to assist Agencies/IHEs in improving Contract Management practices. The team consists of members from each of the following offices: (i) OAG, (ii) OSC, (iii) DHR, (iv) OIT, (v) SPO, and (vi) OSA.

**Contract Insight:** The Contract Management Software provided by CobbleStone Systems and referred to generically as the State's Contract Management system or CMS. The software was designed with larger organizations in mind and is based on years of industry research, development, and customer feedback. Implemented in 2009 to assist the State in meeting Contract compliance regulations, centralizing Contract tracking, and improving overall Contract Administration.

**Contract Management:** An umbrella term referring to the entire contracting process, which includes Contract Monitoring and Contract Administration activities from the original purchase through Contract close-out. The term also includes Monitoring the Contract relationship, addressing related problems, identifying necessary changes or modifications, ensuring both Parties meet or exceed their respective performance requirements, and actively interacting with the Vendor to achieve the Contract's objective(s). Associated Words/Concepts: Often used interchangeably with Contract Administration.

**Contract Management System (CMS):** The database created and managed by the OSC to satisfy the reporting requirements of SB07-228, now codified as a part of the State Procurement Code at CRS §§24-102-205, 24-102-206, 24-103-601, 24-103.5-101, and 24-105-102. It is managed by the OSC/OCA.

**Contract Manager:** Generally, refers to individuals that have significant Contract duties for Agencies/IHEs, including but not limited to: managing all features and stages of Contracts entailing creation of different types of Contracts to meet legal, business and all other contractual activities in an organization. Their primary responsibility is to set forth and define all the terms and the conditions on which Parties are to agree upon in the Contract. Associated Words/Concepts: Contract Managers may be involved in following processes related to the formation and management of the Contract: (i) coordination, (ii) reporting, (iii) Monitoring multiple business processes, (iv) planning, (v) Negotiation, (vi) storage, (vii) maintenance, and (viii) analysis.

**Contract Modifications:** Any written alteration of a Contract accomplished by mutual agreement of contracting Parties. Associated Words/Concepts: Amendment, Change Order. A change that adapts, limits, qualifies, or restricts something to a new end or purpose. OSC Policy, *Modifications of Contracts - Tools and Forms*, discusses modifications and lists five modification tools: Options, Grant Funding Letters, Task Orders, Amendments, and Assignments, which are further defined herein.

**Contract Monitoring:** The term refers to State oversight of work performed under a Contract. Monitoring may occur at the program level (where the work is actually occurring) and at the administrative level (Agency/IHE Procurement and/or Contract office) for contractual compliance.

**Contractor:** A business Entity or individual who contracts to provide Goods or Services for another. Often also called "Vendor". Associated Words/Concepts: "General Contractor" contracts to complete an entire project, including Purchasing all materials, hiring and paying Subcontractors, and coordinating the work.

**Contingency:** An event that may occur; possible, but not certain. Contracts may address what happens if a Contingency occurs; for example, closing of a Contract for purchase of land is contingent on the Vendor having good and marketable title.

**Corporation:** Artificial persons/Entities created under law. Liability for corporate acts is generally limited to corporate assets as they exist separately from their shareholders. Synonyms: Corp, Inc., Incorporated, Inc., Company, Co.

**Cost(s):** Describes actual monetary expenses incurred in performing contractual obligations. The term may include both Direct and Indirect Costs, but not fees or profit. Associated Words/Concepts: Used by businesses to describe in monetary terms the expenditure of (i) effort, (ii) material, (iii) resources, (iv) time and utilities consumed, (v) risks incurred, and (vi) opportunity costs.

**Cost Analysis:** The review and evaluation of data used to calculate Costs actually incurred or estimates of Costs to be incurred, prices to be paid, and Costs to be reimbursed. Associated Words/Concepts: Used in the business community to describe the accumulation, examination, and manipulation of Cost data for comparisons and projections.

## **D:**

**Damages:** The sum of money that may be recovered as reparation for an injury or wrong suffered as a result of a Breach of Contract. See Chapter V.12, *Contract Administration-Remedies-Types of*, for discussion of various types of Damages.

**DBA:** Doing Business As. A name under which an individual or Entity operates a business. See "Trade Name." Formatted in different ways: dba, d.b.a., d/b/a, etc.

**Default:** Non-performance of duties or Obligations. Associated Words/Concepts: fail, neglect, omit. Similar to, but not synonymous with, breach as not all Defaults are Breaches of Contract.

**Defendant:** One against whom an action is brought. See also, "Respondent."

**Delegation:** The transfer of authority from one person/Entity to another person/Entity. In Contracts, where a Party has a third-Party perform some or all of their Obligations. In the context of Central Approvers, authority is delegated from the latter to Agencies/IHEs to perform the review and approvals with which the Central Approvers are charged.

**Deliverable:** A unit or increment of work required by a Contract, including such items as Goods, Services, reports, or documents. A report or item that must be completed and delivered under the terms of an Agreement or Contract.

**Department of Personnel & Administration (DPA):** The cabinet-level department serving as the business center for the State. Responsible for the largest workforce in the State and for managing State facilities and real estate, as well as providing business services ranging from administrative hearings, financial accounting, State Archives, Purchasing, collections, insurance and State Office of Risk Management, printing, and motor vehicles. It includes the OSC, OSA, and DHR.

**Direct Costs:** Describes the Cost of identified materials or Services allocated solely to specific Goods delivered or Services performed, including material Costs, labor, and Overhead. These Costs can be traced directly to (or identified with) a specific cost center or cost object such as a department, process, or product. Associated Words/Concepts: Direct Costs for Goods (such as for labor, material, fuel, or power) vary with the rate of output but are uniform for each unit of production. As a general rule, most Direct Costs are fixed in the short-run and variable in the long-run.

**Dispute:** A disagreement or controversy between Parties to a Contract over performance or other contractual provisions. Some, but not all Disputes, may require legal or administrative action to resolve. Associated Words/Concepts: verb: protest, contest, disagree, noun: conflict, quarrel.

**Division of Human Resources (DHR part of DPA):** Responsible for development and management of the State personnel system. DHR's Director coordinates State personnel rulemaking, Dispute resolution processes, and division communications. DHR has three business units: Total Compensation, Workforce Planning & Development, and Business Risk & Loss Control. DHR is a Central Approver.

**Documented Quote (DQ):** Under R §24-103-204-03 DQs may be used for informal Solicitations of specific Goods or Services: (i) commodities costing between \$10,000 and \$150,000; (ii) Services costing between \$25,000 and \$150,000; and (iii) construction projects between \$25,000 and \$150,000. DQs greater than \$10,000 must be solicited by Purchasing staff and require detailed Specifications and/or SOW. Vendor selection must be based on which acceptable response is most advantageous to the State, price/Cost being the primary consideration.



**Easement:** The right to use the land of another for a specific, limited purpose; for example, the right to cross over property to access a lake. Usually associated with real property Contracts.

**Effect:** Results, outcomes, or consequences. Associated Words/Concepts: verb: To bring about; to make happen.

**Effective:** In operation and having legal force and effect. Can also mean productive or competent. Associated Words/Concepts: A statute, order, Contract, etc. is often said to be Effective on a certain date. A State Contract is Effective on the date it is signed by the State Controller or delegate.

**Effective Date:** Term of art in State contracting; it is the date the State Controller or delegate signs a Contract. Performance should not begin nor should payments be made before such date.

**Efficient:** Competent, functional, able, etc. Associated Words/Concepts: Term used to describe a level of proficiency, capability, or level of performance.

**Emergency:** FR 2-2 §2.6 defines as “an unexpected event creating an immediate threat to the public health, welfare, or safety, the functioning of government, or the preservation or protection of property, which requires an immediate response.”

**Employee:** A person who works for another for pay in a relationship that allows the other person to control the work performed and the time and manner of performance. Contrast with Independent Contractor (see below). Employees are a type of Agent. Called “servants” in earlier nomenclature. The distinction is important for benefit and payroll tax purposes.

**Encumbrance:** In management accounting, Encumbrance is a management tool used to reflect commitments in an accounting system to prevent overspending. Encumbrances allow businesses/departments to recognize future commitments of resources prior to an actual expenditure. Associated Words/Concepts: (i) Pre-Encumbrance - Amount expected to spend, but for which there is no legal Obligation to spend. A requisition is a typical pre-Encumbrance transaction; (ii) Encumbrance - Amount for which there is a legal Obligation to spend in the future. A PO is a typical Encumbrance transaction; and. (iii) Expenditure - Amount for which there has been an expenditure of funds.

**Entity:** Artificial persons created under or by law such as Corporations, Partnerships, limited Partnerships, and LLCs. With the exception of Partnerships, their common feature is they exist separately from their owners (shareholders, partners, or members) and have limited liability, i.e., liability for acts of the Entity is generally limited to corporate assets and the personal assets of the owners not invested in the Entity are not at risk.

**Evergreen Contract:** Contracts that automatically renew from term to term unless one Party gives advance notice of intent to terminate. These Contracts are disfavored by the State and require pre-approval by the CCU.

**Execution:** The signing of a document or instrument.

**Express Authority:** Actual, distinctly stated (not implied) specific, authority given by a primary Party of authority (principal) to its deluge or Agent, through oral or written, or partly-oral and partly-written, words.

**Expenditure Contract:** FR 3-1 § 2.11 defines as “an agreement between an Agency or Institution of Higher Education and another party resulting in an expenditure of funds, directly or indirectly, or the creation of an obligation on the part of the State. Expenditure contracts include non-financial and in-kind contracts where the State incurs an obligation.”

**Expiration:** The conclusion or ending of a Contract term, which is different than the act of Termination.

**F:**

**Fiscal:** This term relates to financial matters and management of Revenue. Most often used in relation to public (government) finances or taxation.

**Fiscal Rules (FRs):** Administrative rules promulgated by the State Controller pursuant to CRS §24-30-202, which have the force and effect of law and apply to State Contracts entered into by Agencies/IHEs.

**Fiscal Year:** The twelve-month period established between one annual settlement of financial accounts and the next. Used for budgeting, financial reporting, and planning. Colorado's Fiscal Year runs July 1st through June 30th. The federal Fiscal Year runs October 1st through September 30th.

**Fixed-Price Contract:** Contract that provides Goods or Services for a stated price not subject to adjustment. These Contracts are appropriate where reasonably definite Specifications are available, and Costs can be estimated with reasonable accuracy. They subject Vendors to the maximum risk arising as they bear the burden of all Cost escalations. Also called firm-price Contract.

**G:**

**Good(s):** Items purchased or available for purchase other than real property or Services. Defined under the UCC as "a transportable article of trade or commerce that can be bartered or sold." Associated Words/Concepts: noun, assets, durables, items, materials, stock, supplies, things for sale. Any item of merchandise, raw materials, or finished Goods; inventoriable items or assets of any kind, including supplies and items in the process of production.

**Governor's Office of Information Technology (OIT):** The office responsible for consolidating all IT resources for the State Executive Branch Agencies. It coordinates, plans, oversees, procures and provides approvals on Procurements of IT resources for Executive Branch Agencies. OIT is a Central Approver for IT Contracts.

**Grant:** The transfer of government funds to support or stimulate programs authorized by federal or State laws, to accomplish objectives that are locally defined and managed under a federal or State program. Grants are specific types of Contracts by which transfers of Grant funds are achieved. Associated Words/Concepts: FR 3-1 defines a Grant Contract as an "agreement between an Agency/IHE and another party under which the Agency/IHE either receives grant funds from or through the other party to the grant contract or provides funds from State, federal, or other sources to the other party to the grant contract."

**Grantee:** The Party to a Grant who is recipient of a Grant of property, rights, or funds.

**Grantor:** The Party to a Grant who conveys property, rights, or funds to the Grantee.

**Grant Funding Letter:** A modification tool for use with Grants. See Chapter V.7, *Modifications to Contracts*, and OSC Policy, *Modification of Contracts-Tools and Forms*, which states, "The use of Grant Funding Change Letters is limited to unilaterally increasing or decreasing funding Agencies provide to subgrantees from federal or State grants when Agencies lack or have little control over the scope of services being provided by the subgrantee."

**GSA:** General Services Administration, a federal agency.

**H:**

**Held:** In reference to real property, means actual possession, the right to possession, or having title.

**Holdover Tenant:** Tenants who continue in possession of real property without the Landlord's consent after Lease Expiration.

**Human Resources: (HR)** The division of a company or government focused on activities relating to Employees. These activities normally including recruiting and hiring of new Employees, orientation and training of current Employees, Employee benefits, and retention. See "DHR."

**Hypothecation:** A pledge in which the pledged property remains in possession of the debtor.



**Immunity:** An exemption from penalty, burden, or duty granted by law that is contrary to the general rule.

**Implied Authority:** Authority that is not expressly stated or defined, but can be reasonably inferred by third Parties from the conduct of the principal toward the Agent. Also, authority of Agents reasonably necessary to carry out their actual authority.

**Implied Provisions:** Terms implied in a Contract by law or custom and practice without actually being mentioned. Terms implied by custom and practice can be overridden by express terms, but not terms implied by law. It is best practice to provide express language and not rely on Implied Provisions.

**Incidental Costs/Expenses:** Expenses not budgeted or specified. A Cost arising from, or as a consequence of, the performance of contractual Obligations.

**Incorporate:** (i) When used as part of the phrase “attached hereto and incorporated by reference herein,” means inclusion in, or adoption of, some term or condition as part of the Contract. (ii) Also used to describe the process of creating a Corporation.

