

STATE OF COLORADO FISCAL RULES

CHAPTER 3: CONTRACTS

FISCAL RULE

NUMBER

State Contracts

3-1

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1 AUTHORITIES

Article V, Section 33, Constitution of Colorado - Disbursement of public money

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Article XII, Section 13 (2), Constitution of Colorado - Personnel system of state – merit system

Governor's Executive Order signed April 7, 1978 (Authority to sign contracts, deeds, and leases)

Governor's Executive Order D 016 07 - Improving State Information Technology Management

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CRS §4-1-101, et seq. (Uniform Commercial Code)

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CRS §24-30-903(1)(d) (Telecommunications approval authority)

CRS §24-30-1104(1)(h) (Central Services approval authority)

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CRS §24-31-101(1)(c) (State Attorney General - powers and duties)

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CRS §24-34-101, et seq. (Department of Regulatory Agencies)

CRS §24-37.5-101, et seq. (Office of Information Technology)

CRS §24-50-135 (Exemptions from personnel system)

CRS §24-50-501, et seq. (Contracts for Personal Services)

CRS §24-75-302 (Capital construction fund)

CRS §24-101-101, et seq. (Procurement Code)

CRS §24-102-205 (Centralized contract management system)

CRS §24-103.5-101 (Monitoring of vendor performance)

CRS §24-105-102 (Performance evaluation reports)

CRS §§33-1-105 and 105.5. (Acquisition of property – Division of Wildlife)

CRS §33-10-107 (Acquisition of property – Division of Parks and Outdoor Recreation)

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2 DEFINITIONS

All references to “contract” or “agreement” refer to State contracts, which are formal, legally binding documents. The terms “contract” and “agreement” are used interchangeably in the following definitions to reflect their common usage in the State and include any amendments to the contract or agreement. The following definitions include terms used in this Fiscal Rule as well as various types of contracts entered into by the State.

- 2.1 Advice of Employment** – A document that includes an offer of employment.
- 2.2 Agency** – An executive department of the State and offices of the Governor or any subdivision thereof.
- 2.3 Capital Construction** – A capital construction project or controlled maintenance project funded wholly or in part by the State capital construction fund (CRS §24-75-302) or any cash resources of an Agency or Institution of Higher Education.
- 2.4 Central Approver** – Executive directors of Agencies and Elective Officers or their respective delegates, whose prior approval is required by statute or Fiscal Rule for certain types of State contracts. Central approvers include, without limitation, the State Personnel Director, State Architect, Director of the Real Estate Programs, State Communications Coordinator, State Attorney General, Director of the Division of Central Services, and Governor’s Office of Information Technology.
- 2.5 Central Services Contract** – An agreement between an Agency or Institution of Higher Education and another party for the acquisition of services, service equipment, and software related to services. Centralized services include, without limitation, motor pool operation, motor vehicle maintenance, mail or messenger services, office copying, graphic design for print media, printing and binding, microfilming, or design of management forms. See CRS §24-30-1104(1)(h).
- 2.6 Contingency-Based Contract** – A contract for services between an Agency and a vendor where:
 - 2.6.1** All or part of the vendor’s compensation is computed by multiplying a stated percentage by the measurable savings in the Agency’s expenditures or costs of operation attributable to the vendor’s services under the contract; and
 - 2.6.2** The contingency-based contract is not specifically authorized by statute. See CRS §24-17-203. Contingent fees are prohibited in professional services contracts. See CRS §24-30-1404(4).
- 2.7 Debt Contract** - A financial obligation reported in the State’s Comprehensive Annual Financial Report under standards promulgated by the Governmental Accounting Standards Board. Debt contracts include without limitation contracts for revenue bonds, tax revenue anticipation notes, lease purchases, certificates of participation, and other multi-year transactions with outside third party facilitators, issued or otherwise incurred by Agencies, Institutions of Higher Education, and blended component units.
- 2.8 Delegated Agency or Institution of Higher Education** – An Agency or Institution of Higher Education whose controller has been granted delegated signature authority by the State Controller.
- 2.9 Elective Officer** – A State officer elected and holding office under the laws of the State. Elective officers include the State Attorney General, Governor, Lieutenant Governor, Secretary of State, and Treasurer. For purposes of this Fiscal Rule, Elective Officer also includes the Elective Officer’s second-in-command (e.g., the Governor’s Chief of Staff), but does not include any other individual (e.g., executive directors of an Office of the Governor See CRS §24-2-102(4))
- 2.10 Employee Voluntary Separation Agreement** – A contract between an Agency or Institution of Higher Education and a State employee setting forth the terms of the employee’s voluntary separation from State service.
- 2.11 Expenditure Contract** – An agreement between an Agency or Institution of Higher Education and another party resulting in an expenditure of funds, directly or indirectly, or the creation of an obligation on the part of the State. Expenditure contracts include non-financial and in-kind contracts where the State incurs an obligation.
- 2.12 Franchise Agreement** – An agreement where an Agency or Institution of Higher Education grants to a party a concession or right to provide goods or services in a particular market or geographical area controlled by the State, such as concession stands, hotels, and other services provided in certain State parks. The Agency or Institution of Higher Education may regulate service level, quality and price, but users of the service pay the other party directly and the other party provides the goods or services and exercises control over other management decisions.

