

VI. ALTERNATIVES TO CONTRACTS FOR SERVICE AND SPECIAL AGREEMENT TYPES

If contracting for services is not appropriate, an Agency should consider using temporary employees, limited service employees or permanent employees to do the work. The State Department of Human Resources Personnel Policy and Procedure, [Section 5.0](#) establishes the following guidelines:

- Permanent classified or exempt positions shall only be authorized by the Legislature.
- Limited service positions may be authorized by the Joint Fiscal Committee in connection with a grant or by the Legislature itself.
- Temporary employees may only be hired with approval of the Commissioner of Human Resources in accordance with [3 V.S.A. § 331](#). Please consult with the Human Resources Representative for your Agency, to ensure hiring a temporary employee is in accordance with the statutory limitations.

A. Memorandum of Understanding or Memorandum of Agreement

A Memorandum of Understanding (MOU) or Memorandum of Agreement (MOA), is not a contract and is generally not enforceable. An MOU or an MOA **may only** be used between State agencies and units of the Executive, Legislative and Judicial branches of Vermont State government, as required by federal agencies, or with municipalities (for example: towns, cities, school districts, fire districts, county units, etc.), or political sub-divisions (such as regional planning commissions) of the State. An MOU or MOA permitted hereunder, does require approval by the Appointing Authority and review by the AGO or internal counsel. If an MOU is proposed and is intended to have the effect of a binding and enforceable contract, an Agency should be using a contract. Use of an MOU or MOA to circumvent this Bulletin is prohibited.

B. Grants versus Contracts

Contracts are normally used to acquire specific, clearly defined services and/or products from entities or individuals other than state agencies or employees of the State. This includes situations where the State is seeking a service or a product or is offered a service or product for which it will not pay and may even acquire revenues, for example, wireless internet access at State facilities.

Grants are commonly issued for the direct support of persons and are also issued to organizations that perform public benefit activities with a high degree of independence. Grantees often adhere to programmatic requirements of a state or federal program under which the grant is issued and may be required to submit financial and programmatic reports to the granting Agency.

A grant should only be used in the following circumstances:

- a.** The principal purpose is to support or stimulate an activity that benefits an individual (or group) rather than the Agency itself (or wards of the State) and there will be no substantial direct state oversight of the funded activity, other than providing guidance upon request, accumulating information on progress/results achieved, and periodic financial, programmatic and performance monitoring of the program or activity.

AND

b. When the grant contains Federal funds, it meets the definition of a subrecipient relationship as found in the Federal Uniform Guidance ([2 CFR Chapter I, Chapter II, Part 200](#) - *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*).


OR

c. Appropriated funds are characterized in the law or are designated in the grant agreement as “grants,” or designated by a grantor/funding organization as “grants.”

Federal Uniform Guidance identifies the characteristics below to distinguish between a grantee (other than individuals who are eligible for this assistance) and contractor relationships. These characteristics should be considered when determining whether to enter into a grant agreement or a contract for goods and services:

Examples - Grantee (Subrecipient)	Examples - Contractor
Determines who is eligible to receive what Federal assistance	Provides the goods and services within normal business operations
Has its performance measured in relation to whether objectives of a Federal program are met	Provides similar goods or services to many different purchasers
Has responsibility for programmatic decision making	Normally operates in a competitive environment
Is responsible for adherence to applicable Federal program requirements specified in the Federal award	Provides goods or services that are ancillary to the operation of the federal program
Uses the Federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity	Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons

All of the characteristics listed above may not be present in all cases. Agencies must evaluate the features of each agreement individually to determine whether it appears more like a contract or a subaward. Refer to the [Subrecipient/Contractor Determination tools and guidance](#) provided on Bulletin 5 for further information.

 **NOTE:** Use of a federally approved indirect cost rate, or the *de minimus* allowed indirect rate as per the Uniform Guidance, is **NOT** required for State contracts.

C. Capital Leases

No Agency, department or unit of State government is authorized to enter into a capital lease without the approval of the Secretary of Administration and the Treasurer. A contract shall be considered a capital lease if it meets *one or more* of the following four criteria: (1) the lease term is greater than 75% of the property’s estimated economic life; (2) the lease contains an option to purchase the property for less than fair market value; (3) ownership of the property is transferred to the lessee at the end of the lease term; (4) the present value of the lease payments equals or exceeds 90% of the fair market value of the property. Special accounting rules apply to

capital leases which requires their value to be included in the State's total debt. Refer to the Secretary's Directive Memo on [Capital vs. Operating Leases](#) for additional information.



NOTE: Accounting rules require the value of Capital Leases be included in the State's debt total. As such, they are subject to the annual debt limit set by the General Assembly. Use of a capital lease in order to avoid the requirements of either Bulletin 3.5 or Bulletin 5, is EXPRESSLY PROHIBITED.

[END SECTION VI]