

TECHNICAL ASSISTANCE – PERSONAL SERVICES CONTRACTS

Prepared by the Division of Human Resources in the Department of Personnel & Administration. Revised February 1, 2010.

GENERAL

Chapter 10 is structured to better define the appropriate analysis for entering into personal services contracts to effectively manage the labor needs of the state. Throughout this technical assistance best practices for personal services contracting (contracting) have been incorporated. Contracting for services involves more than just signing a contract. It requires developing sound business reasons for entering into personal services contracts and then effectively managing those contracts to ensure appropriate value is received.

Chapter 10 focuses on a more logical business approach to analyzing how labor needs should be carried out for the state. The analysis is a balance of determining the business needs while ensuring employees rights are not violated. Departments should keep in mind that the state constitution presumes a preference for ongoing labor needs to be performed within the state personnel system. It also contemplates the cost effective delivery of services to citizens. Chapter 10 contemplates a sound analysis for balancing these concerns. Through careful analysis, departments are responsible for determining if services ought to be performed in-house or through a personal services contract.

Individual departments and institutions of higher education (departments) are responsible for ensuring compliance with Part 5 of Title 24, Article 50 C.R.S., and Chapter 10 of the Director's Rules. DHR will continue to train HR professionals, and is available to consult on different complex contract issues, and audit to ensure compliance. This technical assistance mirrors the flow of Chapter 10. Only those rules that require further guidance are addressed in this document. Readers are strongly encouraged to examine this entire technical assistance to get a thorough understanding of personal services contract requirements. Once an understanding has been established, departments will then be in a better position to assess what level of detail is required for the analysis for a particular contract.

The personal services review function must be performed by a certified HR professional in a department who meets the requirements for carrying out the personal services review function. HR administrators are required to establish internal processes and procedures for the personal services review function and publish and communicate those policies.

Not all provisions or technical assistance related to Chapter 10 will apply to every contract. The nature of the contract and services to be provided will determine under what conditions a contract may or may not be approved and the appropriate level of detail in the analysis. The technical assistance, rules, and statutory requirements, must all be considered in the review and approval of personal services contracts. In addition, all procurements must comply with state fiscal and procurement rules and law.

Chapter 10 is divided into three major sections:

1. Determining the business case;
2. Evaluating the potential impact on state employees; and
3. Contract process and requirements.

BUSINESS CASE

All personal services contracts require a business case. The nature of the contract will determine the level of detail required in the analysis that establishes the business case. Contracting of functions or programs performed by state employees requires a more detailed analysis. In some cases, establishing the business case for these types of contracts could take a number of years. On the other hand, the business case for obtaining a leased worker to perform clerical services to fill a temporary vacancy and demonstrating it is more cost effective than hiring a state temporary employee should be comparatively simple. Similarly, contracting with a consultant to produce an expert opinion on a particular subject would require a less complex analysis. In all cases departments must consider the level of *accountability* required by state government, the *cost* for the service to be contracted, and the level of *quality* that will either be maintained or improved by contracting.

As part of best practices for contracting, departments should consider integrating the objectives, key questions, stakeholders, planning of the contracting process, and getting the right people involved as part of the business analysis and answer who, what, and why.

1. Define the objectives to be achieved through a personal services contract.

Departments should fully understand what they hope to gain by entering into a contracting agreement. In other words, reasons for entering into a contract should include both strategic and tactical considerations for the department and the state.

Contracting may be appropriate if the in-house performance of the service is high cost or the department lacks the competency in specific areas. Organizational needs may generate the need to contract. However, contracting should not be used as a substitute for dealing with poor performance, a costly or misunderstood function, layoffs, or lack of adequate staffing. The cost of the function and managing it effectively should be understood prior to considering contracting out the service. Otherwise, departments may not be contracting for the right reasons. Contracting just because it seems easier could be more costly in the long run and is inconsistent with applicable law.

Departments should evaluate the potential benefits and disadvantages to contracting. Benefits could include cost savings, increased satisfaction, greater efficiency and effectiveness, improved quality, or technological enhancements. Part of the analysis should include consideration of the department's strategic goals, if the function or service in question is mission-critical or part of the department's core function, and if the focus of existing staff can be redirected to more important tasks.

Potential disadvantages to contracting could include contracting for the wrong reasons and the potential contractor's inability to achieve the expected outcomes or critical services.

Once a department decides to contract a function, the overall merits or performance outcomes need to be evaluated at regular intervals. Strategic goals, technology, or innovations can change over time, which may effect whether contracting continues to be the appropriate avenue for delivering services. It may even change how the function or service is delivered, if at all.

2. Key questions to answer.

- What is the department's core business (mission critical)?
- What services are not integral to or close to those mission-critical services?
- What barriers exist?
- What is the impact?
- Can the service be fixed or improved internally before contracting out the function?
- What can a potential contractor better accomplish?
- What goals need to be achieved through contracting?
- What kind of vendor relationship is appropriate?
- How will employee issues and concerns be addressed and handled?

3. Consider the stakeholders.

Departments should consider the likely impact contracting will have on the department and other related organizations, i.e., customers, citizens, and employees. For example, a contract may require a change in how services are delivered to citizens. In addition, employees may need training, including such matters as contract management. The department must incorporate plans for addressing these issues in the business plan.

4. Plan the process.

Contracting involves many steps or phases. Departments should have a clear understanding of the internal and external review process requirements. Departments should identify and be sure those requirements are addressed prior to initiating the contract through the review process, i.e., purchasing, fiscal, and personal services. As part of best practices and where practical, departments should begin planning the contracting process a year in advance, from identifying requirements, preparing and distributing request for proposals (RFP), examining and evaluating proposals, negotiating contracts, and implementation. In addition, departments should have a systematic process for implementing contracts. The various phases or components of the contracting process could include the following.

- **Planning** – This phase establishes the scope, objectives, and feasibility for contracting. Here a department would establish the time frames, budget and identify resources.
- **Analysis** – This phase establishes a baseline for the service levels required and determines the contractor requirements. In addition, departments identify which functions will remain in-house and the relationship between the contractors, e.g., proper

interfaces between information systems. Here the proposal is developed and responses from contractors are analyzed and a vendor is chosen.