**Indemnify or Indemnification:** Agreement to compensate another upon the occurrence of an anticipated loss or Damage they may suffer. The State is prohibited from providing Indemnification except a limited form under CRS §24-30-1510(3)(e) if approved by the State Office of Risk Management.

**Independent Contractors (ICs):** Persons or entities hired to perform tasks under their own direction and control including the details and means by which the desired results are achieved. Associated Words/Concepts: ICs are engaged to undertake specific projects but are generally free to choose how and when to accomplish them. Confusingly, due to a lack of uniform criteria in different statutes, persons are sometimes deemed an Independent Contractor for by some purposes but not others; for example, one may be an IC for federal tax purposes (a factual determination made by the IRS and federal courts), but not for unemployment insurance (under CRS §8-70-115). This is a complex area requiring legal advice in the event of uncertainty.

**Indirect Cost/Expense:** Costs identified with more than one final cost objective not specifically associated with any single cost objective.

**Information Technology (IT):** CRS 24-37.5-102 defines as “information technology and computer-based equipment and related services designed for the storage, manipulation, and retrieval of data by electronic or mechanical means, or both.”

**Institutions of Higher Education (IHEs):** The State has 27 public institutions of higher education: 12 four-year public institutions and 15 two-year institutions. Associated Words/Concepts: FR 3-1 defines an IHE as a public college, community college, or university established as a part of the State.

**Intellectual Property (IP):** Copyrights, patents, and trade secrets. The physical or tangible result of original thought.

**Interagency Agreement (IA):** FR 3-1 §2.17 defines as an Agreement “between two Agencies, two Institutions of Higher Education, or an Agency and Institution of Higher Education, which includes a dispute resolution process giving the State Controller final decision-making authority.” Interagency Agreements are State Contracts.

**Interagency Purchase Order (IPO):** FR 2-2, 2-6 and 3-1 defines as being between two Agencies, two IHEs, or an Agency and IHE. The OSC has final dispute resolution authority under IPOs and must provide advance approval of IPOs of expenditures exceeding \$100,000.

**Intergovernmental Agreement:** FR 3-1 defines as an Agreement “between an Agency or Institution of Higher Education and a political subdivision of the State, another state, a political subdivision or public institution of higher education in another state, or an agency of the federal government.”

**Invitation for Bids (IFB):** Formal requests to prospective Bidders soliciting price quotations or Bids. IFBs contain, or Incorporate by reference, the Specifications of the SOW and all contractual terms and conditions. Associated Words/Concepts: Procurement process used when the requirements are clearly defined, Negotiations are not necessary and price is the major determining factor for selection. IFBs use the Competitive Sealed Bidding method. The IFB is only a Solicitation. It does not qualify as an offer since the State will review Bids and select a Vendor prior to entering into a binding Contract.

**J:**

**Judgment:** The final decision by a court of the rights of the Parties to an action. Associated Words/Concepts: decree, holding, ruling, opinion, award, finding.

**Joint and Several Liability:** The liability of two or more persons to perform an act or for the consequences of their actions that can be imposed by law, e.g. torts, or as a result of Agreement.

**Joint Venture:** A type of Partnership limited to a single project rather than an ongoing business relationship.

**Jurisdiction:** Authority, control, power. The right of a court or administrative agency to hear matters related to property or subject matter, without which, the court or agency cannot act, even if the Parties agree otherwise. OSC Model Contracts provide for Jurisdiction in Colorado.

**K:**

**Keep:** To maintain; to carry on; to conduct; to manage, e.g., “keep books and records”.

**Knowledge:** Clear awareness of the truth, an accurate perception of the facts. The state of knowing or understanding.

**L:**

**Laches:** The equitable doctrine that a court may deny relief to claimants who neglect or failure to assert a rights in a timely manner if the other Party has changed their position to their detriment as a result thereof.

**Landlord:** One who rents real property to another (Tenant/Lessee). Synonymous with Lessor.

**Lease:** A type of Contract which gives one Party (Tenant/Lessee) the right to use real or personal property owned by another Party (Landlord/Lessor) for a specified time in return for compensation (usually monetary payments called rent). Ownership of the real or personal property subject to the Lease does not change under a pure Lease Agreement but may under a Lease-purchase or capital Lease. Associated Words/Concepts: The most common Leases involving the State are (i): real property Lease, giving Tenant/Lessee (usually, but not always the State) exclusive rights to use the leased property for a period of time in exchange for rent, and (ii) personal property Leases or capital Leases where Lessors lease property for a term shorter than its useful life and retain responsibility for taxes on the property. See FR 3-1 §5.1.3, *Real Property Purchases (State as Buyer), Leases (State as Tenant), and Licenses (State as Licensee)*.

**Lessee:** One who rents real property from another (Landlord/Lessor). Synonymous with Tenant.

**Lessor:** One who rents real property to another (Tenant/Lessee). Synonymous with Landlord.

**License:** A document evidencing permission or authority for non-exclusive of use another's real or personal property. Associated Words/Concepts: See FR 3-1 §5.1.3, *Real Property Purchases (State as Buyer), Leases (State as Tenant) and Licenses (State as Licensee)*.

**Limited Liability Company (LLC):** Statutorily authorized Entity with limited liability for its members. See Entity.

**Liquidated Damages:** A specific sum provided for in Contracts which the Parties agree is a fair and reasonable estimation of actual Damages which would be incurred in the event of contractual breach by either Party. Liquidated Damages replace actual Damages and are appropriate only when it is difficult to determine the amount of actual Damages. A Liquidated Damages provision may apply to one or both Parties. Associated Words/Concepts: Contracts containing Liquidated Damages clauses, must establish the actions or omissions which will constitute a breach. If a court determines that it is possible to determine the actual amount of Damages incurred or that the amount of Liquidated Damages is unreasonable under the circumstances, it may determine that such Damage amount is a fine or penalty, disregard the Liquidated Damages provision and make it own determination as the appropriate amount of Damages.

**Lowest Responsible Bidder:** The Responsible Bidder submitting a responsive Bid at the lowest price of all the responsive Bids submitted. “Responsibility” refers to a prospective Bidder’s ability to satisfactorily perform the work. Responsibility is determined based on past performance, financial capability, past compliance, current licenses, and related considerations. “Responsive” refers to the conformity of the form and content of Bids to the requirements of Solicitation documents.

**M:**

**Master Contracts:** Contracts setting forth base provisions against which Task Orders or POs are written to perform specific Services or provide Goods. Examples include, State Price Agreements, non-project specific Contracts, and OSA as needed Agreements.

**Material:** Significant and important; relating to substance rather than form; going to the merits; relevant.

**Material Breach:** Contractual breach sufficiently Substantial to give the injured Party a right to seek Damages or rescind the Contract, or both.

**Material Changes:** Any significant change logically connected with contractual Obligations.

**Material Defects:** Defects having important or consequential impacts on contractual performance.

**Material Mistake:** Mistakes so Substantial that it is apparent that the Parties did not act with Knowledge of the true facts; for example, recital of 10,000 acres in a Lease when Lessor only owned 1,000. Material Mistakes usually justify reformation or rescission of a Contract.

**Material Representation:** Statements, assertions, Representations, or actions regarding Material matters by one person or Entity reasonably influencing another person or Entity to do or forgo doing something they would not otherwise have done and or forgone.

**May:** Auxiliary verb. In the construction of Contracts, “May” indicates discretion or choice between alternatives; advisory or optional rather than mandatory. Contrast with “shall”, compare with “should”.

**Mediation:** A method of non-binding Dispute resolution (ADR) involving a neutral third-Party who assists disputing Parties to try and reach a mutually agreeable solution. Associated Words/Concepts: noun: arbitration, intervention, Negotiation.

**Merchant:** Persons who regularly trade in particular types of Goods. Retailer, dealer, seller.

**Merger:** The process by which Negotiations lose their legal effect when Contracts are executed.

**Model Contract(s):** Model Contracts developed by the OSC to provide consistency in form (which speeds up review), and the provisions that are more protective of the State while being fair and reasonable for Vendors. Use of Model Contracts are strongly recommended. The Model Contracts can be found on the OSC/CCU’s website at: <http://www.colorado.gov/dpa/dfp/sco/contracts/modelcontracts.htm>.

**Monitor(ing):** Oversight of performance. Agency/IHE oversight of Vendor performance or Central Approver oversight of Agency/IHE performance under a Delegation Agreement.

**Multi-Party Contract:** Contracts between three or more Parties.

**Must:** Auxiliary verb with five different meanings, one of which is to “command”. Some of its meaning is not strong for mandatory Contract language, so to avoid issues, use “shall” when mandating something.

**N:**

**Negotiation(s):** The bargaining (give and take) process between two or more Parties seeking to find common ground and reach Agreement. Contract Negotiations are a bargaining process between two or more Parties for the purpose of reaching an understanding to be set forth in a written Contract which may encompass new matters or be used to attempt to reach Agreement on a disputed issues. Associated Words/Concepts: noun: arbitration, bargaining, compromise, contract talks, Mediation.

**Negligence:** Careless, heedless, lax. Failure to do or refrain from doing something a reasonable person would do or not do under the circumstances. In law, a breach of a duty of care that is the proximate cause of injury to another.

**Net Profit:** Gross profit after all Costs and expenses.

**Non-performance:** Failure to do or perform in accordance with contractual provisions.



**Non-profit Corporation:** A non-stock Corporation organized for purposes other than making a profit, usually for charitable or educational purposes. Often called 501(c)(3) after a provision in the federal tax code. Review tip: non-profits often neglect to put Corp, Inc., etc after their names.

**Notary Public:** A public official whose function is to attest to the genuineness of documents.

**Novation Agreement:** An Agreement executed by all of the Parties to a Contract and a successor-in-interest to whom one of the Parties has transferred all of such Party's interest in the Contract. A Novation Agreement transfers all of a Party's Obligations and rights under the Contract to the successor-in-interest. Associated Words/Concepts: Substituted Contract. Upon substitution, the Obligations of the withdrawing-Party are automatically discharged and no express-release is required. To be Effective, the substitution must be agreed-to by all the original and new Parties to the Contract. Novation Agreements are not the same as Assignment of an Agreement as a new Agreement is not needed and the existing rights and duties of a Party are transferred from the assignor to the assignee.

## **O:**

**Obligation(s):** As used in this Manual, a broad term describing any promise, duty or responsibility of one Party to another. The term encompasses, among other things, the performance of work, delivery of Goods, provision of notice, compliance with restrictions, and provision and maintenance of insurance. Associated Words/Concepts: noun: That which legally, morally, or socially binds a person or Entity to do or refrain from doing actions.

**Offer and Acceptance:** Proposal by one Party to another to do or refrain from doing something resulting in a legally binding commitment. Acceptance of the other Party creates a Contract.

**Office of the Attorney General (OAG):** The Office of the State Attorney General. Attorneys in the OAG designated by the State Controller as "reviewing attorneys" act as a Central Approver for Contracts referred to them by the OSC and for Contracts requiring OAG approval pursuant to statute e.g., the State Legislature.

**Office of Contract Administration (OCA):** The office created to manage the reporting requirements and associated database created by SB07-228, now codified as CRS a part of the State Procurement Code at CRS §§24-102-205, 4-102-206, 24-103-601, 24-103.5-101, and 24-105-102. The OCA is part of the OSC.

**Office of the State Architect (OSA):** The office within DPA responsible for the purchase of real estate and the Negotiation of real property Leases, Easements and rights-of-way, the management of capital construction, controlled maintenance, energy consumption analysis, and the selection and maintenance of lists of qualified Vendors for the State. OSA includes the SBP and REP units. OSA is a Central Approver for Contracts within its purview.

**Office of the State Controller (OSC):** The office within DPA responsible for managing the financial affairs of the State. As relevant to this Manual, it promulgates the State FRs and Policies, maintains liaisons with Agency/IHE financial personnel, manages the State contracting process, and maintains central aspects of the State's financial system. It includes the CCU and OCA. CRS §24-30-202 sets out the OSC's authority and role.

**OIT:** See Governor's Office of Information Technology.

**Oral Contracts:** Contracts not in writing. State Contracts should always be written. While Oral Contracts not subject to the statute of frauds are valid, enforceability is limited due to difficulty in proving terms.

**Option(s):** In the context of State Contracts, most commonly refers to a type of Contract Modification permitted in OSC Policy *Modification of Contracts-Tools and Forms*, which gives the State the Option to Unilaterally extend terms, change quantities, and to initiate the next stage phased performance. Options are generally defined as future Contracts where a Party has the right to insist of performance, or to cancel it, at their election, for example, the Option to purchase real property for a certain period of time.

**Overhead:** Business expenses that cannot be allocated to a particular Good or Service. Examples include rent, utilities, or support staff salaries. Overhead also may be referred to as fixed or ordinary operating Costs, administrative expenses, and office expenses. Associated Words/Concepts: General expenses, costs of doing business. Costs which do not contribute directly to the end-product. Also called burden Cost.



**Partnership:** An association of two or more people or entities to carry on a business for profit. Partnerships can arise by operation of law without specific intent of the partners. All members of a Partnership (except for limited partnerships) are jointly and severally liable for Partnership Obligations.

**Parol:** Oral; by word of mouth; spoken as opposed to written. State Contracts should always be written.

**Party or Parties:** Person or Entity that is involved in or part of an Agreement, Contract, transaction or legal proceeding.