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- 2.13 Fund Management Services** – Professional consulting services regarding the management of State funds.
- 2.14 Goods Contract** – A contract between an Agency or Institution of Higher Education and another party for the purchase of goods. The term “goods” includes commodities, supplies, and products as such terms are used in the State Procurement Code (CRS §24-101-101, et seq.), Procurement Rules (R-24-101-301), and Uniform Commercial Code (CRS §24-1-201 General Definitions).
- 2.15 Grant Contract** – An agreement between an Agency or Institution of Higher Education and another party where the Agency or Institution of Higher Education:
- 2.15.1** Receives grant funds from or through the other party to the grant contract. An Agency or Institution of Higher Education may receive grant funds from or through any contract type, including without limitation, revenue contracts, sponsored project agreements, intergovernmental contracts, and interagency agreements, depending on the nature of the grant; or
 - 2.15.2** Provides funds from State, federal, or other sources to the other party to the grant contract. An Agency or Institution of Higher Education may grant funds to the other party from or through any contract type, including without limitation, personal services contracts or capital construction contracts, depending on the nature of the grant.
- 2.16 Information Technology Contract** – A contract between an Agency or Institution of Higher Education and another party, where the other party provides information technology services or products and services. An information technology contract is a type of personal services contract. See CRS §24-37.5-102 and State Controller Policy entitled “*Information Technology Contracts*” for a comprehensive list of information technology products and services.
- 2.17 Interagency Agreement** – An agreement between two Agencies, two Institutions of Higher Education, or an Agency and Institution of Higher Education, which includes a dispute resolution process giving the State Controller final decision-making authority. An interagency agreement is a State contract, subject to the provisions and requirements of this Fiscal Rule.
- 2.18 Intergovernmental Contract** – An agreement between an Agency or Institution of Higher Education and a political subdivision of the State, another state, a political subdivision or public institution of higher education in another state, or an agency of the federal government.
- 2.19 Institution of Higher Education.** A public college, community college, or university established as a part of the State.
- 2.20 Investment Advisory Services** - Professional consulting services regarding securities and investments.
- 2.21 License** – A grant by the owner of rights in real or personal property to another of a personal privilege to use such property, without the transfer of the underlying ownership interest therein.
- 2.22 Loan Contract** – An agreement between an Agency or Institution of Higher Education and another party, where the Agency or Institution of Higher Education agrees to loan funds to such other party.
- 2.23 No-Cost/Non Cash Contract** – An agreement between an Agency or Institution of Higher Education and another party involving an exchange of resources, goods, or services, that does not result in the direct or indirect expenditure of funds.
- 2.24 Outsource Contract-Third Party Payor** – An agreement between an Agency or Institution of Higher Education and another party for personal services, where the Agency or Institution of Higher Education:
- 2.24.1** Is charged with providing the function or services that are the subject matter of the contract to members of the public;
 - 2.24.2** Delegates performance of a part of the function or service to the other party, but does not dictate the third party’s operations beyond providing limited input regarding the third party’s performance of its obligation; and
 - 2.24.3** Mandates that members of the public, and not the State, are responsible for paying the other party to perform the function or service; for example, where an applicant seeking a license or certification from the State pays the other party for providing testing services that are required as a prerequisite to the grant of such license or certification.
- 2.25 Party** – An individual or entity who is not an Agency or Institution of Higher Education. If appropriate in the context, the term “party” may also refer to multiple individuals or entities who are not Agencies or Institutions of Higher Education.

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- 2.26 Personal Property Lease Agreement** – An agreement between an Agency or Institution of Higher Education, as lessee, and the owner of personal property, as lessor, where the Agency or Institution of Higher Education pays the lessor for the right to use such personal property for the term of the lease. A personal property lease may be an operating lease or a capital lease. See State Controller Policy entitled “*Lease Purchases and Capital Leases*”.
- 2.27 Personal Services Contract** – A contract between an Agency or Institution of Higher Education and another party, where the other party provides personal services for the benefit of the Agency or Institution of Higher Education or a third party. An individual or entity performing services under a personal services contract is an independent contractor and not an employee of the State.
- 2.28 Personal Services Exempted From Personal Services Review** – Personal services that are:
- 2.28.1** Exempted from the State classified personnel system, including State Attorney General subordinate officers and employees under CRS §24-31-104; professors at Institutions of Higher Education, under CRS §24-50-135, and employees of the judicial branch and the offices of the Governor and Lieutenant Governor under the State Constitution Article XII, Section 13; and
 - 2.28.2** Non-recurring services lasting six months or less, where the need for such services is not expected to recur on a regular basis. Temporary services that do not meet these criteria are subject to personal services review.
- 2.29 Price Agreement** – A contract between the Department of Personnel and Administration, Division of Finance and Procurement, State Purchasing Office, and a vendor, which allows Agencies and Institutions of Higher Education to order goods or services from the vendor, pursuant to the terms of the price agreement, by issuing a purchase order, task order, or other approved order form.
- 2.30 Professional Services Contract** – A contract between an Agency or Institution of Higher Education and another party for the performance of any of the following services: architectural, engineering, land surveying, industrial hygienist, and landscape architect.
- 2.31 Real Property Lease Agreement** – An agreement between an Agency or Institution of Higher Education and another party, where the Agency or Institution of Higher Education:
- 2.31.1** As landlord, owns the real property subject to the lease and gives the other party to the Lease, as tenant, the right of possession of such property for the lease term; or
 - 2.31.2** As tenant, obtains the right of possession of the real property subject to the lease from the owner of such property, as landlord, for the lease term.
- 2.32 Real Property Purchase Agreement** – An agreement for the purchase of an interest in land (fee title or lesser interests) and improvements to land, such as buildings and other structures.
- 2.33 Revenue Contract** – An agreement between an Agency or Institution of Higher Education and another party where cash and/or property are paid to the State, resulting in revenue recognition. Revenue contracts do not require the expenditure of State funds or create an obligation on the part of the State.
- 2.34 Reviewing Attorney** – An assistant attorney general, special assistant attorney general or other attorney authorized by the State Attorney General and employed by an Agency or Institution of Higher Education, who has received a written designation as a Reviewing Attorney from the State Controller. A written designation from the State Controller is personal to the Reviewing Attorney and may not be assigned or further delegated. The designation is limited to the specific responsibilities and authority set forth in the written designation, which may be terminated or modified at any time at the sole discretion of the State Controller.
- 2.35 Sale of Securities** – The offer, issuance or sale of securities by the State of Colorado or any Agency or Institution of Higher Education. Securities include certain debt contracts.
- 2.36 Settlement Agreement** – A contract between an Agency or Institution of Higher Education and another party for the purpose of ratifying agreements concerning employment or contractual disputes.
- 2.37 Sponsored Project Agreement** – An agreement between an Institution of Higher Education and another party, where the Institution of Higher Education receives or expends restricted funding for use in connection with oversight responsibilities for research and development or other specified programmatic activities sponsored by federal, state, or local governments, or private agencies or organizations.
- 2.38 State** – The State of Colorado.
- 2.39 State Contract** – An agreement between two Agencies, two Institutions of Higher Education, an Agency and an Institution of Higher Education, or an Agency and/or Institution of Higher Education and another party. State contracts, as used in this Fiscal Rule, do not include purchase orders.

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2.40 Utility Cost-Savings Contract – An energy performance contract, shared-savings contract, or other agreement in which utility cost savings are used to pay for services or equipment. See CRS §24-30-2001(6).

3 CATEGORIES

The following categories provide examples of different types of State contracts, but are not all inclusive.

3.1 Expenditure Contracts

- 3.1.1 Capital construction contracts;
- 3.1.2 Employee voluntary separation agreements;
- 3.1.3 Fund management services agreements;
- 3.1.4 Goods contracts;
- 3.1.5 Information technology contracts;
- 3.1.6 Investment advisory services agreements;
- 3.1.7 Outsource contracts-third party payor;
- 3.1.8 Personal property leases/licenses - State as lessee or licensee;
- 3.1.9 Personal services contracts;
- 3.1.10 Personal services review exempted contracts;
- 3.1.11 Professional services contracts;
- 3.1.12 Real property leases/ licenses – State as tenant or licensee;
- 3.1.13 Real property purchase agreements – State as buyer; and
- 3.1.14 Settlement agreements.

3.2 Revenue Contracts

- 3.2.1 Franchise agreements;
- 3.2.2 Real property leases/licenses – State as landlord or licensor; and
- 3.2.3 Real property purchase agreements – State as seller.

3.3 Other Contract Types

- 3.3.1 Debt contracts;
- 3.3.2 Grant contracts;
- 3.3.3 Interagency agreements;
- 3.3.4 Intergovernmental contracts;
- 3.3.5 Loan contracts;
- 3.3.6 No cost/non cash contracts;
- 3.3.7 Price agreements;
- 3.3.8 Sale of securities agreements; and
- 3.3.9 Sponsored project agreements.

4 RULE

Each Agency or Institution of Higher Education shall:

- 5.1 Use a State contract as the commitment voucher, as required in Fiscal Rule 2-2, “*Commitment Vouchers*”; and
- 5.2 Ensure that all constitutional, statutory, Fiscal Rule, and State Controller Policy requirements have been met prior to signing a State contract.

5 CONTENT OF STATE CONTRACTS

6.1 Expenditure Contracts, Other State Funded Contract Types, Debt Contracts, and Price Agreements. The general provisions of subsection 5.1.1 shall apply to all contract types noted in subsection 5.1 except as limited or excluded in the specific §5 subsections covering: (a) real property purchases (State as buyer), leases (State as tenant), and licenses (State as licensee) and (b) settlement agreements and employee voluntary separation agreements. See State Controller Policy entitled “*Content-Mandatory Provisions in State Contracts.*”

- 6.1.1 **General Provisions-** The following provisions shall be included in (a) expenditure contracts, (b) grant contracts where an Agency or Institution of Higher Education is the grantor and provides funds from State, federal, or other sources to the other party, (c) intergovernmental

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agreements where the State provides funds to the other governmental entity, (d) debt contracts, and (e) price agreements, to-wit:

- 6.1.1.1 Identification of the parties;
- 6.1.1.2 Appropriated or non appropriated spending authority (except for Institutions of Higher Education);
- 6.1.1.3 Statutory authority (except for Institutions of Higher Education);
- 6.1.1.4 Statement of Work;
- 6.1.1.5 Payment terms, including maximum dollar amount;
- 6.1.1.6 Performance period;
- 6.1.1.7 General terms and conditions;
- 6.1.1.8 Special Provisions (see Appendix to this Fiscal Rule);
- 6.1.1.9 Signature page (see State Controller Policy entitled “*Signature Page Forms*” for model signature pages); and
- 6.1.1.10 Statement that the contract shall not be valid until it has been approved by the State Controller or delegate. Note: this statement is included in the model signature pages and the Special Provisions.

6.1.2 Personal Services Contract Provisions – In addition to the elements listed in subsection 5.1.1 above, each personal services contract over \$100,000 (other than sponsored project agreements and certain contracts related to health care) shall include all of the contract requirements of §24-103.5-101 as follows:

- 6.1.2.1 Performance measures and standards developed specifically for the contract by the administering Agency or Institution of Higher Education;
- 6.1.2.2 Accountability standards requiring regular vendor reports on achievement of the specified performance measures and standards;
- 6.1.2.3 Payment provisions allowing the Agency or Institution of Higher Education to withhold payment until successful completion of all or specified parts of the contract and requiring prompt payment upon successful completion;
- 6.1.2.4 Monitoring requirements specifying how the Agency or Institution of Higher Education and the vendor will evaluate each other’s performance, including progress reports, site visits, inspections, and reviews of performance data; and
- 6.1.2.5 Processes for resolving disputes between the Agency or Institution of Higher Education and the vendor.

6.1.3 Real Property Purchases (State as Buyer), Leases (State as Tenant) and Licenses (State as Licensee). State contracts for the purchase, lease or license of real property shall contain the following provisions:

- 6.1.3.1 If an Agency or Institution of Higher Education is the buyer, tenant or licensee, the contract shall include the following Special Provisions:
 - 5.1.3.1.1 State Controller’s Approval;
 - 5.1.3.1.2 Funds Availability; and
 - 5.1.3.1.3 Vendor Offset.
- 6.1.3.2 If an Agency or Institution of Higher Education is the buyer, tenant or licensee, the contract may include the other Special Provisions, at the discretion of the Agency or Institution of Higher Education.
- 6.1.3.3 If an Agency or Institution of Higher Education is the tenant or licensee, the contract shall include provisions specifying cancellation rights, if the real property leased or licensed is destroyed by fire and/or becomes subject to eminent domain.

6.1.4 Capital Construction Contracts – See Fiscal Rule 4-1, “*Capital Construction Projects*”. See also approved contract forms, available on the website of the Office of the State Architect.

6.1.5 Settlement Agreements and Employee Voluntary Separation Agreements – See State Controller Policy entitled “*Settlement Agreements.*”

6.2 Content for other Contract Types

6.2.1 Interagency Agreements - All interagency agreements require approval of the State Controller, or delegate. Each interagency agreement shall include, at a minimum, the following elements:

- 6.2.1.1 Identification of the parties;

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6.2.1.2 Spending authority, including fund, appropriation code, and encumbrance number (except for expenditures incurred by Institutions of Higher Education);

6.2.1.3 Statement of work;

6.2.1.4 Statement of consideration (if applicable);

6.2.1.5 Payment and other performance terms; and

6.2.1.6 Definition of breach and remedies, consistent with Fiscal Rule 2-6, "*Interagency Purchases and Payments*".

6.2.2 Intergovernmental Contracts

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

6.2.2.2 Federal Government Contracts – All intergovernmental contracts with any agency of the Federal Government shall be reviewed by the Office of the State Controller or a Reviewing Attorney. See State Controller Policy entitled "*Federal Government Contracts*."

6.2.3 Sponsored Project Agreements – See State Controller Policy entitled "*Sponsored Projects*".

6.3 Content for All Contract Types

6.3.1 Indemnification by the State Prohibited – Unless specifically authorized by statute, an Agency or Institution of Higher Education shall not indemnify and/or hold harmless another party (no matter how it is phrased) against any liability incurred as a result of the acts or omissions of such Agency or Institution of Higher Education. See Constitution of Colorado, Article V, §33 and Article XI, §1.

5.3.1.1 CRS §24-30-1510(3)(e) authorizes limited indemnification of an owner of property leased to an Agency or Institution of Higher Education for State purposes.

6.3.2 Limitation of Liability

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

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

6 APPROVED STATE CONTRACT FORMS

All State expenditure contracts shall be in a form approved by the State Controller. The State Controller has approved the following contract forms and may approve additional forms at his or her sole discretion.

6.1 Capital Construction Contracts – See Fiscal Rule 4-1, "*Capital Construction Projects*". See also approved contract forms available on the website of the Office of the State Architect.

6.2 Model Contracts – The State Controller has approved model contracts for personal services, information technology and interagency agreements, and may approve other model contracts in the future, at his or her sole discretion. See State Controller Policy entitled "*Model Contracts*".

6.3 Contract Amendments – All modifications to a State contract shall be made by a formal written amendment signed by the parties to the contract and approved by the State Controller, unless an alternative modification tool has been approved by the State Controller. A contract cannot be amended

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or extended (revived) after the contract term has expired. A form of contract amendment and forms of alternative modification tools are set forth in State Controller Policy entitled "*Modifications of Contracts-Tools and Forms*" ("Modification Policy").

- 6.4 Alternative Modification Tools and Forms** – An Agency or Institution of Higher Education may use an approved alternate modification tool to modify a contract in lieu of a contract amendment only in the specific circumstances identified in the Modification Policy. An Agency or Institution of Higher Education shall obtain written approval from the Office of the State Controller prior to making a change to the form of an alternative modification tool or using an alternative modification tool in a manner not described in the Modification Policy. A contract cannot be modified or extended after the expiration of the contract term. Approved alternative modification tool forms are set forth in the Modification Policy.
- 6.4.1 Required Provision and Attachment.** An approved modification tool may be included as a part of a State contract only if the contract contains a provision referencing the specific modification tool, in the form set forth in the Modification Policy, and the form of the specific modification tool is attached as an exhibit to the contract.
- 6.4.2 Caveat.** Each contract modification tool was created for use in connection with specific types of contracts and scopes of services and is not universally applicable. Each modification tool shall be used only for its intended purposes, as set forth in the Modification Policy, and shall not be changed or combined with any other contract modification tool.
- 6.5 Real Property Lease Agreements** – Lease agreements involving real property shall be in a form approved by and set forth on the website of the Office of the State Architect, except for:
- 6.5.1** Leases exempted by statute (see subsection 7.10 of this Fiscal Rule), and
- 6.5.2** Leases where the Department of Personnel and Administration is a party, which may be in any form approved by the State Controller.
- 6.6 Special Provisions** – All State (a) expenditure contracts, (b) grant contracts where an Agency or Institution of Higher Education is the grantor and provides funds from State, federal, or other sources to the other party, (c) intergovernmental agreements where the State provides funds to the other governmental entity, (d) debt contracts, (e) price agreements, and (f) capital construction contracts shall contain the State Special Provisions. See §14 to this Fiscal Rule. No modification shall be made to a Special Provision without the prior written approval of the Office of the State Controller and, in the case of the Choice of Law Special Provision, a Reviewing Attorney, except as otherwise expressly provided in subsection 5.2.2 above.
- 6.7 Waived Contracts** – Where an Agency or Institution of Higher Education will enter into multiple contracts containing identical provisions, except for the date, contractor and consideration amount, the Agency or Institution of Higher Education may request a written Phase 1 Waiver from the State Controller for the contract format. Once the State Controller has granted the Phase 1 waiver, the Agency or Institution of Higher Education may enter into multiple contracts using the contract format, without obtaining a separate State Controller approval for each individual contract. The Phase 1 Waiver shall not apply to a contract containing any changes other than changes to the date, contractor, and consideration amount. See State Controller Policy entitled "*Phase I Waivers*".
- 6.8 Other contract forms** – Any other contract form which may be approved by the State Controller from time-to-time.

7 STATE CONTRACT APPROVALS

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

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- 7.1 **Capital Construction** and **Controlled Maintenance** contracts require the approval of the State Architect or delegate, unless otherwise exempted by statute or waived by the State Architect. See CRS §24-30-1303(1)(d).
- 7.2 **Central Services** contracts require the approval of the Director of the Division of Central Services, Department of Personnel and Administration, or delegate, for all Agencies located within Adams, Arapahoe, and Jefferson counties and the City and County of Denver. Institutions of Higher Education are exempted from this requirement. See CRS §24-30-1104(1).
- 7.3 **Contingency-Based** contracts require the approval of the Office of State Planning and Budgeting. See CRS §24-17-204.
- 7.4 **Debt Collection Services** contracts require the approval of the State Controller or delegate. See CRS §24-30-202.4.
- 7.5 **Financial Information** contracts used by an Agency or Institution of Higher Education to record financial transactions and information, develop financial reports, or prepare financial statements require the approval of the State Controller. See CRS §24-30-202(12).
- 7.6 **Information Technology** contracts require approval by the Governor's Office of Information Technology as follows:
 - 7.6.1 Services under an Information Technology staff augmentation price agreement – any dollar amount; and
 - 7.6.2 All other Information Technology projects – over \$10,000.
 - 7.6.3 The following are exempted from these requirements under CRS §24-37.5-102(5): Legislative Department, Judicial Department, Department of Law, Department of State, Department of Treasury, and State-supported Institutions of Higher Education.
- 7.7 **Legal Services** contracts require the approval of the State Attorney General or delegate. See CRS §24-31-101.
- 7.8 **Personal Services** contracts require the approval of the State Personnel Director or delegate. See CRS §24-50-501, et seq.
- 7.9 **Real Property** contracts, including leases where the Agency or Institution of Higher Education is the tenant, easements, and rights-of-way contracts, require the approval of the State Architect/Director of Real Estate Programs, Department of Personnel and Administration, or delegate, unless otherwise exempted by statute. Real properties administered by the State Board of Land Commissioners, Division of Wildlife, Division of Parks and Outdoor Recreation, and Department of Transportation, and contracts relating to such real properties, are exempted from this requirement. See CRS §24-30-1303.
- 7.10 **Utility Cost-Savings** contracts require the approval of the State Personnel Director or delegate. See CRS §24-30-2003(1)(b).

8 STATE CONTRACT LEGAL REVIEW

At the discretion of the State Controller a State contract may be subject to legal review by and approval of the Office of the State Attorney General.

- 8.1 **Mandatory Review.** Legal review shall include, without limitation, scrutiny of contract provisions to ensure that the following requirements are met:
 - 8.1.1 Compliance with the United States and Colorado Constitutions, federal and State statutes, State regulations, and Governors' executive orders;
 - 8.1.2 Authority of the contracting Agency or Institution of Higher Education;
 - 8.1.3 All essential elements of a legally binding contract;
 - 8.1.4 A statement of work or comparable provisions and business or commercial terms, which are sufficiently clear and definite, under the applicable circumstances, to be enforceable;
 - 8.1.5 Required signatures; and
 - 8.1.6 Compliance with State Fiscal Rules and State Controller Policies.
- 8.2 **Discretionary Review.** At the discretion of the State Controller legal review also may include:
 - 8.2.1 Review and analysis of the significant risks and issues of a particular transaction;
 - 8.2.2 Inquiry into the availability of specific remedies; and

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- 8.2.3** Review of compliance with grant conditions, federal funding requirements, and required assurances, where provided by the Agency or Institution of Higher Education.

9 STATE CONTROLLER REVIEW AND APPROVAL

State Controller review and approval of all State expenditure contracts, intergovernmental agreements, and price agreements is mandatory. The State Controller's Office will, in its discretion, review other types of contracts, for example, non-expenditure contracts, if requested by an Agency or Institution of Higher Education. All State Controller reviews and approvals shall be conducted in accordance with the provisions of this §9.

9.1 Outsource Contracts - Third Party Payor. All outsource contracts shall be submitted to the State Controller or delegate for review and approval, including without limitation, any outsource contract that diverts revenues due to the State, unless specifically exempted by State statute. For example, see CRS §24-34-101.

9.2 Performance of State Controller Functions

9.2.1 Agencies-Delegated – Delegated Agencies shall be responsible for determining the level of risk for their State contracts. A Delegated Agency shall classify each of its State contracts as automatic high risk, automatic low risk, or undetermined risk. The Delegated Agency shall perform a risk assessment analysis, in accordance with State Controller Policy, to determine whether a contract classified as undetermined is high or low risk. Automatic low risk contracts and contracts classified as low risk pursuant to a risk analysis may be signed by the Agency's State Controller delegate. Automatic high risk contracts and contracts classified as high risk pursuant to a risk analysis shall be submitted to the Office of the State Controller. Only Delegated Agencies may use the risk-based approach to review and approve State contracts. See State Controller Policy entitled "*Review and Approval-Delegated Agencies.*"

9.2.2 Agencies and Institutions of Higher Education - Non-Delegated – Non-delegated Agencies and non-delegated Institutions of Higher Education shall submit all State contracts to the Office of the State Controller for review and approval. See State Controller Policy entitled "*Review and Approval-Non-Delegated Agencies.*"

9.2.3 Institutions of Higher Education - Delegated – State Controller delegates of Delegated Institutions of Higher Education may approve State expenditure contracts. All State contracts entered into by a Delegated Institution of Higher Education for an amount in excess of \$100,000 shall be reviewed by a Reviewing Attorney, unless the State Controller identifies a lower threshold for review in the letter granting delegated signature authority to the controller of the Institution of Higher Education. See State Controller Policy entitled "*Review and Approval-Delegated Institutions of Higher Education.*"

9.2.4 State Controller Signature Delegation – CRS §24-30-202(2) provides that only the State Controller can delegate State Controller signature authority. Such delegations are personal to the specific individual to whom authority is delegated. The delegate may not further delegate the signature authority within the Agency or Institution of Higher Education.

9.3 Process for Review, Approval, and Signature

9.3.1 Review. The State Controller or delegate shall review all expenditure contracts to determine if the:

9.3.1.1 Expenditure:

- 9.3.1.1.1** Is authorized by the appropriation to which it will be charged;
- 9.3.1.1.2** Does not exceed the unencumbered balance of the appropriation;
- 9.3.1.1.3** Complies with all applicable constitutional and statutory provisions, Fiscal Rules and State Controller Policies;
- 9.3.1.1.4** Is encumbered; and

9.3.1.2 Prices or rates are fair and reasonable and in accordance with State law and administrative rules;

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9.3.1.3 Form and Content of the contract are sufficient and appropriate for the parties and subject matter under applicable State and federal laws, Fiscal Rules, including Section 5 (Content of State Contracts) of this Fiscal Rule, and State Controller Policies; and

9.3.1.4 Risk of the contract is outweighed by the contract's benefits.

9.3.2 Approval and Signature. After review, the State Controller or delegate shall approve or disapprove the State expenditure contract. If approved, the State Controller or delegate shall evidence such approval by signing the contract.

9.4 Contracts Not Approved by State Controller

9.4.1 Not Binding. An expenditure contract is not binding on or enforceable against the State unless and until it is signed by the State Controller or delegate.

9.4.2 Null and Void. Any expenditure contract disapproved by the State Controller or delegate is null and void.

9.4.3 Personal Liability. A person incurring an obligation on behalf of the State through an expenditure contract or other State-funded contract type without the approval and signature of the State Controller or delegate shall be personally liable, jointly and severally, for the obligation. See CRS §24-30-202(3).

10 ACCOUNTING FOR STATE CONTRACTS

10.1 Encumbrances. All Agencies and Institutions of Higher Education shall encumber expenditure contracts in accordance with Fiscal Rule 2-2, "*Commitment Vouchers*", and the Fiscal Procedures Manual.

10.2 Outsource Contracts – Third Party Payor. Agencies and Institutions of Higher Education shall record all gross revenues and expenditures for each outsource contract in the State financial system and shall not net the expenditures against the revenues, unless specifically exempted by State statute.

11 MONITORING OF STATE CONTRACTS

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

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

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

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

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

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

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

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

11.3 Reporting.

11.3.1 Contract Management System – Agencies and Institutions of Higher Education shall report information specified in CRS §24-102-205(3)(a) for all personal services contracts with a total value of over \$100,000 except for contracts listed in CRS §24-102-205(2).

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11.3.2 Contractor Performance Evaluation Report – Agencies and Institutions of Higher Education shall prepare a contractor performance evaluation report for each construction contract with a value of \$500,000 or more. See CRS §24-105-102.

11.4 Exclusions. Section 11 of Fiscal Rule 3-1 does not apply to the following contracts:

11.4.1 Any contract to which the State is a party under Medicare

11.4.2 Indigent Care. See CRS §25.5-3-101 et.seq.

11.4.3 Colorado Medical Assistance Act. See CRS §25.5 -4 to 6-101 et.seq.

11.4.4 Children's Basic Health Plan. See CRS §25.5-8-101 et.seq.

11.4.5 Sponsored Projects

11.5 Office of the State Controller Policy – See State Controller Policy entitled "*Monitoring of State Contracts*".

12 INDEPENDENT CONTRACTOR RELATIONSHIP

Agencies and Institutions of Higher Education shall take care in maintaining the distinctions between services performed by persons who are employees of the State and services performed by independent contractors, and their employees, agents and representatives, pursuant to a personal services contract. The State's responsibilities and obligations with respect to employee/employer arrangements differ from its responsibilities and obligations with respect to independent contractors. The State may be liable to a third party for the actions of its employees, whereas independent contractors and their employees, agents and representatives are liable for their own actions. The State is responsible for social security taxes and benefits for its employees, whereas independent contractors are responsible for social security taxes and benefits of their employees. Agencies and Institutions of Higher Education shall follow guidelines issued by the Internal Revenue Service, the Colorado Division of Human Resources, Colorado statutes, and opinions of the State Attorney General in determining whether an individual is an employee or independent contractor.

13 EXCEPTIONS TO FISCAL RULE 3.1

13.1 Personal Services Contracts - This Fiscal Rule does not apply to State contracts for personal services paid through an authorized State payroll system, which are exempted from the State personnel system by the Colorado Constitution or Colorado statutes. See CRS §24-50-135. Examples of exempted contracts include advices of employment engaging the services of the following:

13.1.1 Appointees by the Governor and Lieutenant Governor and their administrative staffs;

13.1.2 Members of State boards or commissions;

13.1.3 Faculty and other exempted members of Institutions of Higher Education;

13.1.4 Attorneys-at-law serving as an assistant attorney generals; and

13.1.5 Employees of the Legislative and Judicial Departments of the State.

13.2 Elective Officers - An Elective Officer acting within the scope of his or her authority may elect to exempt any contract from the requirements of either or both of CRS §24-30-202 including the Fiscal Rules and Title 24 Article 101 (Procurement Code) by personally signing a contract. See CRS §24-2-102(4). If the contract signed by the Elective Officer is outside the scope of his or her authority, the Elective Officer may be personally liable for all claims arising therefrom.

14 SPECIAL PROVISIONS

See next page.

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SPECIAL PROVISIONS

These Special Provisions apply to all contracts except where noted in *italics*.

- 1. CONTROLLER'S APPROVAL. CRS §24-30-202(1).** This contract shall not be valid until it has been approved by the Colorado State Controller or designee.
- 2. FUND AVAILABILITY. CRS §24-30-202(5.5).** Financial obligations of the State payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.
- 3. GOVERNMENTAL IMMUNITY.** No term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, CRS §24-10-101 et seq., or the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 et seq., as applicable now or hereafter amended.
- 4. INDEPENDENT CONTRACTOR.** Contractor shall perform its duties hereunder as an independent contractor and not as an employee. Neither Contractor nor any agent or employee of Contractor shall be deemed to be an agent or employee of the State. Contractor and its employees and agents are not entitled to unemployment insurance or workers compensation benefits through the State and the State shall not pay for or otherwise provide such coverage for Contractor or any of its agents or employees. Unemployment insurance benefits will be available to Contractor and its employees and agents only if such coverage is made available by Contractor or a third party. Contractor shall pay when due all applicable employment taxes and income taxes and local head taxes incurred pursuant to this contract. Contractor shall not have authorization, express or implied, to bind the State to any agreement, liability or understanding, except as expressly set forth herein. Contractor shall **(a)** provide and keep in force workers' compensation and unemployment compensation insurance in the amounts required by law, **(b)** provide proof thereof when requested by the State, and **(c)** be solely responsible for its acts and those of its employees and agents.
- 5. COMPLIANCE WITH LAW.** Contractor shall strictly comply with all applicable federal and State laws, rules, and regulations in effect or hereafter established, including, without limitation, laws applicable to discrimination and unfair employment practices.
- 6. CHOICE OF LAW.** Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this contract. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this or any other Special Provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this contract, to the extent capable of execution.
- 7. BINDING ARBITRATION PROHIBITED.** The State of Colorado does not agree to binding arbitration by any extra-judicial body or person. Any provision to the contrary in this contract or incorporated herein by reference shall be null and void.
- 8. SOFTWARE PIRACY PROHIBITION. Governor's Executive Order D 002 00.** State or other public funds payable under this contract shall not be used for the acquisition, operation, or maintenance of computer software in violation of federal copyright laws or applicable licensing restrictions. Contractor hereby certifies and warrants that, during the term of this contract and any extensions, Contractor has and shall maintain in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that Contractor is in violation of this provision, the State may exercise any remedy available at law or in equity or under this contract, including, without limitation, immediate termination of this contract and any remedy consistent with federal copyright laws or applicable licensing restrictions.
- 9. EMPLOYEE FINANCIAL INTEREST/CONFLICT OF INTEREST. CRS §§24-18-201 and 24-50-507.** The signatories aver that to their knowledge, no employee of the State has any personal or beneficial interest whatsoever in the service or property described in this contract. Contractor has no interest and

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shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of Contractor's services and Contractor shall not employ any person having such known interests.

10. VENDOR OFFSET. CRS §§24-30-202 (1) and 24-30-202.4. [Not Applicable to intergovernmental agreements] Subject to CRS §24-30-202.4 (3.5), the State Controller may withhold payment under the State's vendor offset intercept system for debts owed to State agencies for: **(a)** unpaid child support debts or child support arrearages; **(b)** unpaid balances of tax, accrued interest, or other charges specified in CRS §39-21-101, et seq.; **(c)** unpaid loans due to the Student Loan Division of the Department of Higher Education; **(d)** amounts required to be paid to the Unemployment Compensation Fund; and **(e)** other unpaid debts owing to the State as a result of final agency determination or judicial action.

11. PUBLIC CONTRACTS FOR SERVICES. CRS §8-17.5-101. [Not Applicable to agreements relating to the offer, issuance, or sale of securities, investment advisory services or fund management services, sponsored projects, intergovernmental agreements, or information technology services or products and services] Contractor certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this contract and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this contract, through participation in the E-Verify Program or the Department program established pursuant to CRS §8-17.5-102(5)(c), Contractor shall not knowingly employ or contract with an illegal alien to perform work under this contract or enter into a contract with a subcontractor that fails to certify to Contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this contract. Contractor **(a)** shall not use E-Verify Program or Department program procedures to undertake pre-employment screening of job applicants while this contract is being performed, **(b)** shall notify the subcontractor and the contracting State agency within three days if Contractor has actual knowledge that a subcontractor is employing or contracting with an illegal alien for work under this contract, **(c)** shall terminate the subcontract if a subcontractor does not stop employing or contracting with the illegal alien within three days of receiving the notice, and **(d)** shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to CRS §8-17.5-102(5), by the Colorado Department of Labor and Employment. If Contractor participates in the Department program, Contractor shall deliver to the contracting State agency, Institution of Higher Education or political subdivision a written, notarized affirmation, affirming that Contractor has examined the legal work status of such employee, and shall comply with all of the other requirements of the Department program. If Contractor fails to comply with any requirement of this provision or CRS §8-17.5-101 et seq., the contracting State agency, institution of higher education or political subdivision may terminate this contract for breach and, if so terminated, Contractor shall be liable for damages.

12. PUBLIC CONTRACTS WITH NATURAL PERSONS. CRS §24-76.5-101. Contractor, if a natural person eighteen (18) years of age or older, hereby swears and affirms under penalty of perjury that he or she (a) is a citizen or otherwise lawfully present in the United States pursuant to federal law, (b) shall comply with the provisions of CRS §24-76.5-101 et seq., and (c) has produced one form of identification required by CRS §24-76.5-103 prior to the effective date of this contract.

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