- **Negotiation** – This phase includes contract negotiations that identify contractor and contracting department’s obligations and responsibilities.
- **Implementation** – This phase includes transitioning in-house services to the contractor as well as planning the implementation of new services.
- **Operations** – This phase includes management of the contract and relationship with the contractor, and the maintenance and completion of the contract.
- **Termination** – This phase is the end of the contracting period where the decision is made to renegotiate or re-solicit the contract and the cycle begins again. Alternatively, a decision could be made to bring the function back inside the department.

5. **Get the right people involved at the right time.**

Early on in the process, departments should identify persons who will take a leadership role in the responsibility for performing the analysis and making decisions. Deciding which personnel to assign to the project depends upon the complexity and nature of the contract. For larger contracting initiatives top management must be included in the process. For smaller projects, mid-level managers may have more of the leadership role with top management support. In most cases, the team should be a mix of management, personnel with technical expertise, and representatives of those impacted by the contract, if applicable.

Accountability

In accordance with Rule 10-2 departments must include discussions in the business plan that addresses the accountability, cost, and quality elements. Performing a thoughtful analysis on accountability, quality, and cost, may result in a business case for contracting out the service function in question.

Accountability includes ensuring adequate safeguards are in place to protect against government authority being improperly delegated to a contractor. In general, state departments should not contract matters that are policy making in nature. The government is responsible to the citizens of the state for such matters and should retain control where the public health, welfare, peace and safety are concerned. For example, appointing authorities are directly responsible for managing state personnel system employees. This includes performance evaluations, position assignments, disciplinary and corrective actions, and the hiring and terminating of employees. Delegating these activities to a contractor would generally be considered an improper delegation of the state’s authority. Anything that may be perceived as making public policy, as opposed to implementing policy established by state officials and employees, should be avoided.

Accountability also includes having sufficient resources in-house to monitor, manage, and enforce a contract. In all cases, the contractor must be monitored in order to determine if the contractor is meeting the performance terms and conditions of the agreement. Some contracts will require more performance management than others. For example, a contract for a leased worker to perform clerical services requires less management effort than a contract to run bookstore operations.

Once a decision is made to contract, departments need to identify the individuals who will be given the responsibility for contract management and oversight. These individuals should be an integral part of the planning process. They will be responsible for managing the vendor relationship and enforcing the terms and conditions of the contract. To understand the issues, it is critical that they are involved in all aspects leading up to the final deal. This creates continuity in the vendor relationship and makes it easier to deal with contractor issues, e.g., contractor performance and future contract negotiations. The degree and level of contract monitoring will depend on the nature and complexity of the contract. Contract administrators should be monitoring the following service-quality elements. These elements are not all inclusive.

- Accuracy – whether the reports and results are correct.
- Reliability/availability - whether service is accessible (for example, uptime/downtime, abandon rates, outages).
- Completeness – whether activities are done in full (i.e., data entry, processing, and documentation).
- Efficiency – whether work is produced effectively with a minimum of waste, expense, or unnecessary effort.
- Response Rate – whether speed of reactions are quick enough (initiation, turnaround, resolution).
- Timeliness – whether deadlines are met.
- Satisfaction – whether users or customers are receiving what they need or expect.
- Cost – whether work is completed within cost allowances or limits.

When choosing an employee to monitor a contract, the department needs to consider these key factors.

- Does the individual have sufficient experience and knowledge of project management? This includes monitoring performance milestones, quality standards, and deadlines.
- Does the individual have the authority to enforce all contract terms and conditions? State employees monitoring contracts should ensure that state funds are not being expended for services that have not been rendered in accordance with contract terms and conditions.

Cost

Cost includes a comparison of the state's cost to the contract price, 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. Regardless of the type of contract, cost should always be considered before entering into a personal services contract. Costing for services will be more labor intensive depending upon the nature of the contract. For example, costing for a leased worker is relatively simple. The costing may only be a comparison of the cost to hire a temporary employee versus a leased worker. In some cases, it may be more cost beneficial to hire a temporary employee because of additional overhead costs that are included in a contract price for obtaining a leased worker.

On the other hand, contracting current internal custodial services should be a more extensive analysis depending on the extent to which the services are being contracted. For example, custodial services in the Capitol Complex area were performed in-house for a number of years;

however, due to a decrease in department resources, alternative methods for delivering the services needed to be identified. Because this is a permanent, ongoing labor need, the state must determine the most cost effective means for performing the service while ensuring quality. Items that need to be considered in comparing cost include, direct labor, indirect overhead cost, equipment and maintenance, continuing state oversight cost, and a comparison of the contribution to benefits. Quality must also be considered and is addressed later in this document.

Departments may utilize any costing process to help determine contractor cost, e.g., formal bid, and documented quotes, through the procurement process. Departments may use the current *Cost Comparison* form as a guide, which may be modified or departments may create their own forms. In addition, the following supporting documentation must be provided when submitting a personal services contract to human resource staff for review.

- Factual information, not unsupported conclusory statements, must be submitted for review, including a list of positions affected, how their duties will be impacted, future outlook for the program and supporting documentation that shows no employee will be adversely impacted by that contract. In addition to a comparison of state cost versus contractor cost, supporting documentation that demonstrates how departments arrived at in-house cost should be included, e.g., indirect overhead cost, labor cost, continuing state oversight cost.
- Documentation that verifies the contractor's contributions towards health insurance. This could include a document from the health plan provider that denotes the type of coverage the contractor carries and the levels of employer contributions, e.g., single employee, employee plus dependents, family.

When departments embark upon a decision to contract for services impacting vacant positions or departments have not historically hired FTE to perform the services, they must demonstrate that contracting the service is more cost beneficial under Rule 10-2 and meets one of the statutory grounds as permitted by C.R.S. 24-50-504. Unless one of the provisions in C.R.S. 24-50-504 applies, which by definition means there is no adverse impact upon the state personnel system, contracts for personal services are presumed to have an impact and must also satisfy all requirements in C.R.S. 24-50-503. Statutory requirements have been further clarified in the *Cost Comparison Instructions* and DHR has developed an electronic form that calculates cost electronically or there is a manual version for departments to utilize (see DHR's Web site for forms). In addition, Appendix A of the *Cost Comparison Instructions* has been developed for departments to include in the solicitation process. This document puts a potential contractor on notice that the award of a contract is contingent upon the state demonstrating cost savings not attributable solely to lower employer contributions to health insurance than those for state employees.

Quality

Quality includes the timeliness, functionality, durability, efficiency, contractor qualifications, flexibility, and any additional investments that yield greater effectiveness over the term of the contract.

Departments should include, as part of the solicitation process, submittal of third party references for consideration as part of the award evaluation process. In addition, the solicitation should include minimum qualifications for the contractor and its employees, and the experience of the potential contractor. The quality provided should be at least at the same level as the state provides or higher. For example, a potential contractor may be able to provide technology that the state is either not able to develop or is too costly an investment for the state, or the contractor's employees may provide experience and expertise that is not available within the state personnel system, or the state would have recruiting difficulties for those services. In addition, quality of services must be measured based on the contractor's performance against the terms and conditions of the contract. The contractor must be held accountable for the services through the contract management process.

There are instances where up front cost savings will not be realized. In other words, a department may have to make an initial investment in a product or service and the overall return on the investment will be realized over several years. An example is a department that needs to upgrade an outdated information technology system. In order for the department to upgrade the system on its own, a large investment would need to be made. The department cannot obtain the funds through the legislative process. However, the amount currently being expended for current services is around \$80,000 annually. A contractor has submitted a bid to upgrade the systems using the same amount of money currently being expended. In addition, the contractor has offered to provide further enhancements at no additional cost that will significantly improve the system. While the upfront cost is the same, over time, old systems will be replaced with new technology and those additional enhancements will allow greater efficiency and service delivery thereby saving the state money in the long run.

EVALUATING POTENTIAL IMPACT ON EMPLOYEES

Once the requirements of the business case are satisfied, departments must evaluate the potential impact on the state personnel system. The provisions in statute and in Chapter 10 that are used to approve a personal services contract will depend on the nature of the contract. Departments must first look to statute to see if there is an approval basis for the contract as outlined in C.R.S 24-50-503 and 24-50-504. Once departments have established there is an approvable basis or exception, Chapter 10 should be consulted for further guidance. The rules were designed to fill statutory gaps and not repeat statute.

Temporary, Occasional, or Urgent

Contracts that do not implicate the state personnel system are those for labor demands that may be temporary, occasional or urgent in nature. One initial question that departments should consider is whether the labor need is permanent and ongoing. If it is permanent and ongoing, the labor need may not fit the definition of temporary or occasional.

Temporary means a contract that meets a need for a specific task or result for a finite period of time. These types of contracts must have a definite ending date. There is no established standard length of time for temporary contracts. However, contracts for leased workers during the hiring process for a permanent position should not be longer than six-months. On the other hand, if a finite project requiring special programming and testing is scheduled to take a

minimum of two years to complete, and once the project is complete the services will no longer be needed, this could be deemed temporary. Further guidance on independent contractors, can be obtained on the DHR Web site.

Occasional means the service is seasonal, irregular, or fluctuating in nature. For example, the Department of Revenue requires assistance from leased workers during tax season. Once tax season is over, the need will no longer exist until the next year. Assuming the business case has been satisfied, the services can be contracted.

Urgent means a contract that meets a compelling need for immediate action to protect the health, welfare, or safety of people or property, or to meet an externally imposed deadline beyond the department's control. For example, a department is responsible for administering a federally funded indigent healthcare program that requires tracking of recipient's eligibility and payments made. Due to changes in federal auditing requirements, the management information system was unable to meet strict payment deadlines. Under court order to remedy the late payments, the state was required to fix the problem within a very short period of time.

In order to do so, the department had to hire over 150 leased workers to assist the state with getting in compliance with the court order. In this situation, the department must take immediate action to protect the welfare of state recipients. In addition, the department had an externally imposed deadline to meet (court order) beyond the department's control.

In another example, a roof collapses at one of the state's correctional facilities. Not only does the building have extensive damage, but also the interior of the building is exposed to outside elements. Inmates housed within the facility need to be relocated for obvious reasons. There is an immediate or compelling need for the department to take action to protect the safety of the public and its inmates, and to get the facility secured as quickly as possible.

Ensuring No Impact to Employees

Departments must be mindful of how contracting affects employee job duties. PDQs may need revision and employees need to be afforded every opportunity to succeed. For example, employees may acquire new duties and need training in contract administration. Where possible, employees should be included in these discussions from the beginning to alleviate concerns and confusion. Impacts to employees must be addressed and plans to mitigate those issues must be implemented prior to contract execution. Department personnel must work with their human resource office to ensure compliance with these requirements.

Sharing Services

For contracts that involve the purchase of equipment, materials, facilities, or maintenance and operations support services, departments must determine if the demand for services warrant the hiring of state personnel system employees and investing in the equipment required to carry out the service. For example, if janitorial services are needed at a remote office within the Division of Wildlife (DOW) in Fort Collins and Colorado State University (CSU) employs maintenance workers, DOW would need to establish first if the demand for the service justifies hiring state personnel system employees and consider the investment required for purchasing equipment needed to carry out the function. If the answer is no, then DOW should determine the feasibility

of partnering with CSU to share the service. Cost is a consideration in this analysis. Departments may be able to demonstrate it is more cost effective to contract the function versus sharing the resources or state personnel system employees. The analysis and costing must be documented.

CONTRACT PROCESS AND REQUIREMENTS

Departments must insure compliance with all personal services review requirements. This includes developing plans that identify how the internal review process will be conducted and having processes in place to ensure compliance with statutory requirements and the Director's Rules.