**Payment Bond:** A bond which assures payments to all persons supplying labor or material for the completion of work under a Contract. A bond executed in connection with a Contract which secures the payment requirements of the Vendor. Associated Words/Concepts: Also called labor and material bonds. A bond itself is a written promise to pay money or do some act if certain circumstances occur or a certain time elapses. The bond is given by a Surety to cover any amounts that, because of the general Vendor's Default, are not paid to a Subcontractor or materialman.

**Performance Bond:** Bonds executed subsequent to Award by successful Bidders, to protect the Buyer from loss due to the Bidder's inability to complete the Contract as agreed. Secures fulfillment of contractual Obligations. Associated Words/Concepts: Typically issued by brokers, but sometimes also by insurance companies. Face amounts vary but typically ranges from 2% to 5% of the value of the performance secured.

**Personal Services:** Acts performed by individuals or entities that provide Services involving their intellectual or manual effort, as opposed to only providing Goods (which may or may not have been created by their efforts). Services acquired for the State's direct benefit of its operations. Associated Words/Concepts: Intellectual or manual work performed by a Service provider in serving a customer. Personal Services can include construction Contracts and are a type of Expenditure Contract governed by FR 3-1.

**Personal Services Business Case:** Provides the business reasons for entering into Personal Services Contracts. DHR requires a business case analysis for all Personal Services Contracts that create an Independent Contractor relationship to ensure that privatization of government Services does not subvert the Policies underlying the State personnel system. The nature of the Contract determines the level of detail required analysis. DHR's Technical Assistance for Personal Services Contracts offers guidance as to the appropriate level of analysis required before entering into Personal Services Contracts and is available on the DHR website at: <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=DPA-DHR%2FDHRLayout&cid=1185870965382&pagename=DHRWrapper>

**Personal Services Certification Form:** DHR's official document that must accompany all Personal Services requests for review unless a Personal Services Departmental Waiver has been issued by the Human Resources administrator. Agencies/IHEs should not alter the form and it must be signed by the HR administrator certifying to the accuracy and completeness of the information. Further guidance is located in DHR's Technical Assistance for Personal Services Contracts document and is available on the DHR website at: <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=DPA-DHR%2FDHRLayout&cid=1185870965382&pagename=DHRWrapper>.

**Personal Services Cost Comparison:** A comparison of the State's Cost to Contract prices the extent to which the State will not realize the full value of its capital investment, and any price increases over the term of the Contract. Cost should always be considered before entering into any type of Personal Services Contract. DHR guidance and instructions with respect to Personal Services Cost Comparisons are provided in Technical Assistance for Personal Services Contracts, available on the DHR website at: <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=DPA-DHR%2FDHRLayout&cid=1185870965382&pagename=DHRWrapper>.

**Personal Services Departmental Waiver:** A Waiver of the necessity for review by DHR of a Personal Services Waiver. DHR's Technical Assistance for Personal Services Contracts states that Human Resources administrators may issue internal Personal Services review Waivers, in accordance with CRS §24-50-511, for Services provided that a detailed analysis is conducted that demonstrates their Knowledge of the Agency/IHE's contracting activity. Agencies/IHEs must document this process and any

Personal Services review Waiver issued internally must be submitted to DHR for review prior to Execution. The Technical Assistance document is available on the DHR website at: <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=DPA-DHR%2FDHRLayout&cid=1185870965382&pagenam=DHRWrapper>.

**Personal Services Prior Approval Checklist:** A checklist of necessary permissions required for use of an outside Vendor for Services. Appendix B to DHR's Technical Assistance for Personal Services Contracts provides direction for State Employees responsible at some level for acquiring Personal Services. This checklist provides a list of Services and identifies which prior approvals can be obtained online. Use of this checklist is recommended to ensure all necessary permissions to use an outside Vendor for Services are obtained.

**Personal Services Solicitation Pre-Approval:** DHR's Technical Assistance for Personal Services Contracts provides guidance regarding the pre-approval process, which, if done correctly, provides Agencies/IHEs adequate time to address and mitigate any potential problems or impacts to the State personnel system prior to Award of Contract. Human Resources administrators may issue pre-approvals utilizing sample language provided by DHR in Appendix C of the Technical Assistance document. The prior approval requirements should be included in the internal Personal Services review process and procedures.

**Plaintiff:** The Party who brings a lawsuit. Also, complainant, petitioner.

**Policies or Policy:** A course of action adopted by an Agency/IHE setting forth acceptable methods and processes. OSC, OIT, SPO, and DHR each have Policies regarding different aspects of State Procurements.

**Price Agreements:** Master Contracts between the State and Vendor(s) that establish baseline terms, usually including pricing, for commodity Goods and frequently needed Services, against which Agencies/IHEs can order. Actual orders are placed via a Task Order or PO. SPO has Statewide Price Agreements (use of some are mandatory, some permissive) while some Agencies/IHEs have Price Agreements for internal use. Examples include office supply Agreements and Agreements with temporary employment Services.

**Price Analysis:** Examination of a Proposal by comparing with outside criteria such as internal estimates, other Bidders' pricing, or established market/catalog pricing without evaluating separate Cost elements. Contrast with Cost Analysis, which examines separate Cost elements.

**Prime Contractor:** Vendor directly contracting with the State who is ultimately responsible for proper completion of performance, even if it subcontracts out part or all of the work.

**Privity of Contract:** Parties that are in direct contractual relations (this can be an important predicate to enforce some contractual rights), e.g., the State and the Prime Contractor, but not Subcontractors, as the latter are in privity with the prime.

**Procurement(s):** Defined broadly as all functions pertaining to the acquisition of Goods and/or Services, including Purchasing, renting, leasing, and construction. Procurement begins with descriptions of needs and requirements included in Solicitations and includes selection, preparation for Award and Contract and all phases of Contract Administration. Associated Words/Concepts: The complete process of obtaining Goods and Services from preparation and processing of requisitions through invoice approval and payment. Cradle to grave process of: purchase planning, standards determination, Specifications development, Vendor research and selection, value analysis, financing, price Negotiation, purchase completion, Contract Management/Administration, inventory control, Contract close-out and final Vendor review.

**Procurement Code:** CRS Articles 101 to 122 of Title 24.

**Procurement Rules - 1 CCR 101-9:** Rules governing the Procurement and disposal of Goods, Services, and construction by the State, promulgated by the Executive Director of DPA, through the SPO.

**Professional Services:** A type of Personal Services rendered by members of a recognized profession or persons possessing a special skill. Such Services are generally acquired to obtain information, advice, training or direct assistance. The acquisition of architectural, engineering, land surveying, industrial hygienist, or landscape architect Professional Services is governed by CRS Title 24, Article 14.

Associated Words/Concepts: Generally refers to Service performed by members of a learned profession or occupation requiring a high level of training and proficiency. FR 3-1 §2.30 defines as “a contract between an Agency or Institution of Higher Education and another party for the performance of the following services: architectural, engineering, land surveying, industrial hygienist, or landscape architect.”

**Proposal:** Document submitted by Vendors in response to RFPs, which are intended for use as the basis for Negotiations. Proposals are requested if Vendor selection is made on the basis of performance offered, rather than on price alone, and may require the specification of qualifications and experience and/or methods of performance. Associated Words/Concepts: Something offered for consideration or acceptance.

**Proposal Opening:** The public opening of proposals submitted in response to Solicitations, in which the names of the Bidders to a Solicitation are publicly read and recorded. Prices are not divulged at a Proposal Opening as these types of Solicitations are subject to Negotiation. See Bid Opening.

**Provisions:** Clauses in Contracts or statutes dealing with particular subject matters or subjects. Synonymous with Terms and Conditions.

**Purchase Order (PO):** A written order issued by a Buyer to a Vendor formalizing all the terms and conditions of the proposed transaction, such as a description of the requested item(s), delivery schedule, terms of payment, and transportation. Associated Words/Concepts: Documents authorizing Vendors to deliver Goods with payment to be made later. FR 2-2 provides when POs may be used and provides the mandatory PO form to be used by Agencies/IHES. See also “IPO.”

**Purchase Requisition:** An internal document by which program staff sends details of Goods, Services, or materials required to Purchasing offices. This request is committing funds to cover the purchase. Associated Words/Concepts: The document generated by user departments or storeroom-personnel to notify Purchasing offices of items it needs to order, their Quantity, and the time frame. It may also contain the authorization to proceed with the purchase. Also called purchase request.

**Purchasing:** The act of buying equipment, materials, Goods, and Services. The act of Purchasing may include determining needs, selecting Vendors, arriving at fair and reasonable price and terms, and preparing Contracts or POs.

**Purchasing Agent:** See “Agent”, above.

**Purchased Services:** Services the State purchases from public or private entities, usually funded by a law-defined Grant that directly benefits discrete groups or individuals in the general public. Examples include foster care, refugee Services, mental health, etc.

**Purchasing Department:** The office at Agencies/IHES whose Employees are responsible for Purchasing needed Goods and Services. These offices solicit Bids from and make Awards to Vendors.



**Quality:** The extent to which Goods or Services meet contractual requirements and Specifications. The composite of all attributes or characteristics, including performance, that satisfy user needs. The particular character or degree of excellence of a person or thing, especially in comparison with other persons or things. It is often used in determining Acceptability of contractual work performed. Associated Words/Concepts: noun: ability, character, condition, distinction, property, worth, competency, merit, soundness, and value. Objective definition: Measurable and verifiable aspect of a thing or occurrence, expressed in numbers or quantities, such as lightness or heaviness, thickness or thinness, softness, or hardness. Subjective definition: Attribute, characteristic, or property of a thing or occurrence that can be observed and interpreted, and may be approximated (quantified) but cannot be measured, such as beauty, feel, flavor, and taste.

**Quantity:** The extent, size, or sum of countable or measurable discrete events, objects, or occurrences, expressed as a numerical value. Associated Words/Concepts: Amount, measure, number, supply, total, volume.



**Real Estate Programs (REP):** Unit within OSA responsible for State real estate Leases (with limited statutory exceptions for the State Land Board, Division of Wildlife, Parks, and CDOT).

**Recitals:** Language generally located at the beginning of Contracts that describe purpose, funding source, authority, etc. They are intended to be an introduction and not legally binding terms; however, if improperly drafted, they can have legal consequences. Older styling introduced Recitals by the term “Whereas”; OSC Model Contracts use a specific numbered provision.

**Registered Agent:** A very specific type of agency (see Agent, above) required by law for entities such as Corporations, LLCs, etc., that allows the Registered Agent to accept service of process (summons, subpoenas, etc.) on behalf of the Entity. Being a Registered Agent, without more, does not confer authority to bind an Entity contractually or in any other manner.

**Remedies:** The means by which rights are enforced, injuries redressed, and relief is obtained. Remedies include monetary Damages (actual, direct, consequential, special, punitive, etc), Specific Performance, restitution, rescission, reformation, or other measures of relief.

**Representation(s):** Statements of fact, e.g. “contractor represents its licenses are current.” See “Warranty” for a discussion.

**Request for Information (RFI):** A general invitation to Vendors requesting information for a potential future Solicitation. RFIs are typically used during the project planning phase where the State cannot clearly identify product requirements, Specifications, and purchase Options. RFIs must clearly indicate that Award of a Contract will not automatically follow.

**Request for Proposal (RFP):** Document used in sealed-Bid Procurement procedures through which a Buyer advises potential Bidders of: the statement and SOW; Specifications, schedules or timelines, Contract type, data requirements, terms and conditions, description of Goods and/or Services to be procured, general criteria used in evaluation procedure, special contractual requirements, technical goals, instructions for preparation of technical, management, and/or Cost proposals. RFPs are publicly advertised and Bidders respond with a detailed Proposal, not just a price quote. They provide for Negotiations after sealed Proposals are opened, and Contracts may not necessarily be Awarded to the lowest Bidder.

**Request for Qualifications (RFQ):** A Solicitation document requesting submittal of qualifications or specialized expertise in response to the scope of Services required. Pricing is not solicited with RFQs. Document issued prior to RFPs typically describing projects in enough detail to let potential Bidders determine if they wish to compete, and forms the basis for requesting qualifications submissions in a two-phase or prequalification process. Used most often with construction projects.

**Request for Quote (RFQ):** An informal Solicitation document requesting pricing on small dollar purchases. Associated Words/Concepts: Document used in soliciting price and delivery quotes meeting minimum Quality Specifications for a specific Quantity of Goods and/or Services. RFQs are usually not advertised publicly, and are used commonly for: standard, off-the-shelf items, items built to known Specifications, items required in small quantities, or items whose purchase price falls below sealed-bidding thresholds. Bidders respond to a RFQ with firm quotations, and Award is generally made to the lowest-priced quote.

**Responsive Bidder:** Responsible Bidders whose Bids are determined to be in Substantial conformance with the conditions, completion or delivery requirements, and Specifications detailed in the IFB, RFP, RFQ, etc.

**Respondent:** (i) Procurements: Persons or entities submitting Proposals in response to Solicitations, (ii) Legal: The Party to a legal or administrative proceeding required to respond to an action. Also, Defendant.

**Responsible Bidder:** Bidders who have the capability to fully perform all Contract requirements, and the experience, integrity, reliability, capacity, facilities, equipment, and credit assuring good faith performance. Past performance, financial capabilities, and business management may be included as criteria for determining if Bidders are capable of satisfying Contract requirements.

**Revenue:** Income, earnings, or proceeds. The income stream from which a state or municipality pays its Obligations, unless a law calls for payment from a special fund. Associated Words/Concepts: noun: compensation, dividends, gain, payment. The amount generated from sale of Goods or Services, or any other use of capital or assets, associated with the main operations of an Entity before any Costs or expenses are deducted.

**Revenue Contracts:** FR 3-1 includes franchise Agreements, real property Leases/Licenses (the State as Landlord or licensor) and real property purchase Agreements (the State as seller), as types of Revenue Contracts, i.e., Agreements between an Agency/IHE and another Party where cash and/or property are paid to the State, resulting in Revenue recognition. Such Contracts do not require OSC approval.

**S:**

**Satisfactory:** A level of Quality implied in every Contract unless expressly excluded, that Goods and/or Services being sold and delivered meet reasonable requirements or standards in terms of appearance, durability, fitness for use, freedom from defect, fulfillment of Obligation, etc. Associated Words/Concepts: adjective: adequate, meeting requirements, acceptable, good enough, average, fair, all right, suitable.

**Service:** The furnishing of labor by a Vendor which may include the delivery of a tangible end product. If Services and Goods are combined, e.g. copier delivery, the test is whether labor or Goods is the primary factor (decide which is incidental to the other). In the case of copier, the labor to deliver the copier is incidental to the copier purchase, making it a Goods Contract. Associated Words/Concepts: Defines an intangible commodity in the form of human effort, such as labor, skill, expertise or advice.

**Shall:** In construing Contracts, "Shall" is imperative, mandatory, and non-discretionary. Compare with discretionary terms such as "may" and "should". Shall is the strongest and preferred term to use in Contracts when making something mandatory; use in place of "must" and "will".

**Should:** In construing Contracts, a non-mandatory term indicating discretion, although it implies a non-legal moral Obligation to do or refrain from doing something.

**Sole Proprietorship:** A business owned and controlled by a sole individual not set up as an Entity.

**Sole Source Procurement:** Procurements where only one Vendor is capable of meeting Solicitation requirements, for example, Vendors with unique skills, who have a patent, or are solely able to timely deliver Goods or Services. Associated Words/Concepts: One and only one source that possesses a unique product having singular characteristics or performance capability.

**Solicitation(s):** A document requesting submittal of Bids or Proposals in accordance with the advertised Specifications. Associated Words/Concepts: the act or an instance of requesting or seeking to obtain something. Unlike an offer, a Solicitation is not unequivocal offer to enter into a binding Agreement.

**Solicitation Conference:** Meetings held by Agency/IHE staff designed to help potential Bidders understand the Solicitation requirements; also known as a pre-Bid or Proposal conference. Associated Words/Concepts: Such conferences can be mandatory or voluntary. Making conferences mandatory could act to limit competition and should be used only if an on-site visit is required to gain full understanding of Procurements or if Solicitations are so complex that Agency/IHE staff believe meeting is critical for potential Bidders to fully understand a Procurement. Solicitation Conferences allow staff to respond to questions and provide benefits to all participants, including: (i) allowing potential Bidders to address specific questions or concerns with Solicitations, and, if necessary, publish Solicitation Addendums to address any issues; (ii) allowing staff to provide additional information, schematics, plans, reports, or other data not easily transferable or distributed through hard copy; (iii) giving potential Bidders the opportunity to receive the same information so they are on a level playing field; and (iv) providing a forum to create subcontracting relationships.

**Specific Performance:** The equitable remedy whereby the court orders performance as opposed to an action at law for Damages due to Non-performance.

**Specifications:** CRS §24-104-101 defines as "any description of the physical or functional characteristics or of the nature of a supply, service, or construction item. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery." Specifications are often classified as performance (only required results or objectives are defined) or method/design (detailed procedures or materials are specified).

**State:** The State of Colorado. As used in this Manual, includes Agencies/IHEs unless otherwise specified.

**State Agency:** See "Agency."

**State Buildings (SBP):** Unit within OSA responsible for capital construction and controlled maintenance.

**State Contract:** FR 3-1 §2.39 defines as an Agreement "between two Agencies, two Institutions of Higher Education, an Agency and an Institution of Higher Education, or an Agency and/or Institution of Higher Education and another party." State Contracts, as used in this FR, do not include POs.

**State Office of Risk Management:** The office within DPA that manages the statewide property, self-insured liability, and self-insured workers' compensation insurance programs. Provides general insurance consulting, guidance regarding insurance requirements in Contracts, and review of insurance certificates. The State Office of Risk Management also must approve any use of CRS §15-30-1510(3)(3).

**Statement of Work (SOW):** A detailed description of the work Vendors are to perform. Contractual provisions defining the Parties' respective Obligations. Often SOWs cover such terms as inspection and acceptance, Quality-assurance requirements, packing and marking, data requirements, and training. Associated Words/Concepts: Generally, there are two types of Specifications in SOWs: (i) performance Specifications establishing minimum requirements for Goods or Services and (ii) design Specifications establishing the methods to be used in meeting those minimum requirements.

**State Purchasing Office (SPO):** The office within DPA that manages statewide centralized Procurement. Its duties include the promulgation of Procurement Rules; maintenance of BIDS, Procurement education and leadership; Procurement and administration of statewide Price Agreements; Procurement of Services for non-delegated Agencies; and appeals authority for Bid protests.

**Statutory Violation:** FR 2-2 § 2.16 states "a statutory violation occurs when liabilities are incurred or payments are made on the State's behalf without prior approval of a State purchase order or contract by the State Controller, when required under this Fiscal Rule."

**Strategic Sourcing:** A Purchasing concept the object of which is to buy Goods or Services that minimizes Costs, increases managerial effectiveness, and improves operational efficiency. Associated Words/Concepts: Strategic Procurement includes the long-range plans for ensuring timely supply of Goods and/or Services critical to an Agency/IHE's ability to meet its core business objectives.

**Subject Matter Expert (SME):** An expert in a particular subject or matter presented for consideration.

**Substantial:** A term generally used to describe something as having substance; being large; having significance. Often used in conjunction with the word "Material" in Contracts. For example: "The changes he made were far from trivial; they made a substantial difference in the productivity of the system." Associated Words/Concepts: adjective: abundant, ample, considerable, consequential, large, significant.

**Subcontractors:** Contractors retained by the Prime Contractor (who is in Privity of Contract with the State) to perform part of the contractual Obligations. The prime and sub have a contractual relationship.

**Subgrantee:** A recipient of Grants funds flowing from the Grantee. For example, CDOT receives federal highway funds designated for highway beautification and passes them on to another Entity.

**Subrecipient:** See "Subgrantee." Also, under ARRA, "a non-Federal entity that expends Federal awards received from another entity to carry out a Federal program, but does not include an individual who is a beneficiary of such a program. Subrecipients are awarded Recovery Act funding through a legal instrument from the prime recipient to support the performance of any portion of the substantive project or program for which the prime recipient received the Recovery Act funding. Additionally, the terms and conditions of the Federal award are carried forward to the subrecipient." See details at OSC website: [http://www.colorado.gov/dpa/dfp/sco/contracts/ARRA/ARRA\\_Main\\_Page.htm](http://www.colorado.gov/dpa/dfp/sco/contracts/ARRA/ARRA_Main_Page.htm).

**Surety:** A person or Entity who undertakes to pay money or perform another action for another person or Entity if the other person/Entity fails to pay or perform.



**Task Order:** A modification tool used to order Goods and/or Services based on Provisions in a Master Contract. See Chapter V.7, *Modifications to Contracts*, and OSC Policy, *Modification of Contracts-Tools and Forms*, which states, “Task Orders are bilateral, i.e., they require both Parties to agree.” They are used to order Goods and/or Services based on provisions agreed to in a Master Contract (rates should be included unless there is a documented reason to exclude them). As specific tasks are identified the Parties agree on a SOW and the maximum price by issuing a Task Order. See “Master Contract,” above.

**Tenant:** One who rents real property from another (Landlord/Lessor). Synonymous with Lessor.

**Term:** This word has dual meanings in relation to Contracts depending on the context of its use. (i) A portion of a Contract related to a particular matter, e.g., price, Quantity, or delivery. Often used in conjunction with the word “condition” as “terms and conditions” or “Ts and Cs”. See “Provision,” above. (ii) A period of time; duration of something. “Contract Term” refers to the performance period of Contracts.

**Termination:** The act of ending a Contract, which is different from Expiration, which is automatic.

**Trade Name:** The name under which an Entity or person does business. These may be registered with the Secretary of State, but are not required to be. Trade Names do not confer any separate legal status, rights, or duties on the holder. Often used as a DBA, e.g., Jim Black dba Black and Sons Roofing.



**Uniform Commercial Code (UCC)-CRS Title 4:** Defines the rights and duties of Parties in commercial situations including sales of Goods, secured transactions, and negotiable instruments, and conforms the rules to modern commercial usages. The UCC has been adopted in some form by every state.

**Unilateral:** Actions only requiring one Party to act; e.g., signing an Option. See also “Bilateral”.

**Unilateral Contracts:** Contracts where an offer to pay is made by the State and Vendor acceptance is made by completed performance, e.g. State PO. Contrast with Bilateral Contracts where all Parties agree in advance, reciprocally exchanging promises



**Value:** A measure of worth. The amount of money that something commands in an exchange; it may or may not be equal to the price. Associated Words/Concepts: In marketing the term defines the extent to which a Good or Service is perceived by its customer to meet their needs or wants, measured by their willingness to pay for it. It depends more on the customer's perception of the worth of the product than on its Cost. In accounting value is defined as the monetary worth of an asset, business Entity, Good sold or Service rendered, or liability or Obligation acquired. “Price is what you pay, value is what you get.”

**Vendee:** Buyer, purchaser.

**Vendor:** Person or Entity providing Goods or Services. A Vendor also can be a Contractor or a Grantee. Under ARRA, defined as “a dealer, distributor, merchant or other seller providing goods or services that are required for the conduct of a Federal program. Prime recipients or subrecipients may purchase goods or services needed to carry out the project or program from vendors. Vendors are not awarded funds by the same means as subrecipients and are not subject to the terms and conditions of the Federal financial assistance award. Program compliance requirements normally do not pass through to vendors.”

**Vendor Agreement:** FR 2-2 §2.17 defines as “any form of agreement provided by a vendor, including an on-line agreement, containing contractual provisions relating to the goods and/or services to be provided by such vendor.”

**Venue:** Refers to where in a county or judicial district a hearing is held. Distinguished from Jurisdiction because Venue is an issue only if Jurisdiction already exists and because it can be waived or changed by the consent of the Parties. OSC Model Contracts generally provide for Jurisdiction in Denver.

**Void:** Null, lacking any legal Effect.

**Voidable:** Voidable Contracts may be avoided or disaffirmed by in whole or part due to defects, but are not Void unless disaffirmed by the person entitled to do so.



**W:**

**Waiver(s):** An intentional and voluntary relinquishment or renunciation of a known right, claim, or privilege. Waivers can be express or implied, for example, telling a Vendor, "You can have an extra week to finish the job", or simply paying in full after an extra week.

**Warranties or Warranty:** An Agreement to be responsible for Damages arising from the falsity of a statement or the failure of an assurance. A Representation, either expressed or implied, that a certain fact regarding the subject matter of a Contract is presently true or will be true. A promise that certain facts are as they are represented to be and that they will remain so, subject to any specified limitation. Associated Words/Concepts: Warranties differs from Representations as follows: (i) a Warranty is an essential part of a Contract, while a Representation is usually only a mentioned incentive; (ii) an express Warranty is usually written into the Contract, while a Representation can be written or oral; (iii) a Warranty is conclusively presumed to be Material, while a Representation must be proven to be Material; and (iv) a Warranty must be strictly complied with, while Substantial truth is the only requirement for a Representation.

**Will:** Auxiliary verb with eight different meanings, one of which is to "require or command". To avoid confusion, use "shall" when mandating something in Contracts.

**X:**

**X:** A symbol or mark made by illiterate or disabled persons to represent their signature.

**Y:**

**Year:** Generally a calendar year; however, see also Fiscal Year, above.

**Z:**

**Zoning:** Land use regulations usually concerning design and use.

## CHAPTER VII. SUPPLEMENTAL MATERIALS

### 1. CENTRAL APPROVER ROLES

#### A. Office of the State Architect (DPA)

##### OFFICE OF THE STATE ARCHITECT CENTRAL APPROVAL ROLE

The Office of the State Architect (OSA) has responsibility for capital construction administration, controlled maintenance request prioritization, code compliance; facilities condition tracking, emergency maintenance funds approval, energy conservation and leasing and real estate transaction oversight and approval.

OSA integrates statutory oversight responsibilities with comprehensive design, construction and real estate expertise in order to provide assistance and training to state agencies and institutions relating to state owned and leased facilities.

**State Buildings Programs** establishes policies and procedures and provides statutory oversight of the state's capital construction process (including controlled maintenance) at each state agency and institution of higher education. This process includes solicitation and procurement of professional design and construction services; development of standard contract language; establishment of project management guidelines including cost management; adoption and implementation of building codes and compliance requirements; and administration of the controlled maintenance program. This controlled maintenance program involves the establishment of a statewide system to annually measure and report to the Office of State Planning and Budgeting (OSPB) and the Capital Development Committee (CDC) of the General Assembly concerning the condition of state-owned facilities and recommending the statewide prioritized list of controlled maintenance project needs.

Construction under the authority of the Department of Natural Resources and bridge and highway construction under the jurisdiction of the Colorado Department of Transportation is outside the program oversight authority of OSA.

**Energy Management Programs** assists the Governor's Energy Office (GEO) in developing and implementing energy performance contracts. Information on energy performance contracts is available at Governor's Energy Office along with other energy programs.

An energy performance contract (EPC) provides an alternative funding source for a state agency to repair and/or upgrade its facilities. Energy performance contracts use avoided future energy costs from increased facility energy efficiency as the method to fund facility improvements over the life of the lease-purchase energy performance contract.

**Real Estate Programs** establishes policies and procedures and provides oversight for state leases and other real estate contracts for executive branch agencies and institutions of higher education. This process includes statutory approval of all leases; coordination with the state's contracted real estate brokers; maintaining the inventory of state-owned and leased property; annually reporting acquisitions, dispositions and lease summaries to the Capital Development Committee of the General Assembly; and development and administration of office space standards for leased space and strategic real property strategies.

While the state's leasing program is the largest single responsibility of Real Estate Programs, other areas of real estate activities are also included such as purchase of real estate for the state, sale or lease of state-owned real estate, and negotiation and execution of licenses, rights-of-way and easements, either on non-state land for the use of the state, or on state land for the use of private parties. All activities of Real Estate Programs exclude three areas of real estate activity that are specifically assigned to other agencies: 1) acquisitions by the Department of Transportation (CDOT), 2) acquisition or disposition of state land by the State Land Board, and 3) certain easements, rights-of way and vacant land leases and acquisitions by the Division of Wildlife or the Parks and Recreation Division of the Department of Natural Resources.

Additionally, Colorado statutes require that all acquisitions and dispositions of real estate by all agencies and institutions of higher education except the State Land Board and CDOT rights-of-way must be reported to Real Estate Programs. Real Estate Programs then uses this information to fulfill its statutory responsibility of maintaining a current inventory of all state owned real estate.

B. Office of the State Controller (DPA)

**OFFICE OF THE STATE CONTROLLER BRIEFING PAPER**

**AUTHORITY.** CRS §24-30-202(1) provides the State Controller with authority to create rules relating to the contracting processes. Under CRS §24-30-202(1) and (3), the State Controller or designee (usually called "delegate") is required to approve all commitment vouchers (contracts) involving expenditures of funds. Delegations may only be made by the State Controller and are personal to the delegate, not to the Agency or Institution of Higher Education (IHE). This statutory authority is detailed in Fiscal Rules 2-2 "Commitment Vouchers" and 3-1 "State Contracts" and further in OSC Policies. CRS §24-30-202(2) charges the State Controller or delegates with reviewing contracts to ensure:

- Funds are available and the expense authorized by the appropriation to which it is charged (in other words, public funds are set aside for a specifically authorized purpose).
- Expenditures do not exceed the amount of the available appropriation.
- Prices or rates are in accordance with law or administrative rule or are "fair and reasonable."

Fiscal Rules and OSC Policies further charge the State Controller or delegates with reviewing contracts to ensure:

- Contracts are signed by authorized persons.
- Contracts are complete.
- Constitutional and statutory requirements are met.

**CCU.** The Central Contract Unit (CCU) is part of the Office of the State Controller (OSC) and performs the State Controller's duties related to contracts and the contract process, which includes reviewing for approval by other central approvers involved in the contracting process. The CCU assists Agencies and IHE's in drafting contracts and applying the various statutes, rules, and applicable policies. The CCU is the main point-of-contact for Agencies and IHEs for contracts and contract processing issues.

**OCA.** The Office of Contract Administration is also part of the OSC. The OCA is in charge of implementing and administering the Statewide Contract Management System (CMS) and related monitoring and reporting requirements created by SB07-228, enacted as C.R.S. §§ 24-102-205, 24-102-206, 24-103.5-101, and 24-105-102.

**DELEGATION-RISK-BASED PROCESS.** In late 2005, the OSC began delegating part of its contract approval authority to Agencies and IHEs. As part of this process, delegated Agencies and IHEs are to assess, identify, and attempt to mitigate risks associate with contracts, starting at the beginning of the procurement process.

Delegated Agencies are charged with analyzing contracts within three categories of risk (automatic high, automatic low, and undetermined) in order to determine which contracts the delegate may approve and which require OSC approval. Fiscal Rule 3-1 §9 and the OSC Policy entitled *Review and Approval-Delegated Agencies* provides further detail. Requirements and authority (or limits on authority) are set forth in individual delegation letters.

General requirements for delegate IHEs are detailed in FR 3-1 §9 and the OSC Policy entitled *Review and Approval-Delegated Institutions of Higher Education* for details. As for Agencies, specific requirements and authority (or limits on authority) are set forth in individual delegation letters.

Non-delegated Agencies and IHEs must send all contracts to the OSC for approval.

**FISCAL RULES.** The OSC asks controllers and contract staff to be familiar with the following terms and concepts, what they mean and how they operate:

**FR 2-2**

- Commitment Vouchers
  - P-cards (procurement cards) - a payment method, not a voucher
  - Purchase Orders
  - Contracts
- Dollar limits and requirements
- Exceptions to the use of a purchase order or state contract
- Modifications to State Purchase Order provisions
- Advance Payments
- Emergencies
- Statutory Violations
- Vendor Agreements
- Encumbrances and their creation
- State Purchase Order provisions

**FR 3-1**

- Prior Approvals needed
- Types of State Contracts
- Mandatory provisions in State Contracts
- Special Provisions
- Approved State forms
- Agency signature authority
- OSC review and approval
- Accounting for State Contracts
- Monitoring of State Contracts
- Contract Management System
- Exceptions
- Elected Officials Exemption

**OSC POLICIES.** Effective January 6, 2009, the State Controller issued 23 new statewide contract policies and updated seven existing policies. Periodic updates are available on the OSC website.

**ADDITIONAL CONTRACTING INFORMATION.**

- The OSC expects all controllers and contract staff to be familiar with the OSC requirements for contracts and the contracting process. Part of this familiarity is keeping current on any/all Fiscal Rule changes and State Controller Policy updates, including knowing where to find OSC resources such as model contracts, checklists and manuals, etc.

The OSC asks controllers and contract staff to frequently check the OSC website:  
<http://www.colorado.gov/dpa/dfp/sco/contracts.htm>

- All contract documents (amendments, option letters, funding letters, change orders, supplements, task orders, etc.) must be entered on the statewide Contract Management System (CMS) and be assigned a routing number (CLIN or CMS ( CMS begins 7/1/09).
- The OSC expects all controllers and contract staff to understand the different Central Approvers' rules, roles, and processes. These specifically include: the Division of Human Resources, the State Purchasing Office, the Governor's Office of Information Technology, the Office of the State Architect, the Office State Controller, and the Attorney Generals Office.
- The OSC suggests that a contract completeness checklist be utilized and the OSC Resource Guide be referenced to aid in proper and timelier contract drafting and processing.
- Most errors occur on the signature page. Please check them carefully.
- State Contracts are not valid until the State Controller or delegate approves them, i.e. signs it. Statutory violations occur if performance begins or payments are made under contracts before such approval. Unless waived and ratified by the OSC, the obligation is not binding on the State and any person incurring or ordering the obligation is jointly and severally liable therefore.

**C. Office of the Attorney General**

**Criteria for State Attorney General Contract Review  
May 7, 2009**

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. Legal Sufficiency             <ol style="list-style-type: none"> <li>a. The terms of the contract must be sufficient to create a legally binding agreement. Specific points:                 <ol style="list-style-type: none"> <li>i. Consideration</li> <li>ii. Term</li> <li>iii. Monetary obligations</li> <li>iv. Performance obligations</li> </ol> </li> </ol> </li> <li>2. Price and term information             <ol style="list-style-type: none"> <li>a. Fixed price</li> <li>b. Time and materials                 <ol style="list-style-type: none"> <li>i. Price sheet</li> </ol> </li> </ol> </li> <li>3. Extension of contract term (evergreen clauses)</li> <li>4. Delivery terms             <ol style="list-style-type: none"> <li>a. FOB Destination vs. FOB Origin</li> <li>b. Inspection after delivery</li> </ol> </li> <li>5. Distinct, defined, measureable deliverables</li> <li>6. Payment upon acceptance of deliverables</li> <li>7. Time for acceptance</li> <li>8. Venue and Choice of Law</li> <li>9. Changes to mandatory insurance provisions             <ol style="list-style-type: none"> <li>a. Risk Management approval</li> </ol> </li> <li>10. Remedies             <ol style="list-style-type: none"> <li>a. Limitations on Liability</li> <li>b. Indemnity</li> </ol> </li> <li>11. Binding arbitration and other dispute resolution</li> <li>12. Unfunded liability in future years</li> <li>13. Compliance with enabling legislation and other law</li> <li>14. Overall risk to the State</li> <li>15. Order of Precedence (OOP)             <ol style="list-style-type: none"> <li>a. Correct documents listed?</li> <li>b. Does it work correctly?</li> </ol> </li> </ol> | <ol style="list-style-type: none"> <li> <ol style="list-style-type: none"> <li>c. Any terms unacceptable and effective regardless of OOP?</li> </ol> </li> <li>16. Compliance with State Fiscal Rules             <ol style="list-style-type: none"> <li>a. Advance payment</li> </ol> </li> <li>17. Name of vendor             <ol style="list-style-type: none"> <li>a. Registered with Secretary of State (SOS)</li> <li>b. Name of Vendor must match SOS registration</li> <li>c. Signature page must match SOS registration</li> <li>d. Consistent use throughout</li> </ol> </li> <li>18. Correct Signature Page             <ol style="list-style-type: none"> <li>a. Authorized person signing for vendor</li> <li>b. Documentation of authority to bind vendor</li> </ol> </li> <li>19. Current Special Provisions</li> <li>20. Adequate and consistent usage of terms</li> <li>21. Definitions             <ol style="list-style-type: none"> <li>a. Used in the document?</li> <li>b. Included in definition section?</li> <li>c. Capitalization of defined terms?</li> </ol> </li> <li>22. Exhibits             <ol style="list-style-type: none"> <li>a. Attached</li> <li>b. Listed in document</li> <li>c. Properly identified on their face</li> </ol> </li> <li>23. Page numbers             <ol style="list-style-type: none"> <li>a. "Page 1 of 15"</li> <li>b. All the pages there?</li> </ol> </li> </ol> |
|--|--|

D. Division of Human Resources (DPA)

## **Personal Services Contracts Training Personnel Certification Program Introduction**

The Personal Services Contracts review program is housed within the Department of Personnel and Administration, Division of Human Resources, Total Compensation section. Staff are responsible for establishing policy, rules, and technical guidelines and training, consulting on complex personal services contract issues, and auditing state departments' compliance with statutes and rules.

These training materials provide guidance when considering whether or not it is legal to use independent contractors instead of state personnel system employees to perform personal services. Individual departments and institutions of higher education (departments) are responsible for ensuring compliance with Part 5 Title 24, Article 50 C.R.S, and Chapter 10 of the Director's Rules. Personal services have review requirements that are distinct and separate from the review carried out by State Purchasing or the State Controller's Office.

A certified HR professional in a department must perform the personal services review. HR administrators are required to establish internal processes and procedures for the personal services review function and publish and communicate those policies.

Work that has commonly and historically been performed by state personnel can be outsourced, provided it meets the criteria set out in C.R.S. 24-50-501 through 514 and Chapter 10, Personal Services agreements. The decision to contract out personal services is a balance of determining the business needs while ensuring employees rights are not violated. Independent contractors cannot perform state work if it causes the separation of state personnel.

E. State Purchasing Office (DPA)

**Central Approvers Briefing Paper**

**State Purchasing Office**

The State Purchasing Office (SPO) approves non-construction contracts from Group I Agencies (agencies with limited purchasing authority). The contracts are forwarded to the State Purchasing Office and are reviewed primarily in regard to compliance with Procurement Rules. For Group II agencies the Purchasing head of the agency fulfills the role of State Purchasing in reviewing and approving contracts for their agencies.

Justification for any contract term that extends beyond 60 months must be submitted to the State Purchasing Director for approval per Procurement Code- CRS §24-103-503. This applies to both Group I and Group II delegated agencies. The contract term cannot exceed the term of the procurement, if the procurement term exceeds five years it must have the State Purchasing Director's prior approval.

When reviewing contracts, the State Purchasing Office looks at the following points:

- **Vendor Selection Method.** If the contract resulted from a Request for Proposals (RFP), and Invitation for Bid (IFB) or a Documented Quote (DQ), the solicitation number should be stated in the contract. A copy of the original as well as a copy of the vendor's proposal or bid response should be included for internal purposes. If the vendor selection was based on a sole source situation, a copy of the Sole Source Form (that has been pre-approved and signed by the State Purchasing Office) with related documentation should be included for internal purposes. Services being procured are covered by a State Price Agreement must reference the price agreement number in the contract and any additional terms and conditions attached.
- **State Date and Term or Contract or Renewal Period.** Does the term of the contract exceed the term stated in the solicitation? Did the original solicitation and contract allow for renewals?
- **The Scope of Work.** Does the SOW differ from the one detailed in the solicitation, sole source justification or price agreement? If it is a contract amendment and it does differ, did the original solicitation/contract allow for changes in scope or for additional services or product?
- **Price/Fees.** If this is a new contract, are the prices/fees higher than those listed in the original solicitation response or quotation? If this is a renewal, was the issue of price increases addressed in the original solicitation or contract?
- **Signature Page.** Are the signatures in place for the vendor and the agency?
- **Referenced attachments and exhibits.** Are they included?
- **Contract copies.** Are there at least three signed originals?

The goal of the State Purchasing Office is to review a contract whenever possible within three business days from the time it arrives in the office. In the event when additional information is required from the contracting agency, the turn around time is dependent upon how quickly the agency contact provides the requested information to the SPO. To expedite the approval process, it is recommended that agencies contact the SPO as early as possible in the contracting process concerning any required waivers, sole source approvals or questions.

The main phone number for the State Purchasing Office is 303.866.6100.

F. Governor's Office of Information Technology

**Governor's Office of Information Technology (OIT)  
Contract Review – Central Approval Role**

The Governor's Office of Information Technology was established by CRS §24-37.5-101 et seq., to manage, set standards and approve all information technology (IT) acquisitions and projects. Therefore, IT contracts are required to include OIT as an additional signature and must be reviewed and approved by OIT as a central approver. In reviewing contracts, OIT evaluates the agreement based on the following criteria:

- Was the procurement approved through the IT Expense Approval Request process?
- Statement of Work
- Changes in term, scope or not-to-exceed amounts
- Enterprise applicability and related language
- Cyber security concerns
- IT architectural concerns
- Project Management requirements
- Vendor performance expectations
- Acceptable testing procedures
- Project phasing, milestones and related project payments
- Ongoing maintenance provisions
- Intellectual property provisions
- TCO Worksheet 7/1/09
- Review Standard Terms and Conditions related to IT – try to identify if any have been altered
- Web Involved – Should SIPA be Used
- Rates beyond 5 years for on-going maintenance included and acceptable
- Vendor Performance Expectations
- Acceptable Testing and Ownership
- Project Phases Clear and Acceptable
- Acceptable Testing and Ownership
- Progress Payments/Milestones
- Structure Concerns:
  - Architectural Structure
  - Database Architecture
  - Maintenance and Warranty
- Security Concerns:
  - Encryption
  - Secure FTP



2. TIPS, CHARTS, AND CHECKLISTS

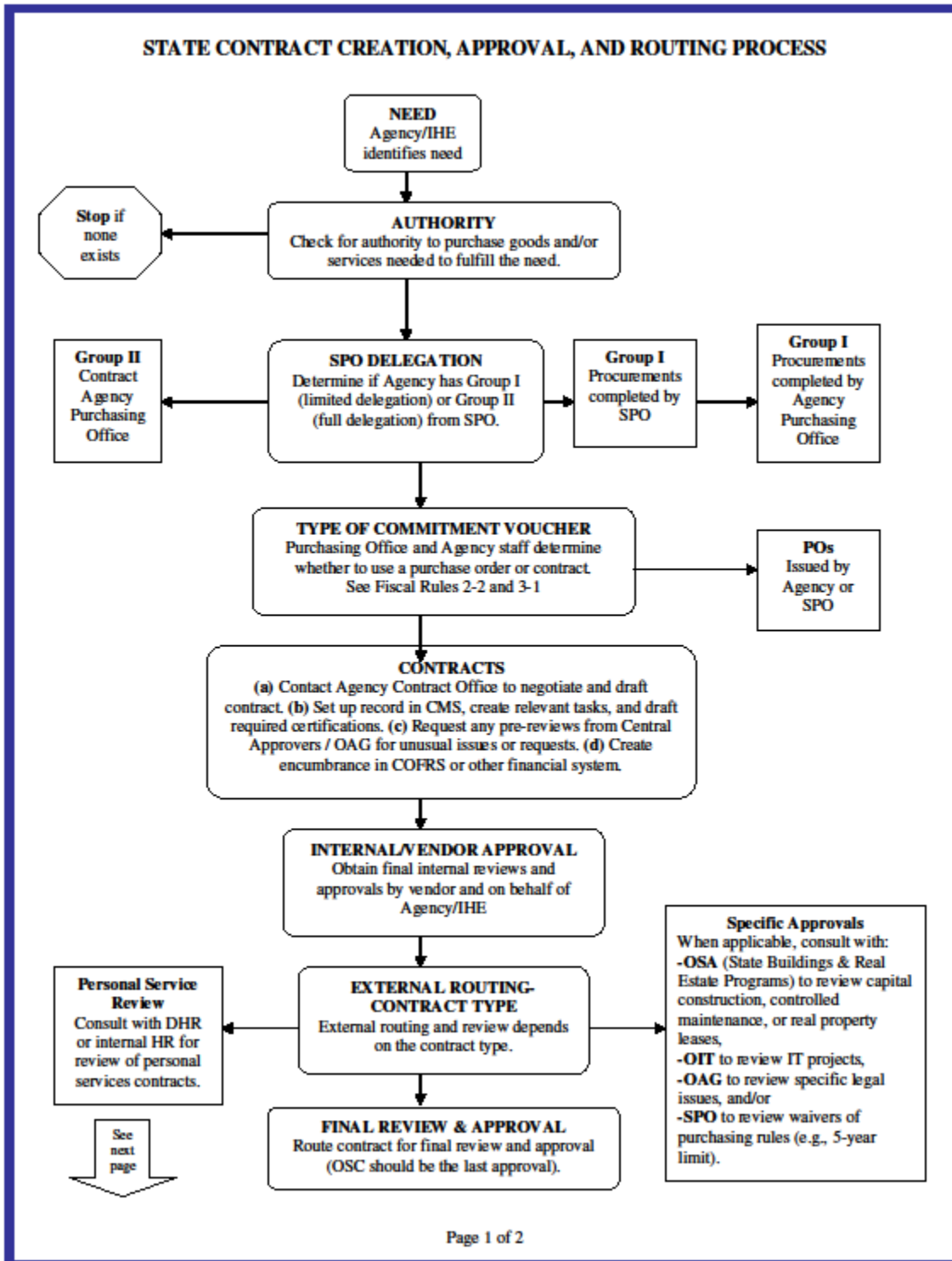
A. Controller Delegate-Review Tips

**OFFICE OF THE STATE CONTROLLER  
CONTRACT REVIEW TIPS FOR CONTROLLER DELEGATES**

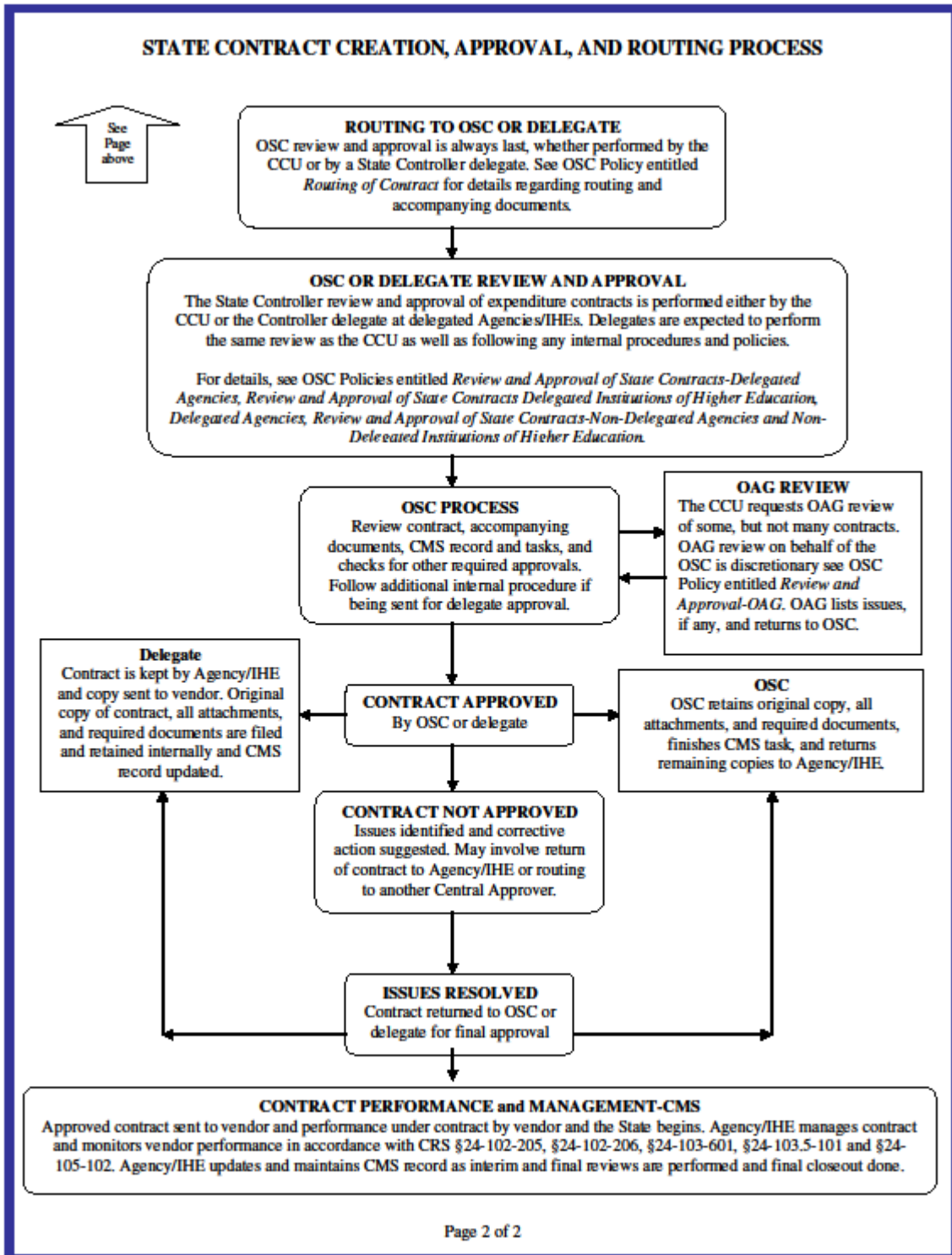
Based on the Central Contract Unit's (CCU) experience reviewing State Contracts, CCU recommends that Controller Delegates incorporate the following procedures as a regular part of their contract review:

- 1) **Parties.** Ensure all Parties to the contract are completely and accurately identified, and that such identification is consistent throughout. Compare the introductory section at the beginning of the contract against the signature page.
- 2) **Signature Page.** Check the signature page to ensure proper signatures on behalf of both Parties, especially that of the contractor. Ensure that:
  - a. The signatory's name is printed (most signatures are not legible).
  - b. The signatory's title appears and they have either actual or apparent authority to bind the contractor to this contract (See OSC Policy entitled *Vendor Signature Authority* for a detailed discussion).
- 3) **State Approvals.** Make sure all necessary approvals have been obtained (this includes any required by internal policy at your Agency or IHE). Depending on contract type, these approvals may include OAG, DHR, OIT, and OSA.
- 4) **Exhibits-Cross Referencing.** Ensure all referenced attachments are in fact attached, are logically identified, and they cross reference the contract itself. Should the exhibits become separated from the contract, this will assist a third party in determining that the documents belong together.
- 5) **Term.** Check the beginning and ending dates to make sure they exist, that they are clearly specified, and that performance does not appear to have begun or payments made before you sign.
- 6) **Payment.** Verify that the amount payable in the contract matches the amount encumbered in your accounting system.
- 7) **SOW.** Read the Statement of Work (what the contractor is to do). You want to ensure it makes sense, that it sets forth what the contractor is to do. Use mandatory language ("contractor shall..."). Do not allow responses to RFPs (or the RFP itself), to be used in lieu of a proper SOW.
- 8) **Changes to Models.** Ask the contract drafter if any changes were made to the standard model contract provisions. If so, review them carefully.
- 9) **Indemnification and Limitations of Liability.** Carefully review any changes to, or additions of, indemnification and limitations of liability provisions. If any exist, ensure that the risks have been analyzed and that benefits outweigh them and that the file contains documentation to that effect.
- 10) **Fair and Reasonable.** Determine if the prices or rates being charged the State "...are in accordance with law or administrative rules or are fair and reasonable..." The first two are fairly easy to determine. Examples of a basis for fair and reasonable determinations include contracts awarded after bid, those based on expert opinion such as a real estate appraisal, or comparison against known commodities.

B. Contract Approval and Routing Flowchart



**STATE CONTRACT CREATION, APPROVAL, AND ROUTING PROCESS**



## C. Drafting Tips-General

**CCU CONTRACT DRAFTING TIPS**

- 1) **Flow.** Insert logical page breaks (often carry part of one paragraph over from one page to the next. This makes it more difficult for a devious person to insert a new page).
- 2) **Length.** There are small things that can be done to cut down on the length of contracts:
  - a. Eliminate superfluous language such as: (i)“the Parties may mutually agree to changes” (the parties may always do so if they both agree), (ii) “shall be done in accordance with law”
  - b. **Symbols.** Use symbols such as § rather in lieu of “section”, © in place of copyright, etc.
  - c. **The.** Endlessly repeating the article “the” eats up a lot of space for little benefit. Consider saying “Contractor: vs. “The Contractor” – Economy of language.
  - d. **Alignment.** Left aligned saves space over Justified and does not cause those odd spaces between words and letters found on some lines.
- 3) **Clarity.** Try to make contracts as easy to read as possible:
  - a. **Boilerplate.** Group technical legal clauses together in place (usually at the end).
  - b. **Redundant Provisions.** Say something once and be done. Don’t keep repeating the same thing in different ways as this causes confusion which may lead to untoward results in court.
  - c. **Consistency.** Call people, places, actions, and things by one name and stick with it; don’t refer to them by several or again, confusion may reign leading to unexpected results in court.
  - d. **Party Names.** Get the right and use them consistently.
- 4) **Unfamiliar Third Party.** Draft as if someone who isn’t familiar with the transaction (like a judge) is reading it and has to be able to understand by reading the contract itself without explanation from the parties.
- 5) **Exhibits.** Reference attached documents in the contract saying, “attached hereto and incorporated by reference herein as Exhibit A” (unless you don’t want to incorporate it, but just reference it – always think). Cross reference the contract on the Exhibit, saying, “Exhibit A to Contract between the State and Vendor X CMS # 111111”. Cross referencing helps make logical connections if attachments get separated.
- 6) **Standard Forms and Provisions.** Be careful with “standard” forms and provisions, especially those supplied by vendors. This warning is less applicable to an unchanged OSC Model contract, but even there, never hesitate to ask questions.
  - a. **Understand.** Understand all provisions and beware of any that you don’t. This is especially true of any supplied by vendors and not included in the OSC Model forms. Incomprehensible provisions may be that way because they are simply poorly drafted or because they are using arcane legalese or both. Ask for OSC or OAG help with these.
  - b. **Replication-Question.** Don’t assume that all provisions are good or necessary and just replicate what someone else has done as contracts may have provisions specific to them that are not good in other circumstances and the “error” may end up being “standard”.
- 7) **Pagination.** Number all pages using a consistent method throughout, including any exhibits, attachments, etc. Page \_\_ of \_\_ is preferred, but not required.

D. Drafting Tips-Checklist-Statement of Work / Obligations-Short

**STATEMENT OF WORK CHECKLIST  
CCIT MEETING HANDOUT-NOVEMBER 18, 2009**

**1) Purpose**

- a)  Does the SOW clearly identify the basic purpose of the project?
- b)  Does the SOW identify the benefits to the State?

**2) Deliverables**

- a)  Does the SOW separately identify the products, deliverables or services to be performed or delivered under the contract?
- b)  Does the SOW answer the questions **who, what, where, when** and **how** with respect to each separately deliverable?
- c)  Does the SOW provide instructions, specifications or requirements for the completion of each deliverable?
- d)  Does the SOW provide for State inspection of products or services prior to delivery or completion?

**3) Timely Completion**

- a)  Does the SOW identify the completion date for the project?
- b)  Does the SOW identify the completion date for each separate deliverable?
- c)  Does the SOW specify consequences/alternatives if completion dates are unmet?

**4) Payment**

- a)  Does the SOW identify when payments will be made?
- b)  Does the SOW identify the amounts and timing of installment payments?
- c)  Does the SOW identify conditions or performances which must be met or completed prior to payment?

**5) Acceptance**

- a)  Does the SOW identify the standards for acceptance of the project?
- b)  Does the SOW identify the standards for acceptance of each deliverable?
- c)  Does the SOW provide procedures for accepting or rejecting deliverables?
- d)  Does the SOW provide a procedure for correcting, modifying or replacing unacceptable deliverables?

**6) Risk**

- a)  Does the SOW identify risks attached to project?
- b)  Does the SOW identify risks attached to individual deliverables?
- c)  Does the SOW identify a method for mitigating risks?
- d)  Does the SOW allocate risks between the parties or to a party?
- e)  Does the SOW contain service or product warranties?

## E. Drafting Tips-Outline-Statement of Work / Obligations-Controller Delegate Material

**STATEMENTS OF WORK-OUTLINE  
CONTROLLER DELEGATE TRAINING MATERIALS**

- 1) **OUTLINE.** Generally, all Statements of Work (SOW) will include elements included in the following outline. Although all of these elements may not be applicable to every SOW, each of these elements should be considered to see if it is applicable to each transaction/project.
  - a) General Description of Project
  - b) Definitions
  - c) Deliverables/Performance (Goods/Services)
  - d) Personnel
  - e) Testing and Acceptance Criteria
  - f) Payment
  
- 2) **OVERVIEW**  
SOWs provide the WHO, WHAT, HOW, WHEN, WHERE and WHY for projects.
  - a) **Brief Description of Project**  
 WHY is this transaction/project beneficial to the State?  
 WHAT are the services to be performed or goods to be delivered?  
 WHO will be responsible for performance and/or delivery?
  - b) **Definitions-Frequently used terms**  
 WHO are the parties to the contract?  
 WHAT are the meanings of specialized terms used in the SOW?  
 WHAT abbreviations are used in the SOW?
  - c) **Deliverables/Performance (Goods/Services)**
    - i) **Final**  
 WHAT services/goods will the State receive at contract completion?  
 WHO will perform services/manufacture goods?  
 HOW will services be performed/goods manufactured?  
 WHERE will services be performed/goods manufactured?  
 WHEN will services be performed/goods delivered?
    - ii) **Interim**  
 WHAT separate components must be finalized prior to completion?  
 WHO will perform or manufacture components?  
 HOW will components be performed/ manufactured?  
 WHERE will components be performed manufactured?  
 WHEN will components be performed/goods delivered?  
 WHAT other components must be completed prior to this component?
  - d) **Personnel**
    - i) **Key personnel**  
 WHAT positions are required to complete this project?  
 WHO will fill these positions?
    - ii) **Levels of expertise**  
 WHAT levels of training/experience are required?
    - iii) **Project managers**  
 WHO will be the contract representative for the State?  
 WHO will be the contract representative for the vendor?  
 WHAT are the duties and obligations of the project managers?

- iv) **Replacement**
  - HOW will key employees be replaced?
  - WHO will be an acceptable replacement?
  - WHAT will happen if an acceptable replacement cannot be found?
- e) **Testing and Acceptance Criteria**
  - i) **Development**
    - WHO will be responsible for developing acceptance criteria?
    - HOW will the criteria be developed?
    - WHEN will the criteria be developed?
    - WHAT will the criteria measure?
  - ii) **Measurements**
    - WHAT type of measurement is required for each deliverable?
    - HOW will the measurement be applied?
  - iii) **Procedures**
    - WHO will evaluate the deliverable?
    - HOW will acceptance or rejection be communicated?
    - WHERE will the evaluation take place?
    - WHEN must the evaluation be completed?
    - WHAT happens if a deliverable is not accepted?
- f) **Payment**
  - i) **Contract method**
    - WHAT payment method is identified in the contract?
    - WHEN will payments be made?
    - HOW will payments be made?
    - WHAT amounts will be held by the State pending final completion?
  - ii) **Standards**
    - WHAT conditions must be met prior to payment?
    - WHAT standards must be met prior to payment?
    - WHEN will payment in full be tendered?
    - HOW do payments tie to acceptance of goods/services?

- 3) **PROJECT DETAILS.** The Statement of Work should contain all of the steps necessary to complete your project. Failure to include all necessary steps may result in ambiguities and miscommunications with respect to specifications, standards, timeliness or divisions of responsibility and liability.
- a) **Project Description. Briefly describe:**
    - i) Reason for and benefits of the transaction/project
    - ii) What is to be done
    - iii) Which party is responsible for doing what
  - b) **Definitions.** Brief definitions of:
    - i) Frequently used terms
    - ii) Terms of art
    - iii) Special or unusual usage of terms agreed to by the parties
  - c) **Deliverables/Performance (Goods/Services)**
    - i) **Final Deliverable(s)/Performance**
      - (1) Identify specifications and requirements
        - (a) design required or optional
        - (b) performance/manufacture
        - (c) quantity
        - (d) quality
        - (e) required or optional
      - (2) Identify responsibilities of the parties
        - (a) documentation
        - (b) schedule of completion
        - (c) reporting
        - (d) training
      - (3) Identify acceptance criteria
        - (a) evaluation
        - (b) testing
        - (c) change mechanism
    - ii) **Interim Deliverable(s)/Performance.** Duplicate steps set forth above for final deliverable(s)/performance for each interim deliverable/performance.
  - d) **Personnel**
    - (1) Identify key personnel
      - (a) Required or preferred
      - (b) Individual or job category
    - (2) Identify required levels of expertise
      - (a) Training
      - (b) Experience
    - (3) Identify project managers
      - (a) Responsibilities of vendor project manager
      - (b) Responsibilities of State project manager
    - (4) Procedures for replacement of key personnel
  - e) **Testing and Acceptance Criteria**
    - (1) Development
      - (a) Completed prior to contract approval; included in SOW
      - (b) Developed during performance
        - (i) Tied to original design
        - (ii) Incorporates change orders/modifications
      - (c) Party responsible for development



**(2) Acceptance measures for:**

- (a) Written reports
- (b) Data/statistics
- (c) Products
- (d) Services

**(3) Procedures**

- (a) Inspection of deliverables
- (b) Acceptance of deliverables
- (c) Rejection of deliverables
- (d) Re-performance-Must comply with cure provision in contract (See Model Contract §§14 and 15)

**f) Payment**

(1) Must conform with method of payment stated in contract (see Model Contract §7 )

(a) **Lump sum** upon completion

**(b) Installments**

(i) Installment payment amount no greater than portion of contract completed

(ii) Installments payments due upon

- 1. acceptance of deliverable
- 2. acceptance of tasks
- 3. periodic schedule
  - a. monthly
  - b. annually
  - c. other

(c) **Cost Reimbursement**

(d) **Holdback**

(2) **Standards** of performance and quality

- (a) Identify acceptance criteria which must be met prior to acceptance
- (b) Identify conditions or events which must be met prior to payment

F. OSC/CCU-Contract Completeness Checklist

**OFFICE OF THE STATE CONTROLLER – CENTRAL CONTRACTS UNIT  
CONTRACT COMPLETENESS CHECKLIST**

This checklist covers items generally required by the OSC under Statute, Fiscal Rules and Policies for expenditure contracts. Agencies/IHEs may use it "as is" or modify it for their particular needs and/or types of documents requiring approval. NOTE: All resources related to state contracting and CMS are located on the OSC website: [www.colorado.gov/dpa/dfp/sco](http://www.colorado.gov/dpa/dfp/sco) under the "Contracts" tab. This checklist is a guide and Statutes and OSC Fiscal Rules and Policies takes precedence in case of any conflicts. Should any conflicts be identified, please notify the CCU. The term "Contract" includes grants and agreements.

Routing # (CMS Record #):	Date:	Reviewer:
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**A. CONTRACT PACKET-DOCUMENTS AND RECORDS REQUIREMENTS-OSC APPROVAL**

Include the following in all approval requests to the OSC or delegate and keep them with the internal contract packet:

1.  **Copies.** OSC keeps one original and returns however many others are sent. When submitting amendments, assignments, task orders, or other modifications add one copy of the original contract and any prior modifications (this can be done as an attachment or via linking in CMS in lieu of hard copy). *OSC Policy-Routing of Contracts.*
2.  **Risk Assessment.** If required. OSC Policy-*Review and Approval of State Contracts-Delegated Agencies*".
3.  **CMS contract ID # on at least the first page of the contract.** Optional: Screen print of the first page of the CMS contracts detail screen (CLIN & CLI2 pre-7/1/09).
4.  **Encumbrance Document.** A PO or SC matching the dollar amount stated in the contract ready for Level 3 approval. OSC delegates must sign and date encumbrance documents once approved.
5.  **Fair & Reasonable Justification.** Some basis for finding that the expenditure is fair and reasonable to the State.
6.  **Central Approvers:** Evidence of approval from other necessary Central Approvers
  - a.  DHR (DHR review, Personal Services Program Waiver, or Personal Services Certification Form)
  - b.  OSA (capital construction, controlled maintenance, leasing and real estate transactions)
  - c.  SPO (purchasing issues-sole source, contracts exceeding 5 years, emergency procurement)
  - d.  OAG (if requested by OSC)
  - e.  OIT (IT contracts) See OSC Policy-*Information Technology Contracts*
7.  **Pre-Approvals-Other:** Other necessary pre-approvals if needed, e.g. OSBP for the "Freeze"
8.  **Fiscal Rule Waivers:** Copies of any waivers granted by the OSC
9.  **Secretary of State:** Information regarding vendor's entity type, standing, legal name and registered agent (hard copy or scanned into the CMS record). Does not apply to intergovernmental, interagency, or sole proprietor contracts.
10. **Special Records Requirements.** If applicable, include the following in approval requests to the OSC or delegate and keep them with the internal contract packet:
  - a.  **Delayed Submission Statement** (via letter/memo/email): If there is a long delay between signing by the vendor and Agencies/IHEs and submission to the OSC, provide a statement that a Statutory Violation has not occurred (performance has not started and payments have not been made).
  - b.  **Statutory Violations:** If performance has started or payments are made before approval by the OSC or delegate, provide documentation in accordance with the FR 2-2 §7 and OSC Policy *Statutory Violations.*

**B. CONTRACT PACKET-DOCUMENTS AND RECORDS-INTERNAL FILE**

A complete internal file for all Agencies and IHEs (delegated or not) contains the following documents and records:

1.  **OSC Policy.** Those listed in the OSC Policy *Monitoring Reviews - OSC Contract Approval Delegation.*
2.  **Contract Completeness Checklist.** Highly recommended, not mandatory (OSC or modified).
3.  **Insurance.** Contact DHR-Risk Management with questions or for approval of changes from standard provisions.
  - a. **Risk Analysis.** Factors in determining appropriate levels of insurance (coverages and amounts) are:
    - i.  Who will be sued?
    - ii.  Will the vendor lose their business if sued?
    - iii.  Will the vendor's assets cover uninsured losses?

- b.  **Cost.** Will the cost of insurance materially increase the contract price? If so, what is the cost/benefit?
- c.  **Insurance Certificates.** A current insurance certificate (Acord or company-specific form) complying with contract provisions.
  - i.  Ensure vendor is properly named
  - ii.  Ensure the State is specifically listed as an "Additional Insured" in the endorsement box of the insurance certificate, including General Liability and Automobile liability (if applicable).
  - iii.  Ensure the amounts of coverage stated in the contract match those on the certificate.
- 4.  **Licenses and Certifications.** Copy of current and valid for professions requiring licenses or certifications. Seek OAG advice if license contains notations or restrictions from the issuing agency.
- 5. **Two-Month Extension** (previously called "Holdover"): If included in contracts or modifications, documentation the provision was invoked (oral invocation is not acceptable) before contract expiration.

**C. CONTRACTS AND STANDARD PROVISIONS:**

- 1.  **Model Contracts:** See OSC policy *Model Contracts*.  Yes or  No. Were OSC or OSA models used? If not, why not?
- 2. **Contract Provisions-Mandatory:** Per FR 3-1 §5 and OSC Policy *Content- Mandatory Provisions in State Contracts* all contracts shall include:
  - a. **Parties-Identification:** Identify the Parties and include the following:
    - i.  **Agencies/IHEs name** (address optional)
    - ii.  **Vendor Name:** Provide full legal name (match with signature page). If not an individual, check for type of entity (corporation, partnership, LLC, etc). Address is optional.
    - iii.  **Multiple Parties:** Make sure all Parties are properly identified when there are more than two.
  - b. **Recitals:**
    - i.  **Authority**-statutory or otherwise (except IHEs)
    - ii.  **Appropriation**-funds available and authorized (except IHEs)
  - c.  **Effective Date**-date approved by OSC or delegate
  - d.  **Definitions**-as needed-define all acronyms
  - e. **Term-Performance Period**
    - i.  When does the contract start?
    - ii.  When does the contract end?
    - iii.  If the performance period is not the same as the contract term, define it
  - f.  **Obligations-SOW**
  - g. **Payments-Compensation**
    - i.  Maximum Amount Payable
    - ii.  Define how, when, and any conditions
    - iii.  Future Funding Contingency clause
    - iv.  Interest Rate shall not exceed 1% per month for late payments by the State and the State will not pay interest until 45 days after the due date.
  - h.  **Main Body Provisions**-Approximately 19 in Model Contracts. If not using a Model, ensure all relevant provisions are included.
  - i.  **General Provisions**-These are "boilerplate" legal terms. If not using a Model, ensure all relevant provisions are included.
  - j.  **Order of Precedence Clause**-(Often found in General Provisions)
  - k.  **Colorado Special Provisions**-latest version
  - l.  **Signature Page**-Be careful, many errors occur here. See OSC Policy *Signature Page-Form Of*
- 3. **Contract Provisions-Specific:** Provisions that apply to specific contracts, include:
  - a.  **Performance Bond**-Is this non-Capital Construction that requires a performance bond?
  - b.  **ARRA**-Include ARRA Exhibit if ARRA funds are involved.

**D. MODIFICATION TOOLS (OSC Policy Modifications Of Contracts - Tools And Forms.)** Spreadsheets tracking modifications, including changes in costs, are useful and help avoid mathematical and other errors.

1. **Modification Tools**-If desired, add language in OSC Policy Modification of Contracts-Tools & Forms.
2.  **Amendments.** Amendments must recite a valid reason or additional consideration for the changes. Significant increases in payments to vendors may require SPO approval.
3.  **Assignments.** Calculate the correct dollars owed to or payable by the State to the assignor (prior vendor) Un-encumber remaining funds and re-encumber under the assignee (new vendor)

**E. CONTRACTS WITH SPECIAL REQUIREMENTS**

1.  **Auto-High Risk**-All contracts considered auto-high risk under the OSC Policy *Review and Approval of State Contracts-Delegated Agencies*, require OSC approval and may not be approved by OSC delegates.
2.  **Capital Construction/Controlled Maintenance.** These require review by the OSA/State Buildings Program. They are for professional services by an architect, land surveyor, industrial hygienist. In addition to the usual insurance requirements check the following:
  - a.  **Coverage and Amounts.** If insurance requirements (dollar amounts and coverages) are different than model contract provisions, ensure that the more protective requirements are met.
  - b.  **Performance and Labor and Material Bonds.** Ensure that required bonds for performance and/or labor/materials are included in the contract packet. Are the (above mentioned bonds) dated property?
3.  **Leases-Personal Property (any property that is not real estate).** Issues with these include:
  - a.  **Assignment.** The State must receive documentation of assignment of payment rights from vendors to their third-party lenders. Do not accept any additional obligations to the State as a result.
  - b.  **Third party financing (auto-high risk).** If the State arranges its own third party financing ensure that the finance company assigns all warranties and maintenance rights to the State. Define who holds the title to the equipment during the lease (the finance company or the vendor). If the State has an option to take title when the lease ends, a lease-purchase may exist (see below).
  - c.  **Lease Purchase (auto-high risk).** If the State may take title to property when leases ends ensure compliance with CRS §24-82-801 and FAS 13. Recommend consulting the OSC regarding lease purchases.
4.  **Leases-Real Property.** Issues with these include:
  - a.  **OSA/REP Forms.** REP must approve all leases and has model lease forms. REP approval and an OSC Risk Analysis are required for all changes to the form lease or use of any other lease form.
  - b.  **Build-Out.** If provided for in a lease, see OSC Policy *Real Property Leases – Build Out*
  - c.  **Termination Payments.** Notify the OSC if a lease requires payments upon termination.
  - d.  **New Landlord.** See OSC Policy *Real Property Leases - Payments to New Landlord* if the property is transferred to a new landlord.
5.  **Loan Agreement**-Submit all agreements to the OSC for approval where the State is a lender.
6.  **Real Property Purchases over \$100,000.** Under CRS §24-30-202(5)(b), all purchases over \$100,000 require an appraisal. Supply an appraisal or other evidence that the purchase price is fair and reasonable for those \$100,000 or under.
7.  **Vendor Agreements.** Avoid using if possible and always use an Order of Precedence clause specifying that the State Contract provisions control in the event of conflict. OSC Policy *Vendor Agreements*

**F. SIGNATURE & SIGNATURE PAGE REQUIREMENTS: Signature Block must include the following (Many errors occur on the signature page)**

1.  **Contractor Name**-Full legal name as it appears on page 1 (remember the SOS "Information of File"
2.  **Agency/IHE Name**
3.  **Original Signatures**
4.  **Names & Titles of all Signatories**
5.  **Contractor Signatory Authority**-must have authority, actual or apparent, to bind contractors. If questionable, obtain evidence of authority, e.g. corporate resolutions or delegation letters. See OSC Policy *Vendor Signature Authority*
6.  **State Signatory**-See OSC Policy *Signature Authority Delegation*

**G. FORMATTING, PROOFING, AND ORGANIZATIONAL TIPS**

1.  **Page Numbering**-Number all pages using a consistent method throughout, including any exhibits, attachments, etc. Page \_\_ of \_\_ is preferred, but not required.
2. **References/Exhibits/Attachments**
  - a.  Highlight (**Bold**) references to exhibits, attachments, etc and internal cross-references in the contract (best practice-speeds up review).
  - b.  Cross-References-Exhibits, Attachment, etc should reference back to the contract (best practice-aids identification if documents get separated)
  - c.  Proofread all references to exhibits, including those in amendments and other modification tool to ensure they match and are not duplicated. Also proof section (§) references if sections are added or deleted.

**H. CMS (CONTRACT MANAGEMENT SYSTEM).** Ensure that at least all expenditure contracts are properly entered into CMS (other types of contracts are also recommended for tracking in CMS – such as Revenue contracts, but are not required CMS entries).

1.  **Record Created.** A record is created, CMS ID # assigned, and appropriate fields completed.
2.  **Tasks Created.** Appropriate tasks are created, assigned and completed by assigned party(s).
3.  **Certifications.** Certifications required by OSC Policy entitled *CMS-Performance Evaluations-Forms*.

**3. REFERENCE MATERIALS**

**A. Books, Charts, and other Publications**

<b>Author's Name</b>	<b>Title</b>	<b>Book Title</b>	<b>Other Description</b>	<b>Publishing Company</b>	<b>Pub Date</b>
Adoranti, Frank	JD, MBA	<i>The Managers Guide to Commonly Used Contract Terms: Boilerplate Clauses</i>	Commercial Contracts for Managers Series	Lessons Professional Publishing	2006
Burton, William C.	JD	<i>Legal Thesaurus</i>	4th Edition	McGraw-Hill	2006
Cole, Peter S.	CPCM	<i>How to Write a Statement of Work</i>	5th Edition	Management Concepts	2003
Davison, William D. and Wright, Elizabeth	CPPO and Ph.D., CPCM	<i>Contract Administration</i>	2nd Edition (this is part of a 3-day course which is also available)	NIGP (National Institute of Government Purchasing)	2007
Garner, Bryan A.	Editor-in-Chief	<i>Black's Law Dictionary</i>	8th Edition	Thomson-West	2004
Grim, Rick	CPPO, CPPB	<i>Public Procurement Dictionary of Terms</i>	2008 Revision	NIGP	2008
Hillman, Robert A.	Prof. of Law, Cornell	<i>Principles of Contract Law</i>	2nd Edition, Concise Hornbook Series	Thomson-West	2004
Ramm, Benjamin	Writer	<i>Contracts</i>	SparkCharts (a handy quick guide to contract provisions)	Barnes & Noble	2003

**B. Websites**

Go to popular search engines and type in Contract-related subject and there are hundreds of links for more materials and many useful sites offering free information, such as:

**i) Commercial**

- (a) [www.west.thomson.com](http://www.west.thomson.com)—Good source for legal publications.
- (b) <http://sparkcharts.sparknotes.com>—Source of useful charts (quick reference).
- (c) <http://www.nigp.org/eweb>—Good source for live and online courses and related materials.
- (d) [http://www.ncmahq.org/files/Articles/B50B6\\_CM\\_Apr06\\_p62.pdf](http://www.ncmahq.org/files/Articles/B50B6_CM_Apr06_p62.pdf) - SOW tips.
- (e) <http://www.ncmahq.org/>—National Contract Management Association (NCMA). Emphasis on federal government contracting, but many the concepts are useful.

**ii) Governmental**

- (a) <http://www.michie.com/colorado>—Colorado Revised Statutes online.
- (b) <http://www.colorado.gov/dpa/dfp/sco/contracts.htm>—OSC/CCU website. Find information regarding Contract training, CCIT meetings, CCIT email list subscription and removal, Model Contracts, Fiscal Rules, Policies, ARRA information and forms, Office of Contract Administration information and forms regarding CMS, and updates regarding Contract-related legislation.

## STATE OF COLORADO PROCUREMENT MANUAL

- (c) <http://www.colorado.gov/dpa/dfp/spo/index.htm>-SPO website. Information and links regarding Colorado BIDS, Price Agreements, Procurement Cards, and Procurement and Fiscal Rules. <https://www.gssa.state.co.us/VenSols>-Colorado BIDS website.
- (d) <http://www.colorado.gov/dpa/dfp/sbrep/>-OSA website. Information, forms, and model Contracts related to construction and real-property Leases.
- (e) <http://www.colorado.gov/cs/Satellite/DPA-DHR/DHR/1186562189606> - DPA/DHR information and forms regarding Personal Services review.

### C. Acronym List

<b>ADR:</b>	Alternative Dispute Resolution
<b>BIDS:</b>	Bid Information and Distribution System
<b>CCR:</b>	Colorado Code of Regulations
<b>CCU:</b>	Central Contracts Unit-Part of the OSC
<b>CFR:</b>	Code of Federal Regulations
<b>CGL:</b>	Commercial General Liability (insurance)
<b>CLIN:</b>	Former Contract tracking system used by the State
<b>CMS:</b>	Contract Management System
<b>CO:</b>	Change Order
<b>COFRS:</b>	State accounting system used by most Agencies and some IHEs
<b>CRS:</b>	Colorado Revised Statutes
<b>DHR:</b>	Department of Human Resources-Part of DPA
<b>DPA:</b>	Department of Personnel & Administration
<b>DQ:</b>	Documented Quote
<b>FR:</b>	Fiscal Rules
<b>HIPAA:</b>	Health Insurance Portability and Accountability Act
<b>IA:</b>	Interagency Agreement
<b>IC:</b>	Independent Contractor
<b>IFB:</b>	Invitations for Bid
<b>IGA:</b>	Intergovernmental Agreement
<b>IHE:</b>	Institution of Higher Education
<b>IPO:</b>	Interagency Purchase Order
<b>K:</b>	Abbreviation for "Contract" often used by attorneys
<b>OAG:</b>	Office of the Attorney General
<b>OCA:</b>	Office of Contract Administration-Part of the OSC
<b>OIT:</b>	Office of Information Technology-One of the Governor's offices
<b>OMB:</b>	Office of Management and Budget (federal)
<b>OSA:</b>	Office of the State Architect-Part of DPA
<b>OSC:</b>	Office of the State Controller-Part of DPA
<b>PO:</b>	Purchase Order
<b>RFI:</b>	Request for Information
<b>RFP:</b>	Request for Proposal
<b>RFQ:</b>	Request for Qualifications
<b>SBREP:</b>	State Buildings and Real Estate Programs-State Buildings handles construction. Real Estate Programs handles real property Leases. Both are part of the OSA.
<b>SME:</b>	Subject Matter Expert
<b>SOW:</b>	Statement of Work
<b>SPA:</b>	State Price Agreement
<b>SPO:</b>	State Purchasing Office
<b>UCC:</b>	Uniform Commercial Code
<b>USC:</b>	United States Code