State of Colorado

Contract Procedures and Management Manual

STATE OF COLORADO

EXECUTIVE CHAMBERS
136 State Capitol
Denver, Colorado 80203-1792
Phone (303) 866-2471

Roy Romer
Governor

August 18, 1997

Dear Colorado State Contract Manager:

One of the primary objectives in Colorado State Government is to ensure that the state receives full value for each of the tax dollars it spends. As a manager of state contracts, you play an increasingly important role in accomplishing this objective.

To assist all state managers in better managing their contracts, the Department of Personnel/General Support Services has joined with other state agencies, representing each branch of state government, to review and improve the state contracting process. These state employees, working together, streamlined the state contract approval process, rewrote, updated, and improved the State of Colorado Contract Procedures and Management Manual, and developed the Contract Management Guide.

In addition to the manual and the guide, General Support Services has also developed a Contract Management Training Course that is available to all state employees. This full-day training course teaches state employees how to effectively manage state contracts.

I applaud and appreciate the efforts of the many state employees who participated in this undertaking and thank the General Assembly for its support and funding. By using the manual and the guide, and by taking advantage of the Contract Management Course, all state employees will improve their skills as state contract managers.

Sincerely,

Roy Romer
Governor

Acknowledgments

The *State of* Colorado *Contract Procedures and Management Manual* (*Manual*), the *Contract Management Guide* (*Guide*), and the Contract Management Training Course was the combined effort of volunteer state employees working together to improve the State contracting process.

Three separate groups participated in this State contract improvement initiative:

CATF - Central Approval Task Force

Responsible for streamlining the State contract approval process and publishing the quarterly State contracting newsletter, *The CURE* (*Contract Users' Redtape Eliminator*).

Members:

Yvonne Anderson	Jeff Brauer	Loraine Burger	Phil Holtmann
Aurora Ruiz-Hernandez	Richard Pennington	Chris Trujillo	

CCIT - Colorado Contract Improvement Team

Responsible for revising chapters 1-9 of the *Contract Procedures and Management Manual* (*Manual*).

Members:

Ginger Alcorn	Delma Aldrich	Gary Ashida	Rosemary Augustine
Audrey Aultman	Don Baker	Joanne Gray Ballard	Jeanne Barish
David Besel	Jeff Brauer	Loraine Burger	Threasa Castleman
Richard Cumbee	Bonnie Daniels	Rosemarie Del Monte	Betty Dyart
Diane Fechisin	Steve Fincher	Karla Foote	Tracy Gann
Sue Griswold	Shelley Hayes	Dennis Hayzlett	Betsy Holdredge
Phil Holtmann	Donna Johnson	David Kaye	Thirza Kennedy
John Ivy	Debbie Mason	Linda Meserve	Roberta Miller
Carmen Modglin	Maryann Motza	Benay Muckleroy	Gloria Muniz
Gary Newell	Kathy Newell	Don Parker	Richard Pennington
Judi Pummell	Eva Reynolds	Bob Rizzoto	Andy Rodriguez
Aurora Ruiz-Hernandez	Sandra Schmitzer	Jim Schoendaller	Ruth Schuessler
Gary Smith	Everette Stasny	Jean Stewert	Joyce Stites
Elvira Streble-Henson	Paul Swearingen	Chris Trujillo	John Utterback
Carmela Vanare	Charlie Vanderlinden	Marian Yacko	

CMTF - Contract Management Task Force

Responsible for writing chapter 10 of the *Manual*, referred to as the *Contract Management Guide* (*Guide*) and for developing the Contract Management Training.

Members:

Ginger Alcorn	Delma Aldrich	Jeanne Barish	Nancy Bigley
Eric van de Boogaard	Doug Brown	Loraine Burger	Brian Burnett
Charlene Byers	Jim Campbell	Su Cha	Kenneth Conahan
Richard Cumbee	Hille Dais	Bill Daley	Linda Deits
Rose Marie DeMonte	Robert Dolphin	Steve Fincher	Karla Foote
Larry Friedberg	Andrew Gale	Sherry Gansert	Steve Garcia
Dan Gould	Gary Graalman	Larry Gupton	Clifford Hall
John Ivy	Karen Jackson	Rick Johnson	Janeen Kammerer
David Kaye	Evelyn Kirk	Howard Leavenworth	Bob Marusin
Harry McCabe	Mary Ellen McEldowney	Myra Melbuer	Maryann Motza
Velma Navarro	Lisa Nelson	Gary Newell	Kristine Newton
Richard Pennington	Donald Porter	Vickey Ricketts	Aurora Ruiz-Hernandez
Barry Ryan	Jean Stewart	Karen Stroup	Cheryl Swanson
John Taylor	Scott Toland	Robert Tyler	John Utterback
Charlie VanderLinden	Brent Voge	Eric Werner	Gary Williams

Without the involvement of these three teams of dedicated state employees many of the problem areas relating to state contracts that were identified and either improved or eliminated altogether would have gone undetected and much of the material contained in the *Manual* and the *Guide* would have been overlooked.

With the publishing of the *Manual* and the *Guide* and development of the Contract Management Training Course the mission of the Contract Management Task Force has been completed and the CMTF has been disbanded. Any state agency wishing to or be added to the mailing list of the *CURE* or any state employee wishing to assist with the continuing effort to improve the state contracting process by joining the Colorado Contract Improvement Team is urged to contact the State Contracting Unit of the State Controller's Office in the Department of Personnel/General Support Services.

STATE OF COLORADO

Contract Procedures and Management Manual

August 1997

Revisions Posted

Revision 1 January 1, 1999

SUMMARY OF CONTENTS

CHAPTER 1 : INTRODUCTION

Introduction to Contracting for the State of Colorado 1-1

References 1-16

Agency Supplement (Insert) 1-17

CHAPTER 2 : PLANNING

Defining Need 2-1

Authority 2-2

Interagency Coordination 2-2

Personal Services Issues 2-3

Cost Estimate 2-3

Choose the Appropriate Commitment Document 2-4

Determine the Procurement Method 2-4

Lead Time Information 2-4

Establish Time Line and Responsibility Areas 2-7

Writing Statements Of Work (SoW) And Specifications 2-7

Agency Supplement (Insert) 2-13

CHAPTER 3 : PERSONAL SERVICES

Introduction 3-1

Personnel Director's Administrative Procedures 3-3

Key Exceptions To Privatization Review Requirements 3-3

Grounds For Approval 3-5

Limitation On Use Of State Temporary Employees 3-7

Other Policies 3-7

VI. Forms Instructions **3-7**

Privatization Program Summary

Appendix A: Personnel Review Forms **3-10**

PERSONNEL RULES (AGENCY INSERT) **3-11**

CHAPTER 4 : VENDOR SELECTION

Introduction **4-1**

Bid Information and Distribution System (BIDS) **4-1**

Vendor Selection Methods **4-2**

Agency Supplement (Insert) **4-10**

STATE PROCUREMENT CODE AND RULES (AGENCY INSERT) **4-11**

CHAPTER 5 : CONTRACT PRICING

Introduction **5-1**

Statutory and Regulatory Requirements **5-2**

Price Analysis **5-3**

Cost Analysis **5-5**

A Note About Grants **5-9**

Price Negotiation in Commercial Contracts - Considerations **5-12**

CHAPTER 6 : WRITING THE CONTRACT

Introduction **6-1**

Personal Liability -- An Introductory Caution **6-1**

Purchase Order Or Contract -- Which One? **6-2**

Types Of Contracts **6-5**

Contract Formats And Essential Elements **6-10**

Insurance Requirements **6-18**

Indemnification And Limitation Of Liability **6-27**

Signature Authority **6-29**

Amendments, Changes, And Modifications 6-39

APPENDIX A: Model Contract Clauses 6-40

APPENDIX B: Contract Amendment Format 6-94

APPENDIX C: Interagency Agreement Format 6-99

APPENDIX D: Agency Contract Forms 6-102

CHAPTER 7 : DEPARTMENTAL ACCOUNTING PROCEDURES

Responsibilities under the Controller's Statute 7-1

Encumbrance 7-1

Advance Payments 7-2

Suggested Internal Routing for Contracts 7-2

CLIN & CLI2 Tables 7-3

Contract Waiver Program 7-3

Subrecipient Grants and Required Reporting 7-3

State Financial Reporting Requirements for Subrecipient Grants 7-5

Agency Accounting Procedures Supplement (Insert) 7-6

Appendix A: Contract Log Procedure for State Agencies 7-7

STATE FISCAL RULES (AGENCY INSERT) 7-8

CHAPTER 8 : EXTERNAL APPROVAL ROUTING

External Routing Requirements 8-1

Central Approvers Routing Policies/Procedures 8-2

CHAPTER 9 : CONTRACT CHECKLIST

Agency Supplemental Checklist (Insert) 9-7

CHAPTER 10 : CONTRACT MANAGEMENT GUIDE

Introduction To Contract Management 10-1

Beginning Contract Administration 10-3

Day-To-Day Contract Administration 10-19

Modifications To Contracts **10-27**

Subcontracts and Assignments **10-35**

Dispute Resolution **10-39**

Performance Remedies and Termination **10-58**

Contract Close-Out **10-74**

ANNEX A : STATE BUILDINGS PROGRAMS **A-1**

ANNEX B : POLICY LETTERS **B-1**

ANNEX C : GLOSSARY OF TERMS **C-1**

STATE OF COLORADO

Contract Procedures and Management Manual

August 1997

Revisions Posted

Revision 1 January 1, 1999

Contract Procedures and Management Manual
Revision #1 – January 1, 1999

The following 17 pages, contain the 15 Items that were incorporated into the State of Colorado Contract Procedures and Management Manual as of January 1, 1999. This is the first revision to the Manual, which was originally published in August 1997. This document is made available to assist users in understanding the rationale behind the revisions. Should you have question or comments, please contact John Ivy in the State Controller's Office at 303-866-3765.

Item 1: Reference to the CURE, *Contract User's Resource for Excellence*, pg. 1-14

Revision: Page 1-14, *Contract Improvement Initiatives in Colorado State Government*, line 9, title of the CURE is changed to "*Contract User's Resource for Excellence*."

Comments: In 1997, the title of the CATF/CCIT newsletter (known as the CURE) was changed from "*Contract User's Redtape Eliminator*" to "*Contract User's Resource for Excellence*" to better describe the current objectives of the quarterly newsletter published by the CATF/CCIT.

Item 2: Purchase Orders/State Price Agreements Discussion, p. 6-4

Revision: Lines 1-4 at the top of page 6-4 are revised to read:

> Supplies may be ordered from State Price Agreements using purchase orders, regardless of contract amounts. Some State Price Agreements for services have adequate contract terms and conditions that permit orders to be placed using purchase orders, regardless of the order amount. The Division of Purchasing will designate those State Price Agreements for services that permit orders to be placed using State purchase orders regardless of the order amount. Of course, contracts may still be used (and in some cases may better protect the interests of the State) when buying from a price agreement.

Comments: This revision was necessary because not all State Price Agreements for services permit orders using purchase orders. The Division of Purchasing designates which vendors have signed the comprehensive terms and conditions that permit ordering of services using purchase orders regardless of the amount of the order.

Item 3: Industrial Hygienist Services Acquisition Using State Contracts, p. 6-4

Revision: The last paragraph (subparagraph 3) of 6-4 is changed to "Acquiring architectural services, industrial hygienist services, engineering services, land surveying, and landscape architectural services;"

Comments: Section 24-30-1401, et. seq., CRS was revised in 1997 to add "industrial hygienist services" to the list of professional services that are governed by the professional services selection statute.

Item 4: Worker's Compensation Discussion, Page 6-26

Revision: The first paragraph at the top of page 6-26 is deleted and the following substituted:

> Agency personnel should not be advising contractors about workers' compensation requirements. Generally, however, an individual operating as a sole proprietor, and not using other employees during the course of contract performance, would not be required by law to pay either unemployment taxes or obtain workers' compensation. The same rule applies to performance of services by the named partners of a partnership that has no other employees. Consequently, in cases where the contractor is exempt from the requirements, there is no need to insist on receipt of any forms or certifications. In any other case, normally the entity will be able to provide evidence that it has workers' compensation coverage. There is an exception for corporate officers or members of limited liability companies (LLCs). (Section 8-41-202, CRS) They may elect to reject workers' compensation coverage; this election most commonly is made by officers of small, closely held corporations. The election must be made by filling out a form WC43 ("Rejection of Coverage by Corporate Officers or Members of a Limited Liability Company") or substantially equivalent form (Rule IIID1, Election to Reject Coverage, pp. 3.01-3.04, 7 CCR 1101-3), and providing the form to the insurance carrier (if any) or to the employer compliance unit of the Division of Workers' Compensation.

Comments: The form referred to at page 6-26 of the *Manual* was designed by Colorado Compensation Insurance Authority (CCIA) for use by its policyholders in order to satisfy statutory provisions governing "statutory employers." The current manual discussion erroneously required submission of a CCIA form whenever a contractor claimed to be exempt from workers' compensation laws.