Departments must have at least one HR professional with a certificate in the Personal Services Contracts modules of the Personnel Certificate Program to conduct personal services reviews. The review includes all contracts, purchase orders, and solicitations, except for intergovernmental agreements (e.g., local governments, foreign or sovereign governments) and attorney services. An HR professional must ensure completion of all personal services documents, such as certification forms and pre-approvals. In addition, HR professionals must ensure that all supporting documentation is included with each request, e.g., cost comparison and related supporting documentation and business plans.

Waiver of Personal Services Review

HR administrators may issue internal personal services review waivers, in accordance with C.R.S. 24-50-511, for services provided that a detailed analysis is conducted that demonstrates his or her knowledge of the department's contracting activity. Departments must document this process and any personal services review waiver issued internally must be submitted to DHR for review prior to execution.

When considering what types of services can be waived, HR administrators need to use the same guidelines that were used for waivers prior to July 1, 2005. These guidelines are stated below.

HR Administrators should evaluate the recurring nature of the service such as maintenance or services agreements (includes software and equipment); contract modifications including option letters, renewal letters, contract amendments, task orders (provided master contract was reviewed); temporary services for any type of leave; conference accommodations (could include hotel accommodations and catering), purchased services (those services that have a direct benefit to individual groups or the public at large), design and construction services, and trash removal services. Listing specific dollar amounts or the number of vendors used for each contract category is optional.

Departments should keep in mind that review waivers granted by HR administrators are not blanket waivers and human resource offices should establish a review schedule to ensure their department complies with the established waiver conditions. HR administrators should also consider limiting the life span of the review waiver, e.g., one to three years maximum. Limiting the life span of the waiver will provide HR administrators' opportunities to determine if certain services still warrant waiver status.

HR administrators shall not waive review for any contract that implicates the state personnel system. This includes services where FTE are not allocated but the service exists in the state's job evaluation system, i.e., custodial services, highway maintenance, food service management. See Appendix A for sample general waiver conditions, waiver language, and special department instructions. Waivers should contain specific language that outlines the conditions or reasons for utilizing outside contractors and the application of the department's review waiver.

Most personal services contracts require review by the human resource offices. Contracts include any amendments but do not include acquisitions where a commitment voucher (e.g., state contract, purchase order) is not required by state fiscal rule. For contracts under \$5000 in aggregate over a 12-month period, personal services review is not required. Departments may not artificially divide commitments in order to avoid personal services review. All personal services contracts must create an independent contractor relationship and not an employment relationship. See technical assistance *Independent Contractors* for information on independent contractors.

An analysis should be performed at the time of purchase to determine if a particular service is a one-time need and under the \$5000 limit. If the service has to be obtained again during the year and exceeds the \$5000 limit, this would not be considered a violation of the rule; however the contract needs to be reviewed. Program requirements change and departments do not always know all long-term program needs. The test is whether the requirement (in terms of scope, price, and time of delivery) is reasonably defined at the time of the initial purchase. If a pattern of this nature is established within a department without personal services review, further analysis and evaluation will need to be conducted.

Required Forms & Reporting

The *Certification for Personal Services Agreements* form must accompany all personal services requests for review unless the HR administrator has previously waived review through a personal services review waiver. Departments may not alter the certification form. The certification form is an official state document and HR professionals are certifying the accuracy and completeness of the information provided to justify the contracting and that the contractor is in fact an independent contractor. If the review has been waived internally, the waiver document must accompany the request particularly when routing contracts through the central review process. In addition, all prior approvals, e.g., permission to use outside vendor for printing services, must accompany a personal services request. A list of services is in the *Prior Approval Checklist*, Appendix B. Some prior approvals can be obtained online.

It is strongly recommended that solicitations for services be reviewed by a department's human resource office prior to the solicitation being published on BIDS. The pre-approval process provides departments adequate time to address and mitigate any potential problems or impacts on the state personnel system prior to the award of the contract. HR administrators may issue pre-approvals utilizing sample language provided by DHR, see Appendix C. The prior approval requirements should be included in the internal personal services review process and procedures.

When contracts are routed through the central review process, HR professionals will need to sign their names and enter their titles on the CLI2 screen print document on the personal services line, e.g., Mary Doe, HR Specialist. The processing of an agreement **may be delayed or rejected** if it is submitted **without** this CLIN notation. DHR will maintain a list of certified HR professionals in the contract review process that will be forwarded to the State Controller's Office.

For record keeping purposes departments may include a copy of the signed *Certification for Personal Services Agreement* form with the routed contract; **this is not a requirement**. However, departments will **need to retain** copies of all supporting documentation, including the certification form, for personal services contracts in some manner. DHR will continue to audit and monitor department compliance with statute and rule.

Contract Provisions

All commitment vouchers issued must comply with State Fiscal Rules, State Procurement Rules, and the Capital Construction Accounting Guidelines. All statutes governing capital construction and all policies issued by the State Controller's Office and State Purchasing concerning the use of purchase orders and contracts must be followed. In addition, all personal services agreements must contain the mandatory *Independent Contractor Clause* specified in Rule 10-4 (E)(4). All personal services contracts entered into on behalf of the state must create an independent contractor relationship, not an employment relationship. See technical assistance *Independent Contractors* on the DHR Web site for more information.

In addition to the contract provisions required by statute, Rule 10-4 (E) requires further contract provisions within all state contracts addressing the five areas discussed below. Refer to the state's contract manual for sample contract provisions. The manual can be obtained through the State Controller's Web site at <http://www.colorado.gov/dpa/dfp/sco/index.htm>.

10-4(E)(1) - Provisions addressing the consequences and potential mitigation of improper or failed performance by the contractor.

The contract must address consequences to the contractor for improper or failed performance. For example, if the contractor improperly programs network services that cause major outages resulting in recipients not receiving tax refunds in a timely manner, the contractor may be sanctioned. Timeframes for correcting the problem should be specified including what constitutes a breach of the contract. In addition, clauses should be included that mitigate a default situation.

10-4(E)(2) - Clearly defined measurements of performance outcomes.

Performance outcomes and service levels are key to sound contracts. These outcomes provide the department and the contractor with meaningful information on how performance will be measured and determine base fees, costs, remedies, and performance incentives. The following are examples of subjective and objective performance outcomes. These are not all inclusive.

1. Subjective
 - a. Use of reasonable efforts in providing services;
 - b. Use of best efforts in providing the services; and,

- c. Performance of the services in a professional and workmanlike manner or in accordance with industry standards.
2. Objective
- a. Conformance to specifications;
 - b. Conformance to baseline operational performance metrics;
 - c. Conformance to service levels previously attained by the department or third party provider (if available) for the same services; and,
 - d. Conformance to benchmarked operational standards and service levels (if available).

Milestones at which progress toward a result is demonstrated, with progress payments tied in, are one effective method of ensuring proper performance. Withholding 10% of payment until satisfactory completion is another tool. There are several contractual elements that could be written into a contract.

- Clearly stated and well-defined project objectives or targets and billing procedures.
- A detailed description of the project infrastructure, costs, performance measurements, and service levels to be provided.
- The construction of an objective “scorecard”.
- Performance incentives to encourage continuous project improvements
- Internal and external benchmarking.
- The flexibility to change the scope of the project and regularly review the relationship to reflect new business conditions and objectives.

10-4(E)(3) - Sanctions for untimely or poor performance.

Contract provisions should include remedies in the event the contractor fails to meet certain service levels. In addition, the provisions should specify if one or more of the remedies are exclusive of other remedies. Remedies may include:

- Service level credits;
- Liquidated damages;
- Correction of the failure (timelines);
- Refund or credit; and
- Characterization of the failure as a material breach, giving rise to a claim for damages or the right to terminate the agreement.

10-4(E)(5) - Provisions concerning the orderly transition of functions between the department and the contractor during implementation or following termination of the contract, if applicable.

Where continuity is important or essential, contracts should outline timeframes for turning over a service function to contractors upon contract execution. This includes who maintains control over data, materials, equipment, and facilities. For example, will the state retain ownership of the facilities and any fixtures but the contractor is responsible for the up-keep and maintenance? Will the contractor or department be responsible for investing in improvements for the facilities?

Additionally, where appropriate, the contract needs to address how service functions will be transitioned, either back to the state department or turned over to a new contractor. This is

especially critical when it comes to addressing what happens when there is a breach of the contract.

FREQUENTLY ASKED QUESTIONS

- Q1. What services are exempted from personal services review?
- A1. Colorado Constitution exempts intergovernmental agreements, attorneys, and the judicial branch from personal services review. Government agreements include cities, counties, sovereign and foreign governments, public schools, and those positions exempted from the state personnel system, e.g., professors and officers of higher education.
- Q2. What are purchased services?
- A2. Purchased services for personal services contracts are defined as services purchased for the direct benefit for individuals or groups in the public at large. Services purchased for persons in the physical or legal custody of the state do not meet the definition of “purchased services”. This includes inmates and persons in state mental health institutions.
- Q3. How do I determine if I have a lease or purchase of property (i.e., a “service agreement”) under C.R.S. 24-50-504(2)(d) or a true personal services contract not meeting the statutory provision?
- A3. The question to ask is what is the predominate purpose of the contract, to acquire services or lease or purchase real property? If the answer is to lease or purchase property this is predominantly acquisition of that property and the associated services are incidental. If this is the case, the arrangement is called a “service agreement” and is permissible under the statutory provision. However, if the predominate purpose is to obtain skills, creativity, or judgment, the contract is one for personal services and C.R.S. 24-50-504(2)(d) would not apply.
- Q4. What if the contract is for maintenance of property after expiration of the original service agreement involving acquisition of the property?
- A4. Departments need to treat this as any other personal services contract and determine the business case and the statutory authority for the contract other than “service agreements” under 24-50-504(2)(d). Departments should consider these long-term implications when acquiring the property in the first instance and assess whether the associated services might ultimately be performed by state personnel system employees more cost-effectively, either through existing skills and experience or through training provided by the vendor during the term of the initial service agreement award.
- Q5. Does the \$5000 limitation apply to each transaction or an aggregate of services with any vendor?

- A5. The total aggregate for any given service determines whether personal services review is required. Departments must establish at the time of purchase whether or not the service will exceed \$5000 within a fiscal year. If the services can reasonably be defined (in terms of scope, price and time of performance) at the time of the order, and the total exceeds \$5000, then that commitment voucher will need to be submitted to the department's HR for review.

Example 1: Department A decides it needs to purchase janitorial services for the month of January and this need will continue through June. The cost for the six months totals \$4999.99. This requirement is reasonably defined at the beginning of the performance period and because the dollar amount does not exceed the \$5000, a request does not need to be submitted for review.

Example 2: Department B decides it needs to hire a temporary for the month of July to cover an employee's absence and the transaction is less than \$5000. The department believes that by the end of July the state employee will return and the need for temporary services will not continue. In the month of August the state employee cannot return and the need for the temporary continues. The dollar threshold of \$5000 will be exceeded; this requires review.

Example 3: A division in Department C decides it needs consulting services with a vendor for four months at a cost of \$4,000. Another division within Department C needs consulting services on a different program for three months later in the fiscal year for \$3,000. The deliverables are different. In this case, the services are different and no review would be required.

- Q6. Can a commitment be split to avoid personal services review, e.g., purchase order for \$6000?
- A6. No. If at the time of purchase a department knows the service will exceed \$5000 and a program waiver is not currently in place, the department must submit the commitment for personal services review. The program uses the guidance provided by the State Purchasing Office and State Controller's Office in defining when a requirement has been split.
- Q7. Do zero-dollar contracts fall within the \$5000 limitation of review?
- A7. No. While zero-dollar contracts may be revenue generating or may have no fiscal impact, the services that are being obtained may have an impact on the state personnel system. Example: collection services, estate recovery services, etc. Personal Services review is required on these contracts.
- Q8. If a department is obtaining services listed on the *Prior-Approval Checklist* and the services are under \$5000, must the department obtain a pre-approval waiver from the program that provides the service, e.g., Central Services, Juniper Valley, DHR's training program?

- A8. Yes. Even though this falls under the \$5000 threshold, departments still need to obtain prior approval from the program before entering into an agreement. Documentation must be kept on file. These state programs have first right of refusal on services regardless of the personal services dollar threshold.
- Q9. What happens if it is determined the cost is higher by contracting the services but FTE are not available to perform the function?
- A9. The contracting department must consider two issues. One, is the reason for contracting the service to reduce cost, improve services, quality or expertise? Two, is the additional investment yielding greater effectiveness over the term of the contract? In other words, by contracting out the services will there be additional benefits to the state, e.g., gains in technology and process improvements. If the answer to these questions is yes, there is no impact on current personnel system employees and the department has demonstrated a clear business case in support of the investment, the department may enter into the contract. On the other hand, if the department cannot demonstrate a clear business case that supports the contracting of the service, the department will need to petition for the FTE. Remember, the state constitution presumes a preference for permanent labor needs to be performed by state personnel system employees. In addition, if there is an impact on a current state personnel system employee, which cannot be mitigated, under no circumstances may the department enter into the contract.
- Q10. Can a temporary employee subsequently be retained within the same department as a leased worker performing a service completely unrelated to the temporary employment?
- A10. No. However, the individual may be retained as a leased worker by a different department performing the same or different function. Retaining a former temporary employee as a leased worker within the same department, performing the same or different function, potentially creates an employment relationship and puts the state at risk for legal liability. The reverse would also be true. Departments cannot hire a leased worker and then subsequently retain the same leased worker as a six-month temporary employee performing the same or different work.
- Q11. What needs to be included in the plan that provides a resolution if a contractor fails to perform?
- A11. Departments need to answer the following questions and include them as part of the transition plan.
- If the contractor fails in its performance, how would the service carry on in the absence of that contractor?
 - Would the contract be awarded to the next responsible bidder? Would the service be transitioned in-house?
 - Would the service no longer be performed by the department either through a personal services contract or by state personnel system employees?

Every attempt is made to keep this information updated. For additional information, refer to the *State Personnel Board Rules and Director's Administrative Procedures* (rules) or contact your department human resources office. Subsequent revisions to rule or law could cause conflicts in this information. In such a situation, the law and rule are the official source upon which to base a ruling or interpretation. This document is a guide, not a contract or legal advice.

Appendix A

Sample Waiver Agreement **General Waiver Conditions:**

1. Personal services agreements that directly impact the states personnel system must be forwarded to the _____(fill-in) for review and approval. If you are not sure of the impact on the state's workforce, please complete the Certification for Personal Services Agreements form; attach a scope of work, and forward to _____ (fill-in) for review.

Agreements that fall under \$5000.00 in aggregate and do not require an encumbrance document as outlined in State Fiscal Rule, are exempt from personal services review. If agreements exceed \$5000.00 in aggregate and fall outside the conditions set forth in this waiver, forward to _____(fill-in) for review and approval.

2. **For Printing/Artwork/Graphic Design/Copying/Microfilm/Imaging & Mail Services:** This waiver is limited to the basis that state staff is unable to perform the service needed. In addition, if services are contracted with a company in the four county Denver Metro areas, the Division of Central Services within the Department of Personnel & Administration (DPA) must be contacted to determine if the service can be provided in-house. If Central Services or state staff cannot provide the service(s), a waiver letter will need to be obtained and placed in the department files.
3. **Telecommunications Services:** These services are not available within the state system and are acquired from outside vendors; however, these services should have the approval from the Telecommunications Division within DPA.
4. **Training and Facilitation Services:** The training program within Division of Human Resources (DHR) in DPA should be requested to perform training and facilitation services for state employees. DHR's training program must be contacted to determine if the training can be performed in-house. If the training program is unable to provide the requested services, a waiver letter will need to be obtained and placed in department files.
5. **Temporary Services:** Waiver of successive approval is granted for any type of leave. The use of temporary services cannot be used in place of filling permanent positions. Job vacancies should be filled as soon as possible (within six months of termination). The use of temporary services for "special projects" and work overflow is permissible, but requires personal services review and approval. Any request for temporary services other than leave, must be forwarded to _____(fill-in) for review and approval.
6. **Contract Amendments and/or Modifications:** This waiver applies to all contract amendments, except for "no cost" contracts and amendments where there are modifications to the original contract, i.e. scope of work. Amendments that meet this criterion shall be sent to _____(fill-in) for review and approval.
7. Please refer to the *Prior Approval Checklist* for an additional list of services that require prior approval.
8. Also see *Important Agency Instructions*.

Appendix A

**Sample
Waiver Agreement
Waived Services:**

A1 - Professional/Technical Category

Type of Service

- 1. Printing and Copy Services - See waiver condition #2**
(fill-in)

- 2. Consultant Services**
(fill-in)

- 3. Performing and Visual Arts Theatre Assistants, Judges, and Stage Managers**
(fill-in)

- 4. A/V Services; Photography**
(fill-in)

- 5. Software Maintenance**
(fill-in)

Type of Service - A1 Professional/Technical	Number of Vendors	Dollar Value of Services
Graphics/Printing	12	\$ 85,103.28
Consultant Services	29	\$137,574.54
Performing & Visual Arts Theatre Assistants, Judges, Stage Managers	5	\$ 10,000.00
AV Services; Photography	6	\$ 11,650.00
Software Maintenance	8	\$ 15,002.00
Total	60	\$259,329.82

The approvable basis is Section 24-50-504(2)(c),(e),(h), and 504(3).

A2 - Non-Professional/Support Category

Type of Service

- 1. Exterminating Services**
(fill-in)

- 2. Trash and Recycling Services**
(fill-in)

- 3. Moving Services, Cleaning, Vent Cleaning, Laundry Services and Plant Care**
(fill-in)

4. **Print Promotional Materials**
(fill-in)
5. **Student Recruitment Activities**
(fill-in)
6. **Sign Making, Seamstress – See *Prior Approval Checklist***
(fill-in)
7. **Emergency Sewer Jet and Grease Trap Cleaning**
(fill-in)
8. **Security**
(fill-in)
9. **Safety Inspection**
(fill-in)
10. **Telephone Answering Services and On-Line Subscription services**
(fill-in)
11. **Advertising Services**
(fill-in)

Type of Service - A2 Non-Professional/Support	Number of Vendors	Dollar Value of Services
Exterminating Services	2	\$ 10,000.00
Trash & Recycling Services	3	\$ 2,942.85
Moving, Cleaning, Laundry & Plant Care	13	\$ 20,980.00
Print Promotional Materials	2	\$ 1,200.00
Department Fair Attendee, Student Recruitment, Tour Guide	5	\$ 10,000.00
Sign Making, Seamstress	5	\$ 3,750.56
Emergency Sewer Jet & Grease Trap Cleaning	2	\$ 10,000.00
Security	2	\$ 10,000.00
Safety Inspection	2	\$ 10,000.00
Telephone Answering Services	18	\$ 10,242.94
Advertising Services	10	\$ 50,000.00
Total	117	\$139,116.35

The approvable basis is Section 24-50-504(2)(c, e, h).

A3 - Purchased Services

Type of Service

- 1. Medical Services**
(fill-in)
- 2. Official, Referee, School Event Worker**
(fill-in)
- 3. Performers**
(fill-in)
- 4. Guest Lecturer/Instructors**
(fill-in)
- 5. Translation Services, Transcription, Test Scoring**
(fill-in)
- 6. Day Care**
(fill-in)

Type of Service – A3 Purchased Services	Number of Vendors	Dollar Value of Services
Medical Services	2	\$ 5,000.00
Official, Referee, School Event Worker	1	\$ 230.00
Performers	1	\$ 2,142.00
Guest Lecturer, Instructor	67	\$ 21,935.25
Translation, Transcription, Test Scoring Services	55	\$ 107,538.41
Day Care	15	\$ 30,000.00
Total	141	\$ 166,845.66

The approvable basis is Section 24-50-504(3).

A5-Equipment Maintenance/Repair

Type of Service

- 1. Heating, Air-Conditioning and Electrical**
(fill -in)
- 2. Equipment Maintenance and Repair**
(fill-in)
- 3. Copier and Office Machine Maintenance**
(fill-in)

Type of Service - A5 Equipment/ Maintenance & Repair	Number of Vendors	Dollar Value of Services
Heating & Air-Conditioning	14	\$14,408.10
Equipment Maintenance & Repair	18	\$32,495.16
Copier & Office Machine Maintenance	11	\$20,000.00
Total	43	\$66,903.26

The approvable basis is Section 24-50-504(2)(d).

Appendix A

Sample

Waiver Agreement

Additional Department Instructions:

IMPORTANT AGENCY INSTRUCTIONS (please read carefully):

This waiver of successive approval is limited to the above listed services, number of vendors and dollar amounts (optional) associated with each category, as well as other waiver conditions. If this waiver does not cover a particular service(s), individual agreements must be submitted for review and approval along with the *Certification for Personal Services Agreements* form to _____(fill-in). This waiver is valid for these agreements, as long as, the acquisition of these services does not cause the separation of state personnel system staff.

As necessary, please attach a copy of this document to each of the above listed agreements when routed to other external approvers (Division of Purchasing/State Buildings, Attorney General's Office, State Controller's Office). All personal services contract activity will be reported through the state's Financial Data Warehouse for the Personal Services Annual Report in accordance with C.R.S. 24-50-510. In addition, all personal services agreements must contain the mandatory **independent contractor clause** as instructed in Rule 10-4(E)(4).

All commitment vouchers issued under this waiver must comply with State Fiscal Rules, State Procurement Rules and the Capital Construction Accounting Guidelines. Furthermore, all statutes governing Capital Construction and all policies issued by the State Controller's Office and State Division of Purchasing concerning the use of purchase orders and contracts must be followed.

Periodically, _____(fill in) will conduct reviews to ensure compliance with this waiver. Employees are expected to comply with all conditions of this waiver and any other personal services contract requirements. Furthermore, _____(fill in) reserves the right to revoke this waiver of successive approval for failure to adhere to all conditions and requirements of this waiver.

Appendix B

Prior Approval Checklist Department of Personnel & Administration Division of Human Resources

This checklist is a guide for all human resource and contract administrators, fiscal officers, purchasing agents, and other state employees who are responsible for acquiring services, commodities (goods), and real estate on behalf of the state. Prior to purchasing **any** service, the appropriate state department (including your own) needs to be contacted to determine if it can provide the service for your department. If your needs cannot be met, your department will be granted permission to contract out the services. Your department is responsible for requesting a **current waiver letter** and placing it in your files. It may not be necessary to obtain a waiver letter for commodities or real estate; however, when your department receives approval to procure commodities and real estate, you will be instructed on other requirements. Some agreements may require multiple prior approvals.

[To obtain waivers for any Division of Central Services products, please click here.](#)

FOR	REGION	TYPE OF SERVICE	APPROVAL REQUIRED FROM
Services	Statewide	All Personal Services Contracts require review	DPA, Division of Human Resources –contact Kirsten Jahn-Elfton at (303) 866-4231 or Joi Simpson at (303) 866-5496
Services	Statewide	Collection Services	DPA, Division of Finance and Procurement – contact Greg.Mechem@state.co.us or (303) 866-6540
Services	Statewide	Data Entry Services	DPA, Division of Central Services – contact Cindy.Nardini@state.co.us or (719) 545-5294
Services	Denver Metro	Graphic Design Services	DPA, Division of Central Services – contact IDS Customer Service Rep at (303) 866-4100
Services	Denver Metro	Imaging, Microfilm & Microfiche	DPA, Division of Central Services – contact IDS Customer Service Rep at (303) 866-4100
Services	Denver Metro	Mail	DPA, Division of Central Services – contact IDS Customer Service Rep. at (303) 866-4100
Services	Statewide	Training Services	DPA, Division of Human Resources, Training Program – contact Jerry Wittmer@state.co.us or (303) 866-4265
Services	Denver Metro	Printing & Photocopying Services	DPA, Division of Central Services – contact IDS Customer Service Rep at (303) 866-4100
Services	Statewide	Legal Services	Department of Law – contact Alan Gilbert at (303) 866-3052
Services	Statewide	Moving Services, Flags & Signs	Department of Corrections, Colorado Correctional Industries, (303) 321-2200 or www.coloradoci.com
Services	Statewide	IT Resources - as	Governor’s Office of Information Technology (OIT) –

		defined in 24-37.5-102 et seq.CRS	contact Judy Giovanni at http://www.colorado.gov/dpa/forms/OIT/OITexp10K.htm
Goods	Statewide	IT Resources - as defined in 24-37.5-102 et seq.CRS	Governor's Office of Information Technology (OIT) – contact Judy Giovanni at http://www.colorado.gov/dpa/forms/OIT/OITexp10K.htm
Goods	Statewide	Office Furniture	Department of Corrections, Colorado Correctional Industries, (303) 321-2200 or www.coloradoci.com
Goods	Denver Metro	Photocopiers	DPA, Division of Central Services – contact IDS Customer Service Rep (303) 866-4100
Goods	Statewide	Vehicles (Passenger & Freight) - ¾ ton and under - 1 ton vans	DPA, Division of Central Services, (Fleet Mgt) – contact Ron.Clatterbuck@state.co.us or (303) 866-5482
Real Estate	Statewide	Leasing, purchasing, selling, rights-of-way and easements (for state owned and leased facilities)	DPA, Real Estate Programs –contact (303) 866-4759 or www.colorado.gov/dpa/dfp/sbrep
Construction	Statewide	Capital Construction & Controlled Maintenance	DPA, State Buildings -contact (303) 866-6141 or www.colorado.gov/dpa/dfp/sbrep

DPA = Department of Personnel & Administration

Updated: 02/01/10

APPENDIX C

SAMPLE PRE-APPROVAL LETTER

Date

Name
Title
Address

Re: Pre-approval request

Dear _____:

You have requested pre-approval for title of service (Solicitation #). The services include general service statement. Contracting for these services will not cause the separation or displacement of present state personnel system staff. Name of your department certifies that all personal services contracts will include **mandatory independent contractor language**.

This pre-approval is granted on the basis of facts provided in the documentation submitted with the review request and pursuant to the provisions of C.R.S. 24-50-504 (fill-in). This pre-approval is valid through _____, provided the final contract and subsequent amendments and/or modifications comply with the original terms of the solicitation.

After the agreement(s) are prepared with the provider of these services for this year, **include a copy of this letter** with the agreement when routed to the statewide contract approvers (Division of Purchasing, Attorney General’s Office, and State Controller’s Office). Also insert the notation, **“Pre-approved by HR”**, in the appropriate space on the CLI2 screen print document. The processing of your agreement **may be delayed or rejected** if it is submitted **without** this pre-approval letter and the CLIN notation.

Sincerely,

Appendix D
Personal Services Checklist (Chapter 10)

1. Has the business case been satisfied? All must be checked.
 - Adequate safeguards are in place to ensure that government authority is not improperly delegated.
 - The function does not involve direct daily control over state employees. The more direct daily control required by the state, the less likely leased or contract workers could be deemed independent contractors.
 - The service can be provided through alternative means if the contractor fails to perform.
 - Sufficient resources have been identified to ensure proper monitoring and enforcement of the performance of the contract.
 - A cost analysis has been performed to demonstrate cost savings to the state.

2. Has the personal services contract been reviewed to evaluate the impact to state personnel system staff? Check those that apply.
 - The services are incidental to the lease or purchase of real property.
 - An analysis has been performed to determine if services in a particular geographical area can be shared between programs or departments.
 - The services are temporary for a finite period of time.
 - The services are seasonal, irregular, or fluctuating in nature.
 - The services are urgent and needed to protect the health, welfare, or safety of people or property.

3. Have the requirements for contract provisions been satisfied as required in Rules 10-4(E)? Check those that apply.
 - Provisions for consequences and potential mitigation of improper or failed performance are included.
 - Clearly defined measures of performance are included in the contract provisions.
 - Sanctions for untimely performance are included in the contract provisions.
 - State Controller's Special Provisions are included to satisfy the requirements of the independent contractor clause.
 - If appropriate, provisions concerning the orderly transition of functions to the contractor during implementation and following termination are included in the contract provisions.
 - The contracting relationship does not create an employment relationship.
 - The proposed contractor has not performed for the department as a leased worker, sole proprietor, or state temporary employee within the past six-months and the requirements of Rule 10-3 (E) have been met.

4. Has all supporting documentation been provided for review? All must be checked.
- _____ Business case analysis.
_____ The ***Certification for Personal Services Agreements*** form has been completed by program staff and reviewed and approved by an HR professional with proper certification.
 - _____ Cost Comparison – or some medium - that provides costing information.
_____ Supporting documentation that addresses contractor’s quality of services (e.g., third party references, contractor’s response to solicitation, resumes of proposed contractors who will perform the work). Contractor’s quality must be equal or better than the state’s service delivery.
 - _____ Permission to contract out the services has been obtained. (See ***Prior Approval Checklist.***)

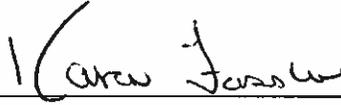
**TECHNICAL ASSISTANCE
DHR APPROVAL FOR PUBLICATION**

This signature page is required for new technical assistance or when major policy revisions are made resulting from changes in law, rule, directives, or official interpretation. As of March 1, 2009, new signatures are not required for non-substantive revisions resulting from correction of errors (e.g., typographical or grammatical), or updating factual information (e.g., minimum wage, statute or rule cites) or illustrative samples. Readers should always check the date on the first page to ensure they are using the most current version.

Technical Guide Topic: Personal Services Contracts

Effective Date of Revisions: February 1, 2010

Date of Superseded Version: August 8, 2008

Section Manager:  Date: 1/29/10

Acting Division Director:  Date: 2/1/2010