

IX. CONTRACT DRAFTING

A. Drafting the contract

All contracts, regardless of dollar amount, must comply with the drafting standards below:

1. General Contract Restrictions

A contract shall not:

- a. require the State to indemnify a Contractor;
- b. require the State to submit to binding arbitration or otherwise waive the State's right to a jury trial;
- c. establish jurisdiction in any venue other than the Superior Court of the State of Vermont, Civil Division, Washington Unit;
- d. waive the certifications regarding tax status, child support, use of State funds, or equal opportunity clauses, as are required by State law;
- e. restrict the ability of the contractor to hire State employees without the prior written permission of the Department of Human Resources (DHR);
- f. designate a governing law other than the laws of the State of Vermont;
- g. constitute an implied or deemed waiver of the immunities, defenses, rights or actions arising out of the State's sovereign status or under the Eleventh Amendment to the United States Constitution;
- h. limit the time within which a legal action may be brought;
- i. include a provision for automatic renewal ("evergreen" clause); or
- j. include a copy of the RFP or RFP response.

2. Standard State Forms (Contract Templates and Attachments)



NOTE: *Standard State Forms and Templates are routinely updated. Agencies are responsible to ensure the use of the most current form/template at all times. The current in-force versions are maintained by OPC at: <http://bgs.vermont.gov/purchasing/forms>. Use of outdated forms/templates may result in delays in obtaining required approvals or rejection.*

a. Short Form Contract May Be Used for Certain Services Below \$25,000

While use of the standard contract form and full Attachment C is preferred, the Appointing Authority may authorize the use of the standard Short Form Contract and Short Form Attachment C ("Short Form") for limited purchases of service not exceeding 12 months and \$24,999.99. Amendment(s) to contracts that either increase the maximum price to \$25,000 or more, or extend the term of the contract beyond 12 months, must be executed using the Standard Contract for Service template and shall be subject to the applicable review and approval process.

The Short Form shall not be used for services related to life safety, transport of persons, hazardous materials, construction, data usage or sharing, access to confidential information, services of licensed professionals, a Zero Dollar Contract, and/or a Financial Transaction Contract. As with all contracts, a current certificate of insurance for the contractor is required on file, including professional liability insurance, if

applicable. Multiple “one-time” purchases entered into within the same 12-month period, and done intentionally, in order to avoid the requirements of this Bulletin are expressly prohibited.

The Short-Form is designed to expedite contract drafting for low risk, small dollar procurements, and should be completed according to the instructions included within the form. The Short Form may not be used when additional attachment(s) or terms and conditions are required. Any questions about whether or not a contract is eligible for the use of the Short Form should be directed to Risk Management at: SOV.riskhelp@vermont.gov.



NOTE: *The Short Form Contract may only be used for one time services below \$25,000 that do not exceed 12 months’ duration. If the maximum amount exceeds \$25,000 the State requires the use of the Standard Contract for Service and the Full Attachment C, etc. (see Appendix I for Short Form Contract and short Form Attachment C).*



NOTE: *Regardless of the contract amount, the Short Form Contract may not be used when contracting for life safety, transport of persons, hazardous materials, construction, data usage or sharing, and/or access to confidential information.*

b. Standard State Contract Forms (Templates and Attachments)

All contracts not eligible to use the Short Form Contract, must use one of the current standard contract templates (“shell”) and adhere to the Attachment “letter” assignments for the standard contract Attachments as follows:

- **Attachment A** – Statement of Work (page [54](#));
- **Attachment B** – Payment Provisions (page [56](#));
- **Attachment C** – Standard State Provisions for Contracts and Grants (“Terms & Conditions”);
- **Attachment D** – Approved Modifications to Attachment C, modifications to a Contractor document or other required Terms and Conditions (if necessary) (Page [58](#));
- Additional Attachments may be lettered as necessary.

All modifications to Attachment C’s standard provisions shall be included in Attachment D which is to be referenced under the standard Contract shell “Order of Precedence” section (Page [53](#)). All such modifications require pre-approval by the AGO before the contract is executed by the Appointing Authority. Modifications to the insurance or audit provisions in Attachment C must be approved by the Director of Risk Management or the Auditor of Accounts, respectively, in advance of contract execution.



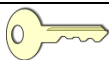
NOTE: *Under no circumstances may the actual Attachment C document itself, be modified. When changes or modifications are necessary, agencies shall use Attachment D.*

Additional Terms & Conditions deemed necessary to the contract shall be included in Attachment D. All requests and approvals for such modifications must be documented and retained in the Contract File. For examples of common Additional Terms & Conditions refer to Appendix IV.

3. Standard Contract Elements

a. Parties to the Contract

The Parties to a contract are: 1) the person(s) or legal entity responsible for performing the work, and 2) the State Agency or department responsible for contract compliance, monitoring and payment. The legal information (name or business name from [IRS Form W-9](#)) must be the same as the party in the contract. A valid W-9 must be dated within six months prior to the contract effective date. Agency staff should work with their business office to review the W-9 and determine if the Vendor is active in VISION, the statewide financial system, with the correct legal name and remittance address. Refer to the [VISION Vendor set-up and Form W-9 FAQs](#).



NOTE: If the contract includes work being assigned to a sub-contractor, see page 47 of this Bulletin.

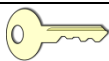
b. Contract Duration (Term)

Contracts must have a specific start and end date (term), defining the legal period in which the contractor is authorized to perform the work, and for which the State will be obligated. The use of “Upon Execution” is not allowed. Including language that automatically renews or extends the contract beyond the stated End Date (“evergreen clause”) is strictly prohibited.

An Agency should carefully consider what period of time is appropriate for contract performance. Considerations should include the nature of the services and the status of any particular industry or market involved.

The base contract term is a period of up to two years. In certain situations, such as when purchasing services for which there is an ongoing need, the State may want to extend the contract beyond a base two-year period. Language may be added to preserve the option(s) to extend for two additional one-year periods, for a total maximum of four years.

Agencies must plan accordingly to allow sufficient time for all required approvals and final contract execution BEFORE a contractor begins work. Agencies must monitor contract end dates well in advance to allow sufficient time to prepare and process the required re-bidding. This re-bidding and resulting award constitutes a new contract (even if the re-bid award goes to the same Vendor) and must have a new VISION contract number. Failure to allow sufficient time to re-bid a contract is not an acceptable justification to request a sole source waiver.



NOTE: In certain instances, Amendment(s) to exercise pre-defined option language (extension of duration and related price increase) may not require review and approval by the AGO and Secretary (see page 49).



NOTE: Under no circumstances may any contract be amended to extend beyond four years, in total, without a specific waiver approved by the Secretary.

c. Maximum Amount

All contracts must clearly disclose the maximum dollar amount for services, supplies, commodities and expenses on a Fixed Price basis or a “Not to Exceed” maximum dollar amount.

The State strongly prefers contractors include reimbursable travel expenses (mileage, airfare, lodging, meals, etc.) as part of their fixed or hourly rate(s), or include a fixed travel allowance amount. Reimbursing detailed invoices for travel expenses is administratively burdensome, requiring additional documentation, review, and accounting transactions in VISION. However, the amount the contractor includes in the rate or as an allowance, must be determined to be reasonable. Reasonableness should be based on: 1) the agreed statement of work specifications for number of on-site days, weekly/monthly trips, over-night stays, mileage, etc.; and 2) standard travel costs, with consideration for federal funding requirements, any limits that may apply, or per diems, such as federal General Services Administration (GSA) rates for meals and lodging.

In cases where the reimbursement of detailed travel expenses cannot be avoided, such as when required by certain industries or professions, agencies must obtain a waiver from the Secretary, or have such waiver in their approved Contracting Waiver Plan, prior to including reimbursable travel expenses in any contract.

d. Total Number of Pages

The Contract and Attachments shall be sequentially numbered within the total pagination, for example, “Page 1 of 10”, with the total number of pages (in this example, 10), stated in the contract.

For long, complex contracts requiring numerous attachments, such as construction and transportation contracts, agencies may choose to number the Contract and each Attachment, within the pagination for each. For example, Contract pages 1-2, Attachment A, pages 1-1500; Attachment B, pages 1-2; Attachment C, pages 1-4; Attachment D, pages 1-2; Attachment E, pages 1-51; resulting in a total of 1,561 pages. However, the total number of pages shall be stated in the contract.

4. Description of the Work and Compliance (Attachment A)

a. Statement of Work

All State contracts must describe the work to be performed in clear, concise and complete statements. Attachment A of the Standard State Contract should be used to detail the work to be performed or products to be delivered by the contractor. A well written description will include the schedule for performance, identification of project deliverables, deliverable milestones, and standards by which the contractor’s performance will be measured. This description of the work may also be referred to as the Statement of Work, Specifications of Work, or Subject Matter. Please refer to Appendix II for further guidance. The deliverables and milestones should be used to inform the payment terms in Attachment B. Attaching RFPs and RFP responses to contracts is not permitted. RFP responses can be long and complicated and may include both unnecessary information and introduce internally inconsistent terms within the contract.

b) Contract Compliance Monitoring

The level of required contract compliance monitoring, if applicable, should be based on the assessment of the risk for delay or failure to deliver the services. In assessing the risk, agencies should consider factors such as: amount of funds involved; contract duration; contract complexity; history of the Contractor with State government; amount of subcontracting involved; and other relevant issues. Whether or not liquidated damages, service credits and/or retainage are part of the contract, the document should include a section that describes specifically how the Agency will monitor the contract for compliance.

Types of compliance monitoring processes and steps may include: (i) periodic contractor reports; (ii) invoice reviews; (iii) on-site visits; (iv) scheduled meetings; (v) audits; (vi) independent performance reviews; (vii) surveys of users/clients; and (viii) post-contract audit or review. This section may also describe a process for identification, discussion, and resolution of disputes between the Contractor and the State, both during the contract duration and after expiration.



NOTE: Additional guidance on Statement of Work is available in this Bulletin as [Appendix II: Attachment A – Statement of Work Guidelines](#).

5. Payment Provisions (Attachment B)

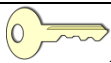
a. *Payment Amounts and Frequency:*

All State contracts must describe how, when and under what circumstances contractors submit invoices to the State. Attachment B of the Standard State Contract should detail:

- Requirements and schedule for the submission of contractor invoices;
- Whether payment will be made based upon: rates; hours worked; delivery of a service, or State acceptance of a deliverable;
- Whether payment or any portion thereof will be tied to the achievement of performance outcomes and/or measures;
- What documentation (bills, invoices or other proof of work) the contractor must provide when invoicing the State;
- When and how much the contractor will be paid, and what deductions, if any, will be made from payments; and
- The payment terms of Net 30 days, from the receipt of a complete and error free invoice, are the generally accepted payment term standard, in accordance with [Finance & Management Policy #5 ~ Payment Terms](#).



NOTE: Additional guidance on Payments is available in this Bulletin as [Appendix III: Attachment B Payment Provision Guidelines](#).



NOTE: Contractor shall be paid based on documentation and itemization of work performed and included in invoicing, as required by [32 V.S.A. §463](#). If based on hourly prices,

invoicing must contain a summary of the work performed and details, including dates and hours of work performed, and rates of pay for individuals.



NOTE: *Advance payments are strongly discouraged. First, advanced payment for work that is not performed or not satisfactory may not be recoverable without filing a lawsuit. Second, in the case of Contractor default and insolvency, the advanced payment may be subject to bankruptcy proceedings and may not be recoverable.*

b. Performance Measures and Accountability

In accordance with [3 V.S.A. § 2313](#), State contracts and grants should include performance measures which enable the contracting Agency to hold the contractor/grantee accountable and assess the performance of their services and deliverables under the terms of the Statement of Work.

Contracts should include provisions, which link specific performance measures to the outputs, quality, and outcomes of the services provided. Contract payment should be expressly contingent upon State review, approval and acceptance of contract deliverables. In very specific language, the contract should detail how the contractor is accountable for the work or product. These specific performance measures provide objective standards for determining if the contractor has successfully completed the contractual obligations and if the delivered services or products meet such standards.

The contract's statement of work to be performed (Attachment A), as noted in Appendix II, must specify the time line for the deliverables, including interim steps, and measurable standards to be maintained during the contract performance period.

c. Retainage

The purpose of retainage is to ensure the State retains sufficient funds in the event a Contractor does not perform in accordance with the specific requirements in the contract. Retainage should be considered for all contracts. When retainage is utilized, the contract sets an amount of funds to be withheld from each payment to the contractor. The terms under which retainage is paid must be detailed in the contract. Retainage should generally be withheld at a minimum of 10% of the Contractor's invoice amount. The retainage language in the contract must specify any additional conditions and requirements that must be met prior to the release (payment) of the retainage, in whole or in part. Such conditions might include contract close-out, final State acceptance and the submission of a separate retainage invoice.

d. Liquidated Damages

The term "Liquidated Damages" refers to an amount of money the parties agree, at the time of contract formation, shall be payable by the contractor to the State as compensation for delay or failure to meet particular performance standards. Liquidated damages operate as an agreed-upon substitute for any actual damages suffered as a result of a breach, thereby enabling the parties to avoid litigation, and to continue performance under the contract.

An amount fixed as liquidated damages must reflect a reasonable approximation of probable damages resulting from a particular breach and shall not operate as a penalty to punish the contractor for late or substandard performance.

Liquidated damages are not appropriate for every contract. Agencies considering whether to include liquidated damages provisions in a contract shall consult with Agency counsel or the AGO.

6. Insurance Coverage Limits

Appropriate insurance coverage limits are required in a contract to protect the State's interests. Standard insurance coverage provisions are included in Attachment C and are deemed appropriate to cover most contractual situations. However, professional service contracts may require additional types of insurance such as professional liability or IT professional liability. Higher insurance limits may be required, such as when relatively dangerous or hazardous activities are contemplated. Conversely, reduced limits or decreases in coverage may be appropriate. Agencies shall consult with the Director of Risk Management for guidance and approval, when considering the appropriateness of insurance requirements. All changes to the standard insurance coverage limits in Attachment C require the prior approval of the Director of Risk Management. Such approval must be documented and retained in the Contract File along with a **current certificate of insurance**.

Special care should be paid to Workers' Compensation coverage for contracts with out-of-state Vendors. Vermont statute requires insurance carriers be specifically licensed to write Workers' Compensation coverage in Vermont. Out-of-state Vendors may have Workers' Compensation coverage valid in their home state, but their carrier may not be licensed to cover workers' compensation for work actually performed by their employees in Vermont. Agencies may verify whether an out-of-state Vendor's workers' compensation carrier listed on the certificate of insurance is licensed in Vermont on the Department of Financial Regulations website by clicking [[here](#)].



NOTE: Changes to insurance limits approved by the Director of Risk Management shall be documented in Attachment D, referencing the Attachment C Insurance section, to which the changes apply.



NOTE: Under no circumstances may the actual Attachment C document itself, be modified. When changes or modifications are necessary, agencies shall use Attachment D.



NOTE: In the case of out-of-state Vendors, the Vendor's workers' compensation insurance carrier must be licensed to write workers' compensation for all work that will be conducted within Vermont.

7. Intellectual Property Ownership

[3 V.S.A. §346](#) allows the State to grant permission to contractors the right to use or own intellectual property developed for the State, for the contractor's commercial purposes. Refer to the IT Guideline for additional information.

8. Change Order Process

Most changes to a Contract will require a Contract Amendment and must adhere to the Contract Amendments, Approval and Execution process required in this Bulletin (Page [47](#)). However, construction and IT implementation service providers typically utilize a formal change order process in order to implement minor scope changes without undue delay in a project. An Agency may choose to include a change order process in its construction and IT implementation contracts using the standard Change Order Process language from an approved template maintained by OPC. Any changes to the standard Change Order process will require Secretary and AGO approval, regardless of the contract amount. Change Orders may also be referred to as “task orders,” “change requests,” and the like. In all instances, the Change Order Process must include:

- Inclusion of the original contract number and a sequential Change Order number, and describe which parts of the contract are changed and which parts are added;
- State approval of all Change Orders, as per the applicable template;
- Execution by both the State and the Contractor; and

All Change Orders executed during the Contract term shall be consolidated into executable Contract Amendments any such time as an amendment would otherwise be required, pursuant to the Contract Amendments, Approval and Execution process required in this Bulletin (Page [47](#)). The executable Amendment will then be routed for the applicable Contract Amendment approvals as required by this Bulletin.

B. Obtaining a VISION Contract Number

Regardless of dollar amount, agencies must enter all contracts, including commodity contracts into the VISION system to obtain a contract number, record and track the contract (see [VISION Procedure #3](#)). In addition, [3 V.S.A. § 344 \(a\)](#) requires: *The Secretary of Administration shall maintain a database with information about contracts for services, including approved privatization contracts and approved personal services contracts; this database is maintained in the VISION system.*

Each VISION contract record shall include a representative “long description” accurately describing the contract subject matter; descriptions such as “Personal Services” or the name of the issuing department are not acceptable. For all contracts of \$10,000 or greater (or for lesser amounts if required by your Agency/department procedures) [Form AA-14](#) (Contract Summary and Certification Form) must be completed. It is the responsibility of the Agency to obtain any required signatures on Form AA-14 before approving the contract in the VISION finance system.

Prior to entering the contract into the VISION system, Agencies must verify all existing Vendor information in the VISION system is correct and a current (within 6 months) Form W-9 is on file. If the form W-9 is out of date and/or a new Vendor record must be established, refer to the [VISION Vendor set-up and Form W-9 FAQs](#).

[END SECTION IX]