Item 5: Addition of Intellectual Property Issue text.

Revision: The following discussion about intellectual property is added before "Amendments, Changes, and Modifications" on current page 6-39, with pages beginning with 6-39a added to the *Manual*.

Intellectual Property Issues

One common problem in contracts is the reservation of lots of rights in documentation, without requiring any delivery of documentation or data. The standard clause that says the State "owns"

all rights in documentation delivered under the contract means little if the contract never requires delivery of software documentation, for example. So, as you read this discussion about "intellectual property rights," do not forget that the contract has to specify what documentation, e.g. software documentation, must be delivered. Otherwise, the contractor probably is not required to deliver any.

Patents, Copyrights, and Trademarks

Some of the most valuable aspects of goods and services are not the actual supply, software, report, or other deliverable, but the right to copy the deliverable in the future, to modify it, to transfer it to other companies or individuals, etc. These rights to copy, modify, and transfer are embodied in a separate set of property rights called "intellectual property rights."

A patent, for example, is a right created under federal law, granting the inventor the exclusive right to use a patented invention. No other company or individual may then use that patented invention without permission, usually granted through a "license" or assignment of the right to the invention. In a sense, this grants a monopoly to the inventor for protection of the idea.

In transactions in goods governed by the Uniform Commercial Code, a sale includes an implied warranty (i.e. promise) that seller has the necessary title to the goods, and that the goods will be delivered free of the claim of any third party by way of infringement or the like. (Section 4-2-312, CRS) So if a holder of a patent tries sues the State for infringing its patent by using a purchased supply, the State can sue the seller under the implied warranty of title and against infringement. Consequently, be careful about disclaimers of warranties; do not permit a vendor to disclaim the warranty of title and against infringement.

Copyrights are somewhat different. They apply to "works" rather than inventions and do not protect the "idea," only the manifestation of the idea. The right of copyright reserves to the maker of the work the right to copy, distribute, prepare derivative works (i.e. modify), and publicly display the work. A copyright exists upon creation of a work, although federal registration grants certain procedural advantages to anyone trying to sue someone for infringement. Copyrights -- like patents -- are creatures of federal law.

There is a limited exception, known as the "fair use" doctrine, to the prohibition on copying copyrighted works without permission. For example, teachers generally can make limited copies of recently published literary materials for one-time use during class. Even they, however, cannot incorporate published materials into instructor supplements routinely sold to the students; that would probably not be a "fair use." This becomes an issue for State contracts where contractor-developed materials, e.g. training materials, will be furnished in limited numbers to the State. Whether the State then can just reproduce additional copies when it needs them is not entirely clear in the law -- because the "fair use" doctrine is very limited -- and should be addressed in the contract.

Trademarks are usually of less concern to governments. A trademark or service mark grants the owner the exclusive right to use the mark to identify goods or services. Protections for trademarks and service marks exist under both state and federal laws.

Trade Secrets and Nondisclosure/Confidentiality Agreements

Trade secrets are categories of information that are afforded protection under state law. While the legal requirements for patents are quite complex, most companies use trade secret protections as an additional way to protect ideas. The advantage to the trade secrets is their scope: protections are granted to a broader category of information than might be available under patents (available only for "new and useful" inventions) or copyright law (protections granted only to "works"). In Colorado, a trade secret is defined as "the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses or telephone numbers, or other information relating to any business or profession which is secret and of value." (Section 7-74-102, CRS) These categories of information are much broader than would be protected under either patents or copyrights.

The downside of trade secrets is that once the secret is lost through lawful disclosure, there are no additional protections. That is why companies typically use nondisclosure clauses in contracts to restrict dissemination of information they consider to be trade secrets. A State agency's failure to comply with the nondisclosure terms could subject it to substantial liability, and potentially attorney fees.

Contracts must clearly identify the trade secrets (or confidential and proprietary information) when contractors want nondisclosure provisions. A clear marking requirement should be included so contractors have the responsibility for marking any information they consider subject to the nondisclosure provision. Further, contractors should be advised that the Colorado Open Records Act may limit the ability of the State agency to reach binding agreements on categories of material that may not be disclosed. Clause B5B in Appendix A has these essential elements.

Intellectual Property Rights in Software

Because of the technical limitations of patent law, most companies protect their software using a combination of copyright and trade secret/nondisclosure concepts. Typically, the software is not "sold" to the State agency, only "licensed." And to the extent the contract requires delivery of source code of previously developed software, often the contracts will have nondisclosure provisions that restrict disclosure of that source code and other associated documentation.

Who owns the copyright or patent in an independent contractor situation?

In patent law, there is a "shop right" granted to the employer, permitting the employer to use a patented invention royalty-free where it was conceived or "reduced to practice" using the employer's time or resources. In copyrights, there is a "work for hire" doctrine that grants

ownership rights in the copyright to the employer where creation of the work was specifically commissioned as part of the employment.

However, these doctrines generally apply only to employer/employee relationships. In an independent contractor situation, the State would not automatically get any rights to use or ownership in the intellectual property right, other than as necessary for use of the product delivered under the contract. Consequently, if the State intends to reserve the right to transfer, modify, or expand the uses of a software product beyond what was intended in the original contract, such a right would have to be included in the contract. While there may be instances when the particular circumstances of the service performance may give the State a "work for hire" right, for example, it is not advisable to rely on it. Specify the terms of any ownership or license rights in the contract. This is particularly important if the State intends to modify or maintain the software after delivery.

Ownership and License Rights - the State Model Clauses

Appendix A of Chapter 6 of the *Manual* provides most of the tools to write an integrated set of clauses that defines the intellectual property rights. Consider the following:

1. Clause A8 in Appendix A is the starting point for specifying rights in data, documents, and computer software. That clause gives the State ownership rights, which include the rights to copy, publish, display, transfer, prepare derivative rights, and otherwise use the works. Often, the contractor will not have any problem with the clause if all the development is unique and funded by the State. In the case of previously developed software modified for State purposes, though, the contractor often will want to negotiate these ownership rights.

2. Do not forget to specify the document/data/software documentation deliverables. Clause B4 is a model provision for specifying these deliverables. The clause is designed to be used with an exhibit that has more detail concerning the nature, content, and formats for the data and documents. The clause has a <u>simplified</u> definition of software documentation and its adequacy. This clause is designed to be a starting point for contract drafters who, in conjunction with their information technology professionals, can better define the specific documentation requirements on any given project. Some complex software projects may require detailed definition of source code requirements, for example, that are better defined using national or industry standards for software documentation.

3. In the case of software, in particular, vendors will often want to retain ownership rights and license "use" rights to the State. Often, vendors will have license provisions that they want to use, which is acceptable so long as the agency and its information management professionals understand the terms and use restrictions. At the very least, the license provisions in the contract should clearly identify:

    a. The term of the license, usually perpetual;
    b. The cost of the license;

c. That other entities on behalf of the State can modify and use the licensed software; and

d. All of the rights that the State needs to retain, usually including the right make archival copies and to modify at least the portion customized for State use.

4. A simplified version of a license provision to accomplish these objectives is:

> The State is granted an irrevocable, nontransferable, nonexclusive, paid-up, perpetual license to display publicly, perform, copy, reproduce, prepare derivative works, and distribute any works, drawings, documents, data, or software delivered under this contract. For purposes of this license, the "State" includes any other person or entity performing services for the State to the extent required for use, modification, or maintenance of the works, drawings, documents, data, or software delivered under this contract.

5. In a complex software development contract, involving previously developed software and a customized software module, sometimes the owned software and licensed software are defined separately. The definitions of "owned software" and "licensed software" then become a key part of the contract.

6. In general, it is acceptable to permit a vendor to retain "ownership rights" in its previously developed software, so long as the State retains adequate license rights at a reasonable price to permit subsequent use and maintenance of the software.

7. Always use caution in negotiating the documentation and ownership/license clauses. It is easily to unwittingly create a de facto sole source situation because the State has either ordered insufficient documentation or retained insufficient rights to permit its own employees or other contractors to maintain the software.

Federally Funded Contracts

Federal grants often require specific allocation of rights in intellectual property conceived or developed with federal funding. Clauses C9 and C10 are the Federal Patent Rights and Rights in Data and Copyrights clauses developed from the *Common Rule*, also known as the *Uniform Requirements for Grants and Cooperative Agreements to State and Local Governments*. (OMB Circular 102) Agencies are encouraged, however, to ask the federal agencies administering the particular grant programs to identify the clauses that should be used in the State's subrecipient agreements whenever "works" or "inventions" are likely byproducts of the contract performance.

Limitation of Liability/Warranty Disclaimer Issues

Especially with respect to software development agreements, vendors are concerned about potential consequential damages (e.g. lost productivity damages from software bugs) that can

potentially far exceed the contract amount. Consequently, many software vendors propose limitation of liability and warranty disclaimer language. Consider these issues:

1. Do not disclaim or exclude the "warranty of title and against infringement" in any contracts. This implied Uniform Commercial Code warranty in "transactions in goods" provides some protection against adverse claims by third parties alleging that the vendor has infringed their intellectual property rights.

2. Other implied warranty disclaimers are fairly common. An example is at clause B11. This disclaimer will limit "warranties" to those expressed in the contract. The State gives up a chance to later claim that the product breached the implied warranty of merchantability or fitness for a particular purpose. See pp. 10-61 and 10-62 for more information about these implied warranties. If an agency is being careful about drafting the contract and statement of work, it should not have to rely on implied warranties anyway.

3. The limitation of liability policies on pages 6-27 and 6-28 apply to software licensing agreements also. Be aware, however, that agreeing to limit liability to the contract amount may cut off vendor liability well short of potential State liability/defense costs if a third party sues the State for intellectual property infringement. Consider using an "Intellectual Property Indemnification" clause such as that at B15 in cases where: 1) limitation of liability provisions are included that limit the vendor's liability, 2) the State could incur significant costs defending an intellectual property action, and 3) discontinuing use of the infringing software or invention is not a viable alternative because of the critical nature of the product or software.

Final Caveat

Integrating rights in data/software and limitation of liability clauses can be difficult, especially when vendor forms are incorporated in the contract. Typically, important terms and conditions are spread throughout the documents, and often terms are used in different ways. Unless the contract amount is relatively insignificant, the nature of the requirement routine, or the consequences for breach otherwise not substantial, we recommend that you seek either the help of experienced purchasing professionals or legal advice from your assigned assistant attorney general. Even more important, agency information management professionals need to be involved to insure that document deliverables are being ordered that permit State use and maintenance of software, and that licensing use restrictions are acceptable.

Item 6: Revisions to Termination for Convenience Clause (Long Form), Paragraph A12, pg. 6-47

Revision: Subparagraph C. 5) on page 6-48 is changed to, "The total sum to be paid the contractor under this subparagraph C shall not exceed the total contract price plus settlement costs, reduced by the amount of payments otherwise made, the proceeds of any sales of supplies

and manufacturing materials under subparagraph B, and the contract price of work not terminated."

Comments: The current clause incorrectly cites subparagraph B in the first line of subparagraph C. 5).

Item 7: Use of Termination for Convenience Provisions, Clauses A11 and A12, pg. 6-47

Revisions: Replace the comments following clauses A11 and A12 with the following:

Clause A11 Comment:

This short form version of the termination for convenience clause is used in contracts with political subdivisions and other contracts not subject to the Procurement Code, and in service contracts having fixed level-of-effort where the State is receiving value as the services are being performed. Janitorial services contracts, for example, would be examples of contracts where this short-form clause may be appropriate, because payment for services in proportion to the performance period completed would fairly reimburse the contractor and still insure that the State receives fair value for its payments. For contracts with commercial entities not meeting these criteria -- e.g. software development/integration contracts involving significant start-up costs -- the Procurement Rules "long form" clause, the next clause in this Appendix, is more appropriate.

Occasionally, contractors will ask to make the termination for convenience clause "mutual," permitting either party to terminate the contract at will by giving specified advance, written notice. In such cases, exercise extreme care, and consider getting legal advice or the assistance of a more experienced purchasing/contracting professional. It is particularly important to consider: the effect of contractor termination on advance or progress payments, and the obligation of the contractor to return them; whether the right of the contractor to compensation after it terminates is clearly stated and requires the State to pay only reasonable compensation for acceptable, completed deliverables having value to the State; whether the milestones and associated progress payments are distinguished from the compensation due the contractor for acceptable, completed services and deliverables after termination, since progress payments are often not sufficiently based on the value of services <u>received</u> by the State; and whether there is procurement authority to acquire replacement or continued services within the needed time. In general, while the termination for convenience clauses in this Appendix are adequate to give the State the right to terminate for convenience, they are not generally adequate to define the contractor's right to terminate at will and receive compensation.

Clause A12 Comment:

This long form version of the termination for convenience clause is prescribed in the Procurement Rules. The clause "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01. See the comments under Termination for Convenience (Short Form) with respect to the proper use of each clause, as well as cautions in making the clauses "mutual" and the contract terminable at will by the contractor.

Comments: These revisions to the comments following the termination for convenience clauses clarify the circumstances when the "short form" and "long form" versions of the clause are appropriate. The revisions also include cautions about modifying the clauses to permit mutual termination for convenience provisions.

Item 8: Revision to Assignment Clause, Paragraph A18, pg. 6-53 and Assignment Discussion in Chapter 10, pg. 10-37

Revisions: 1. The word "only" is deleted in the fourth line of clause A18.

2. The following sentence is added to clause A18, "This provision shall not be construed to prohibit assignments of the right to payment to the extent permitted by section 4-9-318, CRS, provided that written notice of assignment adequate to identify the rights assigned is received by the controller for the agency, department, or institution executing this contract. Such assignment shall not be deemed valid until receipt by such controller -- as distinguished from the State Controller -- and the contractor assumes the risk that such written notice of assignment is received by the controller for the agency, department, or institution involved." In the commentary box, the last sentence of the first paragraph is changed to, "Section 4-9-318, CRS, permits contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract."

3. On page 10-37, the last three sentences of section 5.4 are changed to, "Section 4-9-318, CRS, permits contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract. Legally, the State is obligated to honor such an assignment once it receives notice. If a notice of assignment of payment is received, do not pay the original contractor; contact your agency or institution controller immediately. Other assignments, on the other hand, such as assignment of performance duties or obligations, can be controlled by requiring consent of the State. Appendix A to Chapter 6 has an example of such a clause."

Comments: 1. The first revision is intended to separate the "third party beneficiary" exclusion, a separate issue, from the operation of the assignment clause. Paragraph A22 is the clause used to express the parties' intention that the contract is not a "third party beneficiary" contract. The assignment clause, on the other hand, makes the rights and obligations binding on assignees and successors.

2 & 3. In Colorado, contractors generally have the right to assign payment. See section 4-9-319, CRS (1997). Consequently, the anti-assignment provisions should not be construed or administered to prohibit assignment of payment rights. The second and third revisions highlight the distinction between payment assignments and other assignments. The necessary changes are made to Chapters 6 and 10. Additionally, coverage is added to require submission of written notice of assignment to the agency, department, or institution controller.

Item 9: Harmonization of Force Majeure and Termination for Default clauses, Paragraph A21, pg. 6-55

Revision: The last sentence of clause A21 is revised to make the model clause's list of "force majeure" causes identical to those in the long-form termination for default clause, paragraph A14, page 6-50:

> As used in this contract "force majeure" means acts of God; acts of the public enemy; acts of the State and any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather.

Add the following commentary box after clause 21:

"Force majeure" means those events for which neither party will be held accountable. The long-form termination for default clause has an excusable delay provision that also excuses delays caused by the list of "force majeure" events in the clause. Generally, if the long-form termination for default clause is used, this "force majeure clause need not also be added to the contract. The list of events constituting "force majeure" can be negotiated and modified by the parties.

Comments: The list of force majeure causes was revised so the list in the long-form termination for default clause (taken from the Procurement Rules) is the same as the list in the stand-alone force majeure clause. Occasionally, agencies have been incorporating both clauses, which under the original manual had inconsistent force majeure provisions, leading to potential ambiguity in scope of the force majeure events. These force majeure events can be negotiated and modified by the parties.

Item 10: Revision of the title of the "Sovereign Immunity" Clause A23, pg. 6-56

Revision: The title of the clause is changed to "Governmental Immunity."

Comments: In Colorado, the concept of "sovereign immunity" was abrogated in 1972 by the Colorado Supreme Court, and the doctrine is now recognized only as provided by statute. "Governmental Immunity" is a more correct description of the immunities embodied in the Colorado Governmental Immunity Act, section 24-10-101, *et. seq.*, CRS.

Item 11: Clarification of Confidentiality of Records Clause, Paragraph B.5., pg. 6-60

Revision: Add brackets to the first sentence of subparagraph 5A, so it reads "[The contractor is designated an agent of the State for the purposes of the confidentiality requirements of Section 8-72-107, CRS.]".

Comments: Not all contracts will establish the agency relationship contemplated in the statute that is cited in the model clause. As the commentary to the clause indicates, only the Division of Employment

may designate agents for access to confidential employment records. The first sentence and the related parenthetical statutory reference in line 6 of the clause were intended to be an example of how to incorporate program-specific confidentiality requirements in contracts. The first sentence of subparagraph 5A was not intended to be a confidentiality provision of broad applicability. Normally, the first sentence of the clause should be deleted.

Item 12: Federal Audit Provisions, Paragraph C7, pg. 6-86

Revision: The first paragraph is deleted and the following substituted:

The Office of Management and Budgets (OMB) Circular No. A-133 Audits of States, Local Governments, and Non-Profit Organizations defines audit requirements under the Single Audit Act of 1996 (Public Law 104-156). All state and local governments and non-profit organizations expending $300,000 or more from all sources (direct or from pass-through entities) are required to comply with the provisions or Circular No. A-133. The Circular also requires pass-through entities to monitor the activities of subrecipients and ensure that subrecipients meet the audit requirements. To identify its pass-through responsibilities, the State of Colorado requires all subrecipients to notify the State when expected or actual expenditures of federal assistance from all sources equal or exceed $300,000.

Comments: OMB Circular A-128 was superceded by OMB Circular A-133 and the language strengthened to require pass-through entities to monitor subrecipient activities to assure compliance with audit requirements.

Item 13: Revision to Certifications, Addition of Environmental Tobacco Smoke Certification, Clause C12, pgs. 6-89 and 6-90

Revisions: Clause C12, page 6-89, is replaced with the following:

12. Federal Certifications

Certification Regarding Debarment, Suspension, Ineligibility
And
Voluntary Exclusion-Lower Tier Covered Transaction

Instructions for Certifications

1. By signing and submitting its proposal and signing this contract, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other

remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

4. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted or with whom this contract is made for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting its proposal and signing this contract that should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal and signing this contract that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transaction.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment, suspended, debarred, ineligible, or voluntarily

excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may purse available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility an Voluntary Exclusion-Lower Tier Covered Transactions

1. The prospective lower tier participant certifies, by submission of this proposal and execution of this contract, that neither it nor its principals is presently declared ineligible, or voluntarily excluded from participation in this transaction by an Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to its proposal.

Certification Regarding Drug-Free Workplace Requirements

Instructions for Certifications

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant and executes the contract. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees that are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department

while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

Drug-Free Workplace Certifications

Alternate I. (Grantees Other Than Individuals)

A. The grantee/contractor certifies that it will or will continue to provide a drug-free workplace by:

1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition:

2. Establishing an ongoing drug-free awareness program to inform employees about-

   a) The dangers of drug abuse in the workplace;
   b) The grantee's policy of maintaining a drug-free workplace;
   c) Any available drug counseling, rehabilitation, and employee assistance programs; and
   d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

3. Making it a requirement that each employee to be engaged in the performance of the grant/contract be given a copy of the statement required by paragraph 1;

4. Notifying the employee in the statement required by paragraph 1 that, as a condition of employment under the grant/contract, the employee will:

   a) Abide by the terms of the statement; and
   b) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

5. Notifying the agency in writing, within ten calendar days after receiving notice under paragraph 4(b) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant/contract activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant/contract;

6. Taking one of the following actions, within 30 calendar days of receiving notice under paragraph 4(b), with respect to any employee who is so convicted:

   (a) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or
   (b) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

7. Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs 1,2,3,4,5,and 6.

B. The grantee/contractor may insert in the space provided below the site(s) for the performance of work done in connection with this grant/contract:

_____
_____
_____
_____

Alternate II. (Grantees Who Are Individuals)

1. The grantee/contractor certifies that, as a condition of the grant/contract, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant/contractor;

2. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant/contract activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant/contract.

Certification Regarding Lobbying

(Certification for Contracts, Grants, Loans, and Cooperative Agreements)

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering

into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an office or employee of any agency, a Member of Congress, an office or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(Statement for Loan Guarantees and Loan Insurance)

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with this commitment providing for the United States to ensure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Tobacco Free Certification

Public Law 103-227, the Pro-Children Act of 1994, requires that smoking not be permitted in any portion of any indoor facility owned or leased or contracted for by any entity and used routinely or regularly for the provision of health, day care, education, or library services to children under the age of 18, if the services are funded by Federal programs either directly or through State or local governments, by Federal grant, contract, loan, or loan guarantee. The law does not apply to children's

services provided by private residences, facilities funded solely by Medicare or Medicaid funds, and portions of facilities used for inpatient drug or alcohol treatment. By submitting and signing the application and this contract, the contractor certifies that it will comply with the requirements of the Act. The contractor further agrees that it will require the language of this certification to be included in any subawards which contain provisions for children's services and that all subgrantees shall certify and perform accordingly.

All of these certifications may not be required for particular grant programs, although normally the first three certifications (suspension and debarment, drug free work place, and anti-lobbying) are required. The program administrator should check with the cognizant federal agency, or its implementing regulations, concerning the content of required certifications. Some federal agencies have particular certification forms and instructions for their completion. If the certifications are executed as a part of the grant application or proposal submission, they need not also be included in the contract.

Comments: The certification language on pages 6-89 and 6-90 has been changed to better conform to model certifications in the Code of Federal Regulations. In particular, the requirement for "flow down" of certifications to subrecipients has been added. The "tobacco free" certification was added consistent with the 1994 federal statute, Public Law 103-227, the Pro-Children Act of 1994.

Item 14: Incorrect Statutory Reference in Vendor Offset Intercept System Notice for Tax Debts, Special Provision #9, pg. 6-92

Revision: Line 3 of Paragraph 9 of the Special Provisions is changed to "Article 21, Title 39, CRS."

Comments: The published version of the Special Provisions erroneously referred to the wrong article in Title 39 with respect to tax debts. The correct article should have been "21" instead of "22."

Item 15: Professional Liability Clause in Architect/Engineer Contract, State Buildings Annex

Revision: The next to last sentence of Article 20, Professional Liability for Errors and Omissions, is changed to, "The Architect/Engineer shall be responsible for all claims, damages, losses, or expenses, including attorneys fees, arising out of or resulting from the performance of Professional Services contemplated in this Agreement, provided that any such claim, damage, loss or expense is caused by any negligent act, error or omission of the Architect/Engineer, any consultant or associate thereof, or anyone directly or indirectly employed by Architect/Engineer."

Comment: This clarification is intended to correct previous versions of the State Buildings Program change that had erroneously omitted the words "is caused" from the sentence.

A Return Visit to the State Controller's Office

Remember that the contract is not effective until approved by the State Controller or his delegate. Once the contract gets to the State Controller's Office, you are almost "home free"! But remember, the Attorney General is enforcing policies that are in the statutes and rules that govern potential legal problems for the Controller, who ultimately can approve or disapprove a contract. For example:

1. The Colorado *Special Provisions* not only must be included, they can't be modified unless approved by the State Controller. One "felony" is inclusion of an indemnification provision in the contract that conflicts with the one at paragraph 4 of the *Special Provisions*, without written justification and approval by the Controller. The "capital offense" is including an indemnification provision that requires the State to indemnify the contractor for damages it incurs as a result of contract performance. As we mentioned before when talking about the Risk Management office, such a clause usually is illegal because it violates the Colorado Constitution. Besides, it's not fair. We are paying contractors to do the work. We shouldn't have to answer for their liability. Lesson: read the *Special Provisions*, include them, **never** change them. If you are negotiating a contract that uses the term "indemnify" or "hold harmless", you better get the advice of counsel and be prepared to justify in writing why you need the clause.

2. State Fiscal Rules require that advance payments be approved in writing by the State Controller or an authorized delegate.

3. Any modification/amendment procedure in the contract that attempts to informally change the contract without processing as an amendment will probably be disapproved. The Controller has to approve all commitment documents, including amendments. The Controller requires formal routing and legal review of all amendments by Fiscal Rule. You can't change this Rule by contracting with the other party to permit changes and price increases by mutual agreement. There is an exception: you can use a modification mechanism consistent with the State Controller's policy on contract modifications and change orders, enclosed in this *Manual* in the Policy Letters Annex. For example, the policy has an approved Change Order Letter process that bypasses Attorney General review for use in grant and subgrant programs that provide for benefits to third parties, e.g. contracts for health or social welfare benefits where the volume of services being provided are directly proportional to the level of funding.

4. Attempts to create financial obligations beyond the current fiscal year--the "binding the future legislature" problem--are illegal. That is why the Colorado *Special Provisions* has a clause at paragraph 2 that conditions contract performance on availability of funds. Remember, generally the State appropriates money from year-to-year. Unlike private individuals and companies, you can't agree to a contract that <u>unconditionally</u> extends funding for more than one year at a time. One more reason to include those *Special Provisions* . . .

5. Encumbrance errors can also cause a contract to be disapproved by the Controller. If you cite the wrong source of funds, or there are not enough funds to satisfy the commitment, or the contract has open-ended price/payment provisions or no ceiling on the amount to be paid, the contract will be disapproved.

After Contract Approval - First a Celebration! - Then Contract Management

You can write the best contract in the world, but if no one is inspecting the goods or services to assure their compliance with requirements, money is going to be wasted. Writing a good contract is a giant step towards sound contract administration and management, because it should clearly define the expectations of both parties. But you need to have a process in place to insure that payment is not made under the contract until acceptable performance has been received (hopefully a right given you in the contract . . .). This is a lot simpler to say than to do. As a result of a State performance audit in 1995, and the work of the Contract Management Task Force, a whole chapter has been added to this *Manual* that addresses contract administration issues and responsibilities. The sections in Chapter 10 describe contract monitoring responsibilities, performance remedies, and other key aspects of managing a contract.

Contract Improvement Initiatives in Colorado State Government

In 1994, the central approving offices banded together to find ways to improve the contract approval process by creating a group called the Central Approval Task Force (CATF). Part of that process was the formulation of the Colorado Contract Improvement Team (CCIT), a group composed of representatives from all of the State agencies. The CATF meets monthly, and the CCIT quarterly. The CATF/CCIT structure is designed to foster cross-feed among central approvers and agencies of ideas related to contracting, provide a forum for discussing improvements, and generally serve as a clearinghouse for purchasing and contracting-related information that is important to State employees involved in the process. The CCIT and CATF publish the *Contract User's Resource for Excellence (CURE)* newsletter monthly, and subcommittees have been established to address issues such as contract standardization, coordination of statutes and regulations, improvement to the *Manual*, training, etc. This *Manual* was a byproduct of work done by the CCIT, based on recommendations received from users.

Agencies are encouraged to set up their own "user groups," and you should find out when your user group meets. The CCIT lives and breathes by the quality of these user groups--they are the vehicle to "get the word out" to everyone else in the agencies that are involved in the contracting process.

One Final Note - This Stuff Isn't Easy

You can't just read this summary and expect to do a good job in purchasing or contracting. This is just the road map into the more detailed material in the *Manual*. The Division of Purchasing training will give you much more detailed, invaluable information about vendor selection. Even

Purchase Orders

A purchase order is a unique type of pre-printed State form or agreement, which may be used when, permitted by Chapter 3 of the State Fiscal Rules. These agreements are different from traditional written contracts in three critical ways. First, they constitute a delegation of the Controller's approval authority to the purchasing agent; they may be executed without the approval of the Controller or Controller designee. Second, no legal review is required. Third, they are usually signed only by the State, not by the vendor or contractor. This third feature is highly unusual in that contract law and common sense generally dictate that both parties must sign a contract in order for each to be bound by it. All of these purchase order distinctions from traditional contracts have one factor in common, which accounts for their streamlined treatment. Properly used, purchase orders adequately protect the State without a formal contract and its accompanying oversight.

Purchase orders are designed for the purchase of goods (not services) under Article 2 of the Colorado Uniform Commercial Code (the "UCC"), located at Title 4, Article 2, CRS (Volume 3). Article 2 of the UCC is an entire body of statutory law governing the sale of goods. Article 2 is an attempt to simplify and lend predictability to commercial transactions for goods by specifying what are reasonable expectations, obligations, and rights of parties where they intentionally or accidentally failed to address a certain issue in a written contract. These laws supplement virtually every agreement for the purchase or sale of goods, except consumer transactions dealt with elsewhere in law. Purchase orders are an attempt by the State to streamline administration by utilizing this body of law to supplement simple one or two page documents with certain pre-printed "*boilerplate*".

The additional protections of law supplementing a properly used purchase order have resulted in a determination by the Controller that review by the Attorney General and the State Controller's Office is not necessary.

Purchase orders are not intended to be used to acquire ongoing services having a significant value over an extended period of time. They may be used to order one-time repairs, maintenance, or construction services up to certain dollar amounts where rules permit and the State is adequately protected. See Chapter 3 of the Fiscal Rules. It is critical to remember that there is no body of law like Article 2 of the Uniform Commercial Code governing services contracts, and the State is therefore protected only by what you write in the agreement. As a general rule for services, if there is any question about whether or not the vendor is an independent contractor, or if you cannot adequately describe what you expect of the vendor on the purchase order form, a formal contract executed by both parties should be used. Remember that the Fiscal Rules provide that any questions as to whether or not a purchase order adequately protects the State should be referred to the Attorney General.

In addition, purchase orders for services in excess of $25,000 are not permitted by the Fiscal Rules, with few exceptions. One of the notable exceptions is use of a purchase order to order from a basic ordering agreement entered pursuant to State-wide procurement awards—known as State-wide "price agreements." Frequently utilized services may be centrally bid by the

Division of Purchasing for all agencies. Supplies may be ordered from State Price Agreements using purchase orders, regardless of contract amounts. Some State Price Agreements for services have adequate contract terms and conditions that permit orders to be placed using purchase orders, regardless of the order amount. The Division of Purchasing will designate those State Price Agreements for services that permit orders to be placed using State purchase orders regardless of the order amount. Of course, contracts may still be used (and in some cases may better protect the interests of the State) when buying from a price agreement. Of course, contracts may still be used (and in some cases may be required) when buying from a price agreement.

Contracts

Under the Fiscal Rules, any commitment to pay money, which is not a purchase order, must, by definition, be a "State contract" and must be treated as such. Regardless of what label you use (memorandum of understanding, cooperative agreement, grant, *etc.*) the procedures specified in Chapter 3 of the Fiscal Rules apply. Except in certain cases noted below, all contracts must utilize the standard contract form found in Fiscal Rule 3-1 that includes the Colorado *Special Provisions* (a copy is included in Appendix A of this chapter). Notice that most of the important terms, such as the statement of work/specifications, as well as "*boilerplate*" clauses, are not on the *Special Provisions* and have to be developed by the agency. This is in contrast to a State purchase order, which has provisions on its reverse side governing payment, delivery, etc.

For real property transactions (leases, capital construction contracts, etc.) the State Controller and the Attorney General have approved different formats for these requirements. They are still "contracts," as distinguished from purchase orders; they use special forms due to their unique legal nature and frequency of use. Unless your agency has a statutory exemption from State Buildings Programs for the particular type of transaction involved (e.g. Divisions of Wildlife/Parks, and the Department of Transportation), you must use these approved State Buildings forms.

With respect to other types of contracting, however, there are no prescribed forms. This section will discuss necessary elements of any contract, and Appendix A contains many model provisions to assist you in developing your own contract format for your unique situation.

So, which one? A Purchase Order or A Contract?

Fiscal Rule 3-1 requires use of a State Contract when:

1. Acquiring personal services costing over $25,000, including maintenance and service agreements;

2. Leasing land, buildings, or other office or meeting space when rental is more than thirty days.

3. Acquiring architectural services, industrial hygienist services, engineering services, land surveying, and landscape architectural services;

"Automobile Liability Insurance"

State law requires all automobile owners to carry a minimum amount of liability insurance for injuries or damage they may cause to others while operating a motor vehicle. State law requires a very low amount of insurance--$50,000 per occurrence. This is why the State requires its contractors to carry $600,000, a better approximation of the maximum risk to the State under the Governmental Immunity Act.

Note that the State requests $600,000 "Combined Single Limit." In contrast to various types of injuries and specific dollar amount for each discussed above under CGL, this requires $600,000 per occurrence for any combination of bodily injury or property damage to any number of people. This insurance should be carried for all autos used by the contractor in its business, whether or not State personnel or recipients of State benefits are transported by the contractor. Again, the State is looking for responsible contractors as much as for protection from suit when beneficiaries are actually transported. Sole proprietors or professionals using a single vehicle of their own, not transporting others under the contract, may use their own automobile liability with lower limits, but it should always be at least $100,000 per person, $300,000 per occurrence.

You should always expect covered automobiles to be indicated with an "X" for either "Any Auto," "All Owned Autos," or "Scheduled Autos." Scheduled autos should be listed in an attachment. "Hired Autos," "Non-Owned Autos" or "Garage Liability" should never be the only coverage indicated; these may be in addition to one of the first three types, but never alone. An individual or small firm may typically have only "Scheduled Autos," just as you and I have insurance for only the specific vehicles we own. Larger contractors may typically have "Any Auto" or "All Owned Autos" because of the large number and types of vehicles they may have in their fleet. "Hired Autos" are vehicles that come with drivers and "Non-Owned Autos" are those leased or rented without accompanying drivers. Again, these should appear only in combination with one or more of the first three listed types.

"Excess Liability"

The contractor may meet the CGL and Automobile Liability limits by a combination of basic insurance for those risks and what is called "Excess Liability." When this is offered, it should be "Umbrella Form," so indicated by an "X" in the appropriate box. The total limits of CGL plus Excess Liability, and Automobile Liability plus Excess Liability, should each equal or exceed the required dollar limits.

"Workers' Compensation"

These limits are set by law. The general form certificate should indicate $500,000 if insurance is provided by a commercial insurer. If insurance is provided through a government entity, such as Colorado Compensation Insurance Authority ("State Comp."), a separate certificate of insurance on State Comp. or other government letterhead should be provided showing statutorily required coverage is in place.

Agency personnel should not be advising contractors about workers' compensation requirements. Generally, however, an individual operating as a sole proprietor, and not using other employees during the course of contract performance, would not be required by law to pay either unemployment taxes or obtain workers' compensation. The same rule applies to performance of services by the named partners of a partnership that has no other employees. Consequently, in cases where the contractor is exempt from the requirements, there is no need to insist on receipt of any forms or certifications. In any other case, normally the entity will be able to provide evidence that it has workers' compensation coverage. There is an exception for corporate officers or members of limited liability companies (LLCs). (Section 8-41-202, CRS) They may elect to reject workers' compensation coverage; this election most commonly is made by officers of small, closely held corporations. The election must be made by filling out a form WC43 ("Rejection of Coverage by Corporate Officers or Members of a Limited Liability Company") or substantially equivalent form (Rule IIID1, Election to Reject Coverage, pp. 3.01-3.04, 7 CCR 1101-3), and providing the form to the insurance carrier (if any) or to the employer compliance unit of the Division of Workers' Compensation.

Special Items

Near the bottom of the standard certificate there is a blank space for other matters ("Description of Operations/Locations/Vehicles/Special Items"). This should always indicate your agency as an additional insured. This does not mean additional insured status has been obtained (the actual endorsement is better), but it is a good indication the insurance agent knows he is supposed to request it. This is the appropriate start to the process of actually getting additional insured endorsements to the policy. Make sure the certificate so states before going any further with performance. It is recommended that you actually see the endorsement, unless you have worked with the agent in the past and are confident in the accuracy of the certificate. If there is any confusion about the additional insured endorsement, consult the procurement office or legal counsel.

Certificate Holder

Insurance certificates provide no legal rights. Notice the disclaimer in bold type at the upper right hand corner. Being a certificate holder simply means the insurance company, through its agent, has your agency name on file and will attempt to provide you notice of cancellation. The contractor is independently required by the solicitation/contract to provide notice of cancellation, usually 60 days. See the standard requirements in Clause A15, Appendix A.

Property Casualty Insurance

The State has a commercial insurance policy for damage to its property by fire or other "standard perils." If you are asked to carry casualty insurance by a contractor for property leased or purchased on an installment basis, you should first contact the Risk Management Office of the Department of Personnel and make arrangements to have such property listed on the State's policy. DO NOT wait until after delivery of the goods to do this.

State General Liability Insurance

In the mid-1980's the State found itself unable to purchase CGL from commercial carriers. The State began to self-insure for CGL and the Risk Management Office was born.

The Risk Management Office will, upon request by a contractor, issue a certificate showing State CGL coverage. The Risk Management Fund covers only the liability of State agencies and employees, and no one else may be named an additional insured. Further, the State may not promise to use self-insurance to contractually meet any liability except in property leases. See the discussion about indemnification that follows.

Further, the by-laws of corporations frequently require the signatures of two officers on any instruments binding the corporation. In such a case, unless a State agency ensures that the corporate contractor complies with such by-laws by requiring such attestation, the contract may be void or voidable by the contractor and the State agency may thereby be at risk. Signing by a corporate officer authorized to take such action, and attestation by the corporate secretary, fulfills this requirement and protects the State. Such attestation establishes presumption of signature authority.

Intellectual Property Issues

One common problem in contracts is the reservation of lots of rights in documentation, without requiring any delivery of documentation or data. The standard clause that says the State "owns" all rights in documentation delivered under the contract means little if the contract never requires delivery of software documentation, for example. So, as you read this discussion about "intellectual property rights," do not forget that the contract has to specify what documentation, e.g. software documentation, must be delivered. Otherwise, the contractor probably is not required to deliver any.

Patents, Copyrights, and Trademarks

Some of the most valuable aspects of goods and services are not the actual supply, software, report, or other deliverable, but the right to copy the deliverable in the future, to modify it, to transfer it to other companies or individuals, etc. These rights to copy, modify, and transfer are embodied in a separate set of property rights called "intellectual property rights."

A patent, for example, is a right created under federal law, granting the inventor the exclusive right to use a patented invention. No other company or individual may then use that patented invention without permission, usually granted through a "license" or assignment of the right to the invention. In a sense, this grants a monopoly to the inventor for protection of the idea.

In transactions in goods governed by the Uniform Commercial Code, a sale includes an implied warranty (i.e. promise) that seller has the necessary title to the goods, and that the goods will be delivered free of the claim of any third party by way of infringement or the like. (Section 4-2-312, CRS) So if a holder of a patent tries sues the State for infringing its patent by using a purchased supply, the State can sue the seller under the implied warranty of title and against infringement. Consequently, be careful about disclaimers of warranties; do not permit a vendor to disclaim the warranty of title and against infringement.

Copyrights are somewhat different. They apply to "works" rather than inventions and do not protect the "idea," only the manifestation of the idea. The right of copyright reserves to the maker of the work the right to copy, distribute, prepare derivative works (i.e. modify), and publicly display the work. A copyright exists upon creation of a work, although federal registration grants certain procedural advantages to anyone trying to sue someone for infringement. Copyrights -- like patents -- are creatures of federal law.

There is a limited exception, known as the "fair use" doctrine, to the prohibition on copying copyrighted works without permission. For example, teachers generally can make limited copies of recently published literary materials for one-time use during class. Even they, however,

cannot incorporate published materials into instructor supplements routinely sold to the students; that would probably not be a "fair use." This becomes an issue for State contracts where contractor-developed materials, e.g. training materials, will be furnished in limited numbers to the State. Whether the State then can just reproduce additional copies when it needs them is not entirely clear in the law -- because the "fair use" doctrine is very limited -- and should be addressed in the contract.

Trademarks are usually of less concern to governments. A trademark or service mark grants the owner the exclusive right to use the mark to identify goods or services. Protections for trademarks and service marks exist under both state and federal laws.

Trade Secrets and Nondisclosure/Confidentiality Agreements

Trade secrets are categories of information that are afforded protection under state law. While the legal requirements for patents are quite complex, most companies use trade secret protections as an additional way to protect ideas. The advantage to the trade secrets is their scope: protections are granted to a broader category of information than might be available under patents (available only for "new and useful" inventions) or copyright law (protections granted only to "works"). In Colorado, a trade secret is defined as "the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses or telephone numbers, or other information relating to any business or profession which is secret and of value." (Section 7-74-102, CRS) These categories of information are much broader than would be protected under either patents or copyrights.

The downside of trade secrets is that once the secret is lost through lawful disclosure, there are no additional protections. That is why companies typically use nondisclosure clauses in contracts to restrict dissemination of information they consider to be trade secrets. A State agency's failure to comply with the nondisclosure terms could subject it to substantial liability, and potentially attorney fees.

Contracts must clearly identify the trade secrets (or confidential and proprietary information) when contractors want nondisclosure provisions. A clear marking requirement should be included so contractors have the responsibility for marking any information they consider subject to the nondisclosure provision. Further, contractors should be advised that the Colorado Open Records Act may limit the ability of the State agency to reach binding agreements on categories of material that may not be disclosed. Clause B5B in Appendix A has these essential elements.

Intellectual Property Rights in Software

Because of the technical limitations of patent law, most companies protect their software using a combination of copyright and trade secret/nondisclosure concepts. Typically, the software is not "sold" to the State agency, only "licensed." And to the extent the contract requires delivery of source code of previously developed software, often the contracts will have nondisclosure provisions that restrict disclosure of that source code and other associated documentation.

Who owns the copyright or patent in an independent contractor situation?

In patent law, there is a "shop right" granted to the employer, permitting the employer to use a patented invention royalty-free where it was conceived or "reduced to practice" using the employer's time or resources. In copyrights, there is a "work for hire" doctrine that grants ownership rights in the copyright to the employer where creation of the work was specifically commissioned as part of the employment.

However, these doctrines generally apply only to employer/employee relationships. In an independent contractor situation, the State would not automatically get any rights to use or ownership in the intellectual property right, other than as necessary for use of the product delivered under the contract. Consequently, if the State intends to reserve the right to transfer, modify, or expand the uses of a software product beyond what was intended in the original contract, such a right would have to be included in the contract. While there may be instances when the particular circumstances of the service performance may give the State a "work for hire" right, for example, it is not advisable to rely on it. Specify the terms of any ownership or license rights in the contract. This is particularly important if the State intends to modify or maintain the software after delivery.

Ownership and License Rights - the State Model Clauses

Appendix A of Chapter 6 of the *Manual* provides most of the tools to write an integrated set of clauses that defines the intellectual property rights. Consider the following:

1. Clause A8 in Appendix A is the starting point for specifying rights in data, documents, and computer software. That clause gives the State ownership rights, which include the rights to copy, publish, display, transfer, prepare derivative rights, and otherwise use the works. Often, the contractor will not have any problem with the clause if all the development is unique and funded by the State. In the case of previously developed software modified for State purposes, though, the contractor often will want to negotiate these ownership rights.

2. Do not forget to specify the document/data/software documentation deliverables. Clause B4 is a model provision for specifying these deliverables. The clause is designed to be used with an exhibit that has more detail concerning the nature, content, and formats for the data and documents. The clause has a <u>simplified</u> definition of software documentation and its adequacy. This clause is designed to be a starting point for contract drafters who, in conjunction with their information technology professionals, can better define the specific documentation requirements on any given project. Some complex software projects may require detailed definition of source code requirements, for example, that are better defined using national or industry standards for software documentation.

3. In the case of software, in particular, vendors will often want to retain ownership rights and license "use" rights to the State. Often, vendors will have license provisions that they want to use, which is acceptable so long as the agency and its information

management professionals understand the terms and use restrictions. At the very least, the license provisions in the contract should clearly identify:

a. the term of the license, usually perpetual;
b. the cost of the license;
c. that other entities on behalf of the State can modify and use the licensed software; and
d. all of the rights that the State needs to retain, usually including the right make archival copies and to modify at least the portion customized for State use.

4. A simplified version of a license provision to accomplish these objectives is:

   The State is granted an irrevocable, nontransferable, nonexclusive, paid-up, perpetual license to display publicly, perform, copy, reproduce, prepare derivative works, and distribute any works, drawings, documents, data, or software delivered under this contract. For purposes of this license, the "State" includes any other person or entity performing services for the State to the extent required for use, modification, or maintenance of the works, drawings, documents, data, or software delivered under this contract.

5. In a complex software development contract, involving previously developed software and a customized software module, sometimes the owned software and licensed software are defined separately. The definitions of "owned software" and "licensed software" then become a key part of the contract.

6. In general, it is acceptable to permit a vendor to retain "ownership rights" in its previously developed software, so long as the State retains adequate license rights at a reasonable price to permit subsequent use and maintenance of the software.

Always use caution in negotiating the documentation and ownership/license clauses. It is easily to unwittingly create a de facto sole source situation because the State has either ordered insufficient documentation or retained insufficient rights to permit its own employees or other contractors to maintain the software.

Federally Funded Contracts

Federal grants often require specific allocation of rights in intellectual property conceived or developed with federal funding. Clauses C9 and C10 are the Federal Patent Rights and Rights in Data and Copyrights clauses developed from the *Common Rule*, also known as the *Uniform Requirements for Grants and Cooperative Agreements to State and Local Governments*. (OMB Circular 102) Agencies are encouraged, however, to ask the federal agencies administering the particular grant programs to identify the clauses that should be used in the State's subrecipient agreements whenever "works" or "inventions" are likely byproducts of the contract performance.

Limitation of Liability/Warranty Disclaimer Issues

Especially with respect to software development agreements, vendors are concerned about potential consequential damages (e.g. lost productivity damages from software bugs) that can potentially far exceed the contract amount. Consequently, many software vendors propose limitation of liability and warranty disclaimer language. Consider these issues:

1. Do not disclaim or exclude the "warranty of title and against infringement" in any contracts. This implied Uniform Commercial Code warranty in "transactions in goods" provides some protection against adverse claims by third parties alleging that the vendor has infringed their intellectual property rights.

2. Other implied warranty disclaimers are fairly common. An example is at clause B11. This disclaimer will limit "warranties" to those expressed in the contract. The State gives up a chance to later claim that the product breached the implied warranty of merchantability or fitness for a particular purpose. See pp. 10-61 and 10-62 for more information about these implied warranties. If an agency is being careful about drafting the contract and statement of work, it should not have to rely on implied warranties anyway.

3. The limitation of liability policies on pages 6-27 and 6-28 apply to software licensing agreements also. Be aware, however, that agreeing to limit liability to the contract amount may cut off vendor liability well short of potential State liability/defense costs if a third party sues the State for intellectual property infringement. Consider using an "Intellectual Property Indemnification" clause such as that at B15 in cases where: 1) limitation of liability provisions are included that limit the vendor's liability, 2) the State could incur significant costs defending an intellectual property action, and 3) discontinuing use of the infringing software or invention is not a viable alternative because of the critical nature of the product or software.

Final Caveat

Integrating rights in data/software and limitation of liability clauses can be difficult, especially when vendor forms are incorporated in the contract. Typically, important terms and conditions are spread throughout the documents, and often terms are used in different ways. Unless the contract amount is relatively insignificant, the nature of the requirement routine, or the consequences for breach otherwise not substantial, we recommend that you seek either the help of experienced purchasing professionals or legal advice from your assigned assistant attorney general. Even more important, agency information management professionals need to be involved to insure that document deliverables are being ordered that permit State use and maintenance of software, and that licensing use restrictions are acceptable.

Amendments, Changes, And Modifications

Generally

Appendix B is the model State amendment form and instructions. This discussion will explain the limitations and uses of amendments, and instructions for completing the amendment form.

Amendments are routed for approval just like the original contract. There are some modifications that can be executed without Attorney General review, but which still require approval by the State Controller (unless delegated) and the Department of Personnel (unless waived). Those modifications are described in the State Controller's policy memorandum in the Policy Letters Annex, and the model provisions are included in Appendix A

of this Chapter, Clauses B18-B23. Also, some changes to capital construction contracts can be executed without Attorney General review where consistent with State Buildings Program policies approved by the State Controller. Otherwise, amendments must be done using substantially the form in Appendix B.

Modifications and amendments must be "prospective" only. That is, the changes made to the original contract are made effective at the time of modification, not dating back to the effective date of the original contract. In rare situations where the circumstances require such a result, however, retroactive amendments may be permitted, as in the case of something erroneously omitted from the original contract, or where there has been a mutual mistake by the contracting parties.

A contract must contain mutual obligations to be valid. So too must contract modifications. Where, for example, something is to be done by a particular date in consideration for the payment of a sum of money, to adjust these original obligations there must be some give and take. For instance, the State cannot agree to pay more money unless additional services are agreed to.

Whenever a contract or lease is to be modified or amended, be sure to submit a copy of the original document and prior amendments when review and approval is sought. The original shall be referred to in the modification by its date, encumbrance number, and contract routing number, and need only be attached to <u>one</u> <u>copy</u> of the amendments submitted for approval.

If any of the services do not conform with contract requirements, the State may require the contractor to perform the services again in conformity with contract requirements, with no additional payment. When defects in the quality or quantity of service cannot be corrected by reperformance, the State may (1) require the contractor to take necessary action to ensure that the future performance conforms to contract requirements and (2) equitably reduce the payment due the contractor to reflect the reduced value of the services performed. These remedies in no way limit the remedies available to the State in the termination provisions of this contract, or remedies otherwise available at law.

10. Remedies

In addition to any other remedies provided for in this contract, and without limiting its remedies otherwise available at law, the State may exercise the following remedial actions if the contractor substantially fails to satisfy or perform the duties and obligation in this contract. Substantial failure to satisfy the duties and obligations shall be defined to mean significant insufficient, incorrect or improper performance, activities, or inaction by contractor. These remedial actions are as follows:

A. Suspend contractor's performance pending necessary corrective action as specified by the State without contractor's entitlement to adjustment in price/cost or schedule; and/or

B. Withhold payment to contractor until the necessary services or corrections in performance are satisfactorily completed; and/or

C. Request the removal from work on the contract of employees or agents of contractor whom the State justifies as being incompetent, careless, insubordinate, unsuitable, or otherwise unacceptable, or whose continued employment on the contract the State deems to be contrary to the public interest or not in the best interest of the State; and/or

D. Deny payment for those services or obligations which have not been performed and which due to circumstances caused by contractor cannot be performed, or if performed would be of no value to the State. Denial of the amount of payment must be reasonably related to the value of work or performance lost to the State.

E. Terminate the contract for default.

The above remedies are cumulative and the State, in its sole discretion, may exercise any or all of them individually or simultaneously.

This clause is commonly used in service contracts. Although contract law provides for numerous remedies for contract breach, occasionally it may be beneficial to specifically mention some in the contract. Note that the clause begins with "In addition to any other remedies provided for in this contract, and without limiting its remedies otherwise available at law. . ." This specifically does not limit remedies under the contract to those listed. See Chapter 10, Section 7 for a discussion of performance remedies.

11. Termination for Convenience (Short Form)

The State may terminate this contract at any time the State determines that the purposes of the distribution of State moneys under the contract would no longer be served by completion of the project. The State shall effect such termination by giving written notice of termination to the contractor and specifying the effective date thereof, at least twenty (20) days before the effective date of such termination. In that event, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports or other material prepared by the contractor under this contract shall, at the option of the State, become its property, and the contractor shall be entitled to receive just and equitable compensation for any satisfactory services and supplies delivered.

If the contract is terminated by the State as provided herein, the contractor will be paid an amount which bears the same ratio to the total compensation as the services satisfactorily performed bear to the total services of the contractor covered by this contract, less payments of compensation previously made, provided, however, that if less than sixty percent (60%) of the services covered by this contract have been performed upon the effective date of such termination, the contractor shall be reimbursed (in addition to the above payment) for that portion of the actual out-of-pocket expenses (not otherwise reimbursed under this contract) incurred by the contractor during the contract period which are directly attributable to the uncompleted portion of the services covered by this contract. In no event shall reimbursement under this clause exceed the contract amount. If this contract is terminated for cause, or due to the fault of the contractor, the Termination for Cause or Default provision shall apply.

This short form version of the termination for convenience clause is used in contracts with political subdivisions and other contracts not subject to the Procurement Code, and in service contracts having fixed level-of-effort where the State is receiving value as the services are being performed. Janitorial services contracts, for example, would be examples of contracts where this short-form clause may be appropriate, because payment for services in proportion to the performance period completed would fairly reimburse the contractor and still insure that the State receives fair value for its payments. For contracts with commercial entities not meeting these criteria -- e.g. software development/integration contracts involving significant start-up costs -- the Procurement Rules "long form" clause, the next clause in this Appendix, is more appropriate.

Occasionally, contractors will ask to make the termination for convenience clause "mutual," permitting either party to terminate the contract at will by giving specified advance, written notice. In such cases, exercise extreme care, and consider getting legal advice or the assistance of a more experienced purchasing/contracting professional. It is particularly important to consider: the effect of contractor termination on advance or progress payments, and the obligation of the contractor to return them; whether the right of the contractor to compensation after it terminates is clearly stated and requires the State to pay only reasonable compensation for acceptable, completed deliverables having value to the State; whether the milestones and associated progress payments are distinguished from the compensation due the contractor for acceptable, completed services and deliverables after termination, since progress payments are often not sufficiently based on the value of services received by the

State; and whether there is procurement authority to acquire replacement or continued services within the needed time. In general, while the termination for convenience clauses in this Appendix are adequate to give the State the right to terminate for convenience, they are not generally adequate to define the contractor's right to terminate at will and receive compensation.

12. Termination for Convenience (Long Form)

Termination

The procurement officer may, when the interests of the purchasing agency so require, terminate this contract in whole or in part, for the convenience of the agency. The procurement officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective. This in no way implies that the purchasing agency has breached the contract by exercise of the Termination for Convenience Clause.

Contractor's Obligations

The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The procurement officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the purchasing agency. The contractor must still complete and deliver to the purchasing agency the work not terminated by the Notice of Termination and may incur obligations as are necessary to do so.

Compensation

A. The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data bearing on such claim. If the contractor fails to file a termination claim within 90 days from the effective date of termination, the procurement officer may pay the contractor, if at all, an amount set in accordance with subparagraph C of this Section.

B. The procurement officer and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost or pricing data and that the settlement does not exceed the total contract price plus settlement costs, reduced by payments previously made by the purchasing agency, the proceeds of any sales of supplies and manufactured materials made under agreement, and the contract price of the work not terminated.

C. Absent complete agreement, under subparagraph B of this Section, the procurement officer shall pay the contractor the following amounts, provided the payments agreed to under subparagraph B shall not duplicate payments under this subparagraph:

    1) Contract prices for supplies or services accepted under the contract;

2) Costs incurred in preparing to perform the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid to or to be paid for accepted supplies or services; provided, however, that if it appears that the contractor would have been sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss.

3) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to the contractor's obligations paragraph of this clause. These costs must not include costs paid in accordance with subparagraph B of this Section.

4) The reasonable settlement costs of the contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the terminated portion of this contract.

5) The total sum to be paid the contractor under this subparagraph C shall not exceed the total contract price plus settlement costs, reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph B, and the contract price of work not terminated.

D. Cost claimed or agreed to under this section shall be in accordance with applicable sections of the Colorado State Procurement Code.

This long form version of the termination for convenience clause is prescribed in the Procurement Rules. The clause "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01. See the comments under Termination for Convenience (Short Form) with respect to the proper use of each clause, as well as cautions in making the clauses "mutual" and the contract terminable at will by the contractor.

13. Termination for Default/Cause (Short Form)

If, through any cause, the contractor shall fail to fulfill, in a timely and proper manner, its obligations under this contract, or if the contractor shall violate any of the covenants, agreements, or stipulations of this contract, the State shall thereupon have the right to terminate this contract for cause by giving written notice to the contractor of its intent to terminate and at least ten (10) days opportunity to cure the default or show cause why termination is otherwise not appropriate. In the event of termination, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports or other material prepared by the

contractor under this contract shall, at the option of the State, become its property, and the contractor shall be entitled to receive just and equitable compensation for any services and supplies delivered and accepted. The contractor shall be obligated to return any payment advanced under the provisions of this contract.

Notwithstanding the above, the contractor shall not be relieved of liability to the State for any damages sustained by the State by virtue of any breach of the contract by the contractor, and the State may withhold any payment to the contractor for the purposes of mitigating its damages until such time as the exact amount of damages due to the State from the contractor is determined.

If after such termination it is determined, for any reason, that the contractor was not in default, or that the contractor's action/inaction was excusable, such termination shall be treated as a termination for convenience, and the rights and obligations of the parties shall be the same as if the contract had been terminated for convenience, as described herein.

This short form termination for default clause is customarily used in contracts with political subdivisions and nonprofit entities.

14. Termination for Default/Cause (Long Form)

Default

If the contractor refuses or fails to timely perform any of the provisions of this contract, with such diligence as will ensure its completion within the time specified in this contract, the procurement officer may notify the contractor in writing of the non-performance, and if not promptly corrected within the time specified, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services elsewhere.

TO THIS CONTRACT. CONTRACTOR ACKNOWLEDGES THAT THE CONTRACTOR AND ITS EMPLOYEES ARE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS THE CONTRACTOR OR A THIRD PARTY PROVIDES SUCH COVERAGE AND THAT THE STATE DOES NOT PAY FOR OR OTHERWISE PROVIDE SUCH COVERAGE. CONTRACTOR SHALL HAVE NO AUTHORIZATION, EXPRESS OR IMPLIED, TO BIND THE STATE TO ANY AGREEMENTS, LIABILITY, OR UNDERSTANDING EXCEPT AS EXPRESSLY SET FORTH HEREIN. CONTRACTOR SHALL PROVIDE AND KEEP IN FORCE WORKER'S COMPENSATION (AND SHOW PROOF OF SUCH INSURANCE) AND UNEMPLOYMENT COMPENSATION INSURANCE IN THE AMOUNTS REQUIRED BY LAW, AND SHALL BE SOLELY RESPONSIBLE FOR THE ACTS OF THE CONTRACTOR, ITS EMPLOYEES AND AGENTS.

This paragraph and the typeface is required by the Personnel Rules to be used in personal services contracts.

The purpose of the provision is to declare the intent of the parties to establish an independent contractor relationship. Failure to maintain an independent contractor relationship can result in the State being held responsible for income tax withholding and FICA taxes, workers compensation, and other liability of "employers."

17. Representatives and Notice

A. Representatives. For the purpose of this contract, the individuals identified below are hereby designated representatives of the respective parties. Either party may from time to time designate in writing new or substitute representatives:

For the State:

Name Title

For the Contractor:

Name Title

It is advisable that the responsible employees of the parties be clearly identified, since it is often necessary for parties to a contract to have a continuous course of dealing as the contract is performed.

This provision is not a delegation of signatory authority for the purposes of contracting initially or entering into modifications or amendments. If you want to specify the specific authority of the representative, do so using a provision substantially like the one that follows. Note that you cannot ever give the representative the authority to amend the contract and commit more funds--you must use an approved modification.

B. Authority. With respect to the representative of the State, such individual shall have the authority to _____, inspect and reject services, approve invoices for payment, and act otherwise for the State, except with respect to the execution of formal amendments to or termination of this agreement pursuant to paragraphs ___ and ___.

C. Notices. All notices required to be given by the parties hereunder shall be hand delivered or given by certified or registered mail to the individuals at the addresses set forth below. Either party may from time to time designate in writing substitute addresses or persons to whom such notices shall be sent.

For the State:

Name : _____
Department and Division: _____
Address: _____
_____
_____

For the contractor:

This provision will help avoid practical problems caused by misdirected mail. Several representatives may be listed if necessary. Certified or registered mail is preferred, but regular U.S. Mail is a reasonable alternative. The option of personal delivery of a notice could also be provided for.

18. Assignment and Successors

The contractor agrees not to assign rights or delegate duties under this contract [or subcontract any part of the performance required under the contract] without the express, written consent of the State [which shall not be unreasonably withheld]. Except as herein otherwise provided, this agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns. This provision shall not be construed to prohibit assignments of the right to payment to the extent permitted by section 4-9-318, CRS, provided that written notice of assignment adequate to identify the rights assigned is received by the controller for the agency, department, or institution executing this contract. Such assignment shall not be deemed valid until receipt by such controller -- as distinguished from the State Controller -- and the contractor assumes the risk that such written notice of assignment is received by the controller for the agency, department, or institution involved.

Especially in contracts for personal services, but for most State contracts in general, if the State has selected a certain vendor or contractor, it has done so through a process according to the laws governing State contracting in order to allow for fairness to all potential contractors. If the vendor assigns a contract with the State to another party, then the public confidence in the competitive process may be compromised. Section 4-9-318, CRS, permits contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract.

Despite the prohibition on nonconsensual assignment, if a contractor goes into bankruptcy, its accounts and contract may be assigned. If a company reorganizes or merges with another under a different name, it will have successors. The last sentence of this clause assures that these other entities will be bound by the law to complete the contract if the State desires, even though they are not technically parties to the contract.

19. Changes

A written order

By a written order, at any time, and without notice to any surety, the procurement officer may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

1) [Drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the purchasing agency in accordance therewith] [description of services to be performed];

2) Method of shipment or packing [time of performance of services]; or

3) Place of delivery or performance of services.

Adjustments of Price or Time or Performance

If any such change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

Failure of the parties to agree to an adjustment

Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the purchasing agency promptly and duly makes such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of the time for completion.

Time Period for Claim

Within 30 days after receipt of a written change order under the Change Order paragraph of this clause, unless such period is extended by the procurement officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment.

Claim Barred After Final Payment

No claim by the contractor for an adjustment hereunder shall be allowed if asserted after final payment under this contract.

Without a "changes" clause, the right of the State to direct changes in statement/scope of work or specifications is dependent on the willingness of the contractor to agree to amend the contract. "Changes" clauses give the State a limited right to direct changes to the contract that are "within the scope of the contract." Of course, the contractor would be entitled to an equitable adjustment in price/cost and/or schedule if such a change is ordered. Because the State would be committing to a payment of money by exercising this right, use of the changes clause generally would require review by the Attorney General and approval by the Controller.

Elsewhere in this Appendix is an expanded version of the changes clause that permits a bilateral "change order letter" without the necessity of Attorney General review.

This changes clause, an important right to reserve for the State, could be exercised unilaterally (after approval by the State Controller), although a bilateral change is most common using an amendment or other approved modification format. If you are anticipating use of the clause unilaterally, consult counsel.

20. Price Adjustments

A. Price Adjustment Method. Any adjustment in contract price pursuant to the application of a clause in this contract shall be made in one or more of the following ways:

1) By agreement on a fixed-price adjustment;

2) By unit prices specified in the contract;

3) In such other manner as the parties may mutually agree; or

4) In the absence of agreement between the parties, by a unilateral determination by the procurement officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee.

B. Submission of Cost or Pricing Data**.** The contractor shall provide cost or pricing data for any price adjustment subject to the provisions of the Cost or Pricing Data Section of the Colorado State Procurement Rules.

If there are any clauses in the contract which give the contractor an adjustment in price/schedule for certain events, the contract should also set out how the adjustment will be done. This clause is set forth in the Procurement Rules for general use, but it "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01.

21. Force Majeure

Neither the contractor nor the State shall be liable to the other for any delay in, or failure of performance of, any covenant or promise contained in this contract, nor shall any delay or failure constitute default or give rise to any liability for damages if, and only to the extent that, such delay or failure is caused by "force majeure". As used in this contract “force majeure” means acts of God; acts of the public enemy; acts of the State and any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor

disputes; freight embargoes; or unusually severe weather.

"Force majeure" means those events for which neither party will be held accountable. The long-form termination for default clause has an excusable delay provision that also excuses delays caused by the list of "force majeure" events in the clause. Generally, if the long-form termination for default clause is used, this "force majeure clause need not also be added to the contract. The list of events constituting "force majeure" can be negotiated and modified by the parties.

22. Third Party Beneficiaries

It is expressly understood and agreed that the enforcement of the terms and conditions of this contract and all rights of action relating to such enforcement, shall be strictly reserved to the State and the named contractor. Nothing contained in this agreement shall give or allow any claim or right of action whatsoever by any other third person. It is the express intention of the State and the contractor that any such person or entity, other than the State or the contractor, receiving services or benefits under this agreement shall be deemed an incidental beneficiary only.

23. Governmental Immunity

Notwithstanding any other provision of this [contract] to the contrary, 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, protection, or other provisions of the Colorado Governmental Immunity Act, Section 24-10-101, *et.seq.*, CRS, as now or hereafter amended. The parties understand and agree that liability for claims for injuries to persons or property arising out of negligence of the State of Colorado, its departments, institutions, agencies, boards, officials and employees is controlled and limited by the provisions of Section 24-10-101, *et. seq.*, CRS, as now or hereafter amended and the risk management statutes, Section 24-30-1501, *et. seq.*, CRS, as now or hereafter amended.

24. Severability

To the extent that this contract may be executed and performance of the obligations of the parties may be accomplished within the intent of the contract, the terms of this contract are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof.

Common law allows for an argument that if any one provision of a contract is deemed invalid, illegal, or inoperative for some other reason, <u>all</u> the provisions in the contract are then suspect and the contract can be rescinded or voided entirely. This clause prevents that argument and allows the State to still hold a contractor liable for parts of the contract that have not been deemed invalid.

25. Waiver

The waiver of any breach of a term, provision, or requirement of this contract shall not be construed or deemed as waiver of any subsequent breach of such term, provision, or requirement, or of any other term, provision, or requirement.

26. Entire Understanding

This contract is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a writing executed and approved pursuant to the State Fiscal Rules.

Parties' memories of what was agreed to may get foggy in time and that's why written contracts are valuable. This clause prevents parties from later claiming that there were other provisions agreed to that were not put into the contract. This clause has the effect of saying that, "If it is not written down, it is not valid and the court won't recognize it." Secondly, it makes it clear that changes to the contract must be properly approved and processed under the fiscal rules.

If, at any point after a contract is signed, the parties agree to something different from or in addition to what is contained in the contract, these changes cannot be informally accepted, but must be set forth in writing and embodied in an amendment or approved modification.

27. Survival of Certain Contract Terms

Notwithstanding anything herein to the contrary, the parties understand and agree that all terms and conditions of this contract and the exhibits and attachments hereto which may require continued performance, compliance, or effect beyond the termination date of the contract shall survive such termination date and shall be enforceable by the State as provided herein in the event of such failure to perform or comply by the contractor.

Examples of these types of long-lived contract terms include: records retention, maintenance and replacement provisions, land use covenants, inspections and certification, indemnification, audit rights, rights in data and software, warranties, etc.

28. Modification and Amendment

This contract is subject to such modifications as may be required by changes in Federal or State law, or their implementing regulations. Any such required modification shall automatically be incorporated into and be part of this contract on the effective date of such change as if fully set forth herein. Except as provided above, no modification of this contract shall be effective unless agreed to in writing by both parties in an amendment to this contract that is properly executed and approved in accordance with applicable law.

One alternative is to reference an Exhibit defining the requirements for data or document delivery. Alternatively, you can specify the content requirements in the contract itself, as has been done in this model software documentation clause. One caveat: before using this provision, consult with a software programming expert to see if there are better ways, such as use of national standards, with which to specify the requirements for software documentation.

5. Confidentiality of Records

A. [The contractor is hereby designated an agent of the State for the purposes of the confidentiality requirements of Section 8-72-107, CRS.] In the event the contractor shall obtain access to any records or files of the State in connection with agreement, or in connection with the performance of its obligations under this agreement, the contractor shall keep such records and information confidential and shall comply with [Section 8-72-107, CRS, and all other] laws and regulations concerning the confidentiality of such records to the same extent as such laws and regulations apply to the State. [The contractor shall notify its employees that they are subject to the confidentiality requirements as set forth above, and shall provide each employee with a written explanation of the confidentiality requirements before the employee is permitted access to confidential data.]

Under Section 8-72-107, CRS, (1973), the Division of Employment is permitted to give access to its employment records to other governmental agencies and agents of the division "designated as such in writing." This provision imposes on such parties the same confidentiality requirements to which employees of the division are subject. <u>Only the Division of Employment may designate agents for access to confidential employment records</u>.

If the contractor will have access to confidential data other than employment-related information controlled by the State Department of Labor and Employment, use a variation on the above paragraph which removes the statutory citations and references to DOLE, and substitute a requirement that such data will be held confidential unless it is already in the public domain or its release is approved in writing by the State. <u>Eliminate the first sentence regarding agency unless</u> the statute you are referring to expressly permits the granting of agency status to others.

Where it is anticipated that more than a few of the contractor's personnel will be dealing with confidential data, it is usually a good idea to require the contractor to provide each such employee with an explanation of the confidentiality requirements, using a clause similar to the optional sentence at the end of the clause.

B. Except as required by law, the State will not disclose to third persons, other than contractors or consultants of the State whose performance of services require disclosure, any information marked as “confidential” or “proprietary” or otherwise marked as agreed by the parties. Except as otherwise agreed, “confidential” or “proprietary” information of the contractor which may be marked is information relating to its research, development, trade secrets, business affairs, internal operations and management procedures and like information of its

customers, clients, or affiliates, but does not include information lawfully obtained from third parties, information in the public domain, exhibits, attachments, or appendices to the contract, or information required to be delivered to the State pursuant to the terms of this contract. With respect to any such disclosure to other contractors or consultants of the State, the State agrees to inform them concerning the restrictions on disclosure and include suitable nondisclosure provisions in their agreements. Nothing herein is intended or shall operate as a waiver of any applicable law governing disclosure of records, including the Colorado Open Records Act (Section 24-72-101. CRS). The State agrees to provide the contractor with prompt written notice of requests for disclosure under such laws of contract information within the scope of this clause.

6. Applicable Law

The contractor shall at all times during the execution of this contract strictly adhere to, and comply with, all applicable Federal and State laws, and their implementing regulations, as they currently exist and may hereafter be amended, which are incorporated herein by this reference as terms and conditions of this contract.

7. Licenses, Permits, and Responsibilities

Contractor certifies that, at the time of entering into this contract, it has currently in effect all necessary licenses, certifications, approvals, insurance, permits, etc. required to properly perform the services and/or deliver the supplies covered by this contract. Contractor warrants that it will maintain all necessary licenses, certifications, approvals, insurance, permits, etc. required to properly perform this contract, without reimbursement by the State or other adjustment in contract price. Additionally, all employees of contractor performing services under this contract shall hold the required licenses or certification, if any, to perform their responsibilities. Contractor further certifies that, if it is a foreign corporation or other entity, it currently has obtained and shall maintain any applicable certificate of authority to do business in the State of Colorado and has designated a registered agent in Colorado to accept service of process. Any revocation, withdrawal or non-renewable of necessary licenses, certifications, approvals, insurance, permits, etc. required for contractor to properly perform this contract, shall be grounds for termination of this contract by the State for default.

8. Availability of Funds – Lease/Purchase and Installment Purchases

A. The parties hereto understand and agree this contract is contingent upon continuing availability of funds as provided in Special Provision Two (2) hereinafter, and that the State is prohibited by law from making fiscal commitments beyond the term of its current fiscal period. The State may terminate this contract as provided in the following paragraphs.

B. The State has reason to believe that sufficient funds will be available for the full term of the contract. Where, for reasons beyond State's control, its funding entity does not allocate funds for any fiscal period beyond the one in which this contract is entered into, or beyond a succeeding fiscal period, where State has exhausted efforts to obtain funds legally available for future fiscal periods, and where such failure to obtain funds does not result from any act or failure to act on the part of State, State will not be obligated to make the payments remaining beyond State's then current fiscal period, nor shall State be liable for

6. Federal Examination of Records Clause

Contractor, and its subcontractors and subgrantees, will give the State, the awarding Federal agency, and the Comptroller General of the United States, through any authorized representatives, access to and the right to examine all records, books, papers, or documents related to the award and contract; and will establish a proper accounting system in accordance with generally accepted accounting standards.

7. Federal Audit Provisions

The Office of Management and Budgets (OMB) Circular No. A-133 Audits of States, Local Governments, and Non-Profit Organizations defines audit requirements under the Single Audit Act of 1996 (Public Law 104-156). All state and local governments and non-profit organizations expending $300,000 or more from all sources (direct or from pass-through entities) are required to comply with the provisions or Circular No. A-133. The Circular also requires pass-through entities to monitor the activities of subrecipients and ensure that subrecipients meet the audit requirements. To identify its pass-through responsibilities, the State of Colorado requires all subrecipients to notify the State when expected or actual expenditures of federal assistance from all sources equal or exceed $300,000.

Confirm that the Cognizant Federal agency has not established a different audit threshold for the program involved. Clause A6 has optional clauses that incorporate the applicable cost accounting standards that govern expenditure of funds under federal grants.

8. Conflict of Interest

The contractor (and subcontractors or subgrantees permitted under the terms of this contract) shall maintain a written code of standards governing the performance of its employees engaged in the award and administration of contracts. No employee, officer or agent of the contractor, subcontractor, or subgrantee shall participate in the selection, or in the award or administration of a contract or subcontract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

1) The employee, officer or agent;
2) Any member of the employee's immediate family;
3) The employee's partner; or
4) An organization which employs, or is about to employ, any of the above,

has a financial or other interest in the firm selected for award. The contractor's, subcontractor's, or subgrantee's officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements.

9. Patent Rights - Federal Funds

If any invention, improvement, or discovery of the contractor/grantee or any of its subcontractors or subgrantees is conceived or first actually reduced to practice in the course of or under this contract work, and if such is patentable, the contractor/grantee shall notify the State immediately and provide a detailed written report. The rights and responsibilities of the contractor/grantee, third party contractors, and the State with respect to such invention, improvement, or discovery will be determined in accordance with applicable federal laws and regulations in existence on the date of execution of this contract which define contractor title, right to elect title, federal government "march in" rights, and the scope of the federal government's right to a nonexclusive, irrevocable, paid-up license to use the subject invention for its own. The contractor/grantee shall include the requirements of this paragraph in its third party contracts for the performance of the work under this contract.

This clause will not grant the State much of a right in any invention reduced to practice during performance of a federally funded contract. Unless the invention is covered by the limited circumstances of a "shop right," the State would likely have little interest in the invention unless an assignment, license, or other allocation of ownership exists pursuant to contract. This clause is intended to invoke federal rules governing title to inventions, and the federal government's rights in those inventions. In a case in which development is expected to be funded with State funds, contact legal counsel for assistance in drafting necessary contract provisions.

10. Rights In Data and Copyright - Federal Reserved Rights

Except for its own internal use, the contractor/grantee shall not publish or reproduce any data/information, in whole or part, that is recorded in any form or medium whatsoever and that is delivered or specified to be delivered under this contract, nor may it authorize or permit others to do so, without the written consent of the federal government, through the State, until such time as the federal government may have released such data/information to the public.

As authorized by 49 CFR 18.34, the federal government, through the State, reserves a royalty free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize the State and others to use: a) any work developed under this contract or a resulting third party contract irrespective of whether or it is copyrighted; and b) any rights of copyright to which a contractor/grantee, sub-recipient, or third party contractor purchases ownership with federal assistance.

11. Grant Assurances

If this contract involves the expenditure of federal funds, the contractor shall at all times during the execution of this contract strictly adhere to and comply with all applicable federal laws and regulations, as they currently exist and may hereafter be amended, which are incorporated herein by this reference as terms and conditions of this contract. The contractor shall also require compliance with these statutes and regulations in subgrant agreements permitted under this contract. The federal laws and regulations include:

- The "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (Common Rule), at 49 Code of Federal Regulations, Part 18.

- Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Chapter 60) (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees).

- The Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3) (All contracts and subgrants for construction or repair).

- The Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5) (Construction contracts in excess of $2,000 awarded by grantees and subgrantees when required by Federal grant program legislation. This act requires that all laborers and mechanics employed by contractors or sub-contractors that work on construction projects financed by federal assistance must be paid wages not less than those established for the locality of the project by the Secretary of Labor).

- Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2,000, and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers).

- Standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857(h), Section 508 of the Clean Water Act (33 U.S.C. 1368). Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15) (contracts, subcontracts, and subgrants of amounts in excess of $100,000).

- Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

- Office of Management and Budget Circulars A-87, A-21 or A-122, and A-102 or A-110, whichever is applicable.

- The Hatch Act (5 USC 1501-1508) and Public Law 95-454, Section 4728. These statutes state that federal funds cannot be used for partisan political purposes of any kind by any person or organization involved in the administration of federally-assisted programs.

- USC 6101 et seq., 42 USC 2000d, 29 USC 794, and implementing regulation, 45 C.F.R. Part 80 et. seq.. These acts require that no person shall, on the grounds of race, color, national origin, age, or handicap, be excluded from participation in or be subjected to discrimination in any program or activity funded, in whole or part, by federal funds;

- The Americans with Disabilities Act (Public Law 101-336; 42 USC 12101, 12102, 12111-12117, 12131-12134, 12141-12150, 12161-12165, 12181-12189, 12201-12213, 47 USC 225 and 47 USC 611.

- The Uniform Relocation Assistance and Real Property Acquisition Policies Act, as amended (Public Law 91-646, as amended and Public Law 100-17, 101 Stat. 246-256). (If the contractor is acquiring real property and displacing households or businesses in the performance of this contract.)

- The Drug-Free Workplace Act (Public Law 100-690 Title V, subtitle D, 41 USC 701 et seq.).

- The Age Discrimination Act of 1975, 42 U.S.C. Sections 6101 et. seq. and its implementing regulation, 45 C.F.R. Part 91;

- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended, and implementing regulation 45 C.F.R. Part 84.

These grant assurance provisions were taken from the Department of Transportation model provisions. You should check your sister federal agency for required assurances.

12. Federal Certifications

Certification Regarding Debarment, Suspension, Ineligibility
And
Voluntary Exclusion-Lower Tier Covered Transaction

Instructions for Certifications

1. By signing and submitting its proposal and signing this contract, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

4. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted or with whom this contract is made for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting its proposal and signing this contract that should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal and signing this contract that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transaction.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may purse available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility an Voluntary Exclusion-Lower Tier Covered Transactions

1. The prospective lower tier participant certifies, by submission of this proposal and execution of this contract, that neither it nor its principals is presently declared ineligible, or voluntarily excluded from participation in this transaction by an Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to its proposal.

Certification Regarding Drug-Free Workplace Requirements

Instructions for Certifications

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant and executes the contract. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees that are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

<u>Drug-Free Workplace Certifications</u>

Alternate I. (Grantees Other Than Individuals)

A. The grantee/contractor certifies that it will or will continue to provide a drug-free workplace by:

1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition:

2. Establishing an ongoing drug-free awareness program to inform employees about-

   a) The dangers of drug abuse in the workplace;
   b) The grantee's policy of maintaining a drug-free workplace;
   c) Any available drug counseling, rehabilitation, and employee assistance programs; and

d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

3. Making it a requirement that each employee to be engaged in the performance of the grant/contract be given a copy of the statement required by paragraph 1;

4. Notifying the employee in the statement required by paragraph 1 that, as a condition of employment under the grant/contract, the employee will:

   a) Abide by the terms of the statement; and
   b) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

5. Notifying the agency in writing, within ten calendar days after receiving notice under paragraph 4(b) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant/contract activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant/contract;

6. Taking one of the following actions, within 30 calendar days of receiving notice under paragraph 4(b), with respect to any employee who is so convicted:

   (a) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or
   (b) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

7. Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs 1,2,3,4,5,and 6.

B. The grantee/contractor may insert in the space provided below the site(s) for the performance of work done in connection with this grant/contract:

_____

_____

_____

Alternate II. (Grantees Who Are Individuals)

1. The grantee/contractor certifies that, as a condition of the grant/contract, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant/contractor;

2. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant/contract activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant/contract.

Certification Regarding Lobbying

(Certification for Contracts, Grants, Loans, and Cooperative Agreements)

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an office or employee of any agency, a Member of Congress, an office or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(Statement for Loan Guarantees and Loan Insurance)

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with this commitment providing for the United States to ensure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Tobacco Free Certification

Public Law 103-227, the Pro-Children Act of 1994, requires that smoking not be permitted in any portion of any indoor facility owned or leased or contracted for by any entity and used routinely or regularly for the provision of health, day care, education, or library services to children under the age of 18, if the services are funded by Federal programs either directly or through State or local governments, by Federal grant, contract, loan, or loan guarantee. The law does not apply to children's services provided by private residences, facilities funded solely by Medicare or Medicaid funds, and portions of facilities used for inpatient drug or alcohol treatment. By submitting and signing the application and this contract, the contractor certifies that it will comply with the requirements of the Act. The contractor further agrees that it will require the language of this certification to be included in any subawards which contain provisions for children's services and that all subgrantees shall certify and perform accordingly.

All of these certifications may not be required for particular grant programs, although normally the first three certifications (suspension and debarment, drug free work place, and anti-lobbying) are required. The program administrator should check with the cognizant federal agency, or its implementing regulations, concerning the content of required certifications. Some federal agencies have particular certification forms and instructions for their completion. If the certifications are executed as a part of the grant application or proposal submission, they need not also be included in the contract.

D. Special Provisions

These Special Provisions are required by Fiscal Rule 3-1 to be used in every State contract, including grants.

SPECIAL PROVISIONS

CONTROLLER'S APPROVAL

1. This contract shall not be deemed valid until it shall have been approved by the Controller of the State of Colorado or such assistant as he may designate. This provision is applicable to any contract involving the payment of money by the State.

FUND AVAILABILITY

2. Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

BOND REQUIREMENT

3. If this contract involves the payment of more than fifty thousand dollars for the construction, erection, repair, maintenance, or improvement of any building, road, bridge, viaduct, tunnel, excavation or other public work for this State, the Contractor shall, before entering upon the performance of any such work included in this contract, duly execute and deliver to the State official who will sign the contract, a good and sufficient bond or other acceptable surety to be approved by said official in a penal sum not less than one-half of the total amount payable by the terms of this contract. Such bond shall be duly executed by a qualified corporate surety conditioned upon the faithful performance of the contract and in addition, shall provide that if the Contractor or his subcontractors fail to duly pay for any labor, materials, team hire, sustenance, provisions, provendor or other supplies used or consumed by such Contractor or his subcontractor in performance of the work contracted to be done or fails to pay any person who supplies rental machinery, tools, or equipment in the prosecution of the work the surety will pay the same in an amount not exceeding the sum specified in the bond, together with interest at the rate of eight per cent per annum. Unless such bond is executed, delivered and filed, no claim in favor of the Contractor arising under such contract shall be audited, allowed or paid. A certified or cashier's check or a bank money order payable to the Treasurer of the State of Colorado may be accepted in lieu of a bond. This provision is in compliance with CRS 38-26-106.

INDEMNIFICATION

4. To the extent authorized by law, the Contractor shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees incurred as a result of any act or omission by the Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract.

DISCRIMINATION AND AFFIRMATIVE ACTION

5. The Contractor agrees to comply with the letter and spirit of the Colorado Antidiscrimination Act of 1957, as amended, and other applicable law respecting discrimination and unfair employment practices (CRS 24-34-402), and as required by Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975. *Pursuant thereto, the following provisions shall be contained in all State contracts or subcontracts*.

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap, or age. The Contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to the above mentioned characteristics. Such action shall include, but not be limited to the following: employment upgrading, demotion or transfer, recruitment or recruitment advertising; lay-offs or terminations; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth provisions of this non-discrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, State that all qualified applicants will receive consideration for employment without regard to race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap, or age.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, notice to be provided by the contracting officer, advising the labor union or workers' representative of the Contractor's commitment under the Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975, and rules, regulations, and relevant Orders of the Governor.

(d) The Contractor and labor unions will furnish all information and reports required by Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, and by the rules, regulations and Orders of the Governor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the office of the Governor or his designee for purposes of investigation to ascertain compliance with such rules regulations and orders.

(e) A labor organization will not exclude any individual otherwise qualified from full membership rights in such labor organization, or expel any such individual from membership in such labor organization or discriminate against any of its members in the full enjoyment work opportunity because of race, creed, color, sex, national origin, or ancestry.

(f) A labor organization, or the employees or members thereof will not aid, abet, incite, compel or coerce the doing of any act defined in this contract to be discriminatory or obstruct or prevent any person from complying with the provision of this contract or any order issued thereunder; or attempt, either directly or indirectly, to commit any act defined in this contract to be discriminatory.

(g) In the event of the Contractor's non-compliance with the non-discrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the Contractor may be declared ineligible for further State contracts in accordance with procedures, authorized in Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975 and the rules, regulations, or orders promulgated in accordance therewith, and such other sanctions as may be imposed and remedies as may be invoked as provided in Executive Orders, Equal Opportunity and Affirmative Action of April 16, 1975, or by rules, regulations, or orders promulgated in accordance therewith, or as otherwise provided by law.

(h) The Contractor will include the provisions of paragraphs (a) through (h) in every subcontract and subcontractor purchase order unless exempted by rules, regulations, or orders issued pursuant to Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any sub-contracting or purchase order as the contracting agency may direct, as a means of enforcing such provisions, including sanctions for non-compliance; provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation, with the subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the State of Colorado to enter into such litigation to protect the interest of the State of Colorado.

COLORADO LABOR PREFERENCE

6a. Provisions of CRS 8-17-101 & 102 for preference of Colorado labor are applicable to this contract if public works within the State are undertaken hereunder and are financed in whole or in part be State funds.

b. When a construction contract for a public project is to be awarded to a bidder, a resident bidder shall be allowed a preference against a non-resident bidder from a State or foreign country equal to the preference given or required by the State or foreign country in which the non-resident bidder is a resident. If it is determined by the officer responsible for awarding the bid that compliance with this subsection .06 may cause denial of federal funds which would otherwise be available or would otherwise be inconsistent with requirements of Federal law, this subsection shall be suspended, but only to the extent necessary to prevent denial of the moneys or to eliminate the inconsistency with Federal requirements (CRS 8-19-101 and 102).

GENERAL

7. The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this contract. Any provision of this contract whether or not incorporated herein by reference which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall 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 will not invalidate the remainder of this contract to the extent that the contract is capable of execution.

8. At all times during the performance of this contract, the Contractor shall strictly adhere to all applicable federal and State laws, rules, and regulations that have been or may hereafter be established.

9. Pursuant to CRS 24-30-202.4 (as amended), the State Controller may withhold debts owed to State agencies under the vendor offset intercept system for: (a) unpaid child support debt or child support arrearages; (b) unpaid balance of tax, accrued interest, or other charges specified in Article 21, Title 39, CRS; (c) unpaid loans due to the Student Loan Division of the Department of Higher Education; (d) owed amounts required to be paid to the Unemployment Compensation Fund; and (e) other unpaid debts owing to the State or any agency thereof, the amount of which is found to be owing as a result of final agency determination or reduced to judgment as certified by the controller.

10. The signatories aver that they are familiar with CRS 18-8301, et. seq., (Bribery and Corrupt Influences) and CRS 18-8-401, et. seq., (Abuse of Public Office), and that no violation of such provisions is present.

11. The signatories aver that to their knowledge, no State employee has any personal or beneficial interest whatsoever in the service or property described herein:

IN WITNESS WHEREOF, the parties hereto have executed this Contract on the day first above written.

Contractor:

(Full Legal Name)_____

_____

_____

Position (Title)_____

_____
Social Security Number or Federal Identification Number

If Corporation:)
Attest (Seal)

By_____
Corporate Secretary, or Equivalent, Town/City/County Clerk

STATE OF COLORADO

BILL OWENS, GOVERNOR

_____
EXECUTIVE DIRECTOR

DEPARTMENT OF _____

APPROVALS:

ATTORNEY GENERAL

*By*_____

STATE CONTROLLER

*By*_____

The risk from technically directing subcontractors is that the prime contractor may be able to escape liability for the subcontractor's deficient performance where the State has entered into an implied contractual relationship with the subcontractor by directly dealing with the subcontractor and issuing direction or instructions during performance. Further, the subcontractor may have a right to sue the State directly for alleged breaches by the State under the contract. It is wise to limit the State's obligations (and potential liability) to those owing to the single entity--the prime contractor.

5.4 Assignments Distinguished

When the term subcontracting is used, it usually applies to an element of performance due to the State. For example, a subcontractor in a construction contract may be doing foundation work. In a computer systems contract, there may be subcontractors actually writing the software or supplying some of the hardware. The customary "assignment", on the other hand, involves the contractor's giving away the right to receive something--most often payment. Assignments of the right to payment for the benefit of creditors are common. An example is an assignment to a bank. Section 4-9-318, CRS, permits contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract. Legally, the State is obligated to honor such an assignment once it receives notice. If a notice of assignment of payment is received, do not pay the original contractor; contact your agency or institution controller immediately. Other assignments, on the other hand, such as assignment of performance duties or obligations, can be controlled by requiring consent of the State. Appendix A to Chapter 6 has an example of such a clause.

Checklist of Contract Management Considerations

- Read the contract to identify specific subcontract limitations, approval requirements, reporting obligations, etc.

- Do not interfere in subcontracting decisions made by the prime contractor without the contractual right to do so.

- Never direct the use of any specific subcontractor.

- Do not process claims for payment by subcontractors. Refer the subcontractor back to the prime contractor.

- Retain neutrality in disputes involving the prime contractor and any of its suppliers or subcontractors, except that contract rights or statutory obligations to withhold payments (e.g. in construction contracts) may be exercised, BUT ONLY TO THE EXTENT DEFINED IN THE CONTRACT OR OTHER APPLICABLE LAW. Obtain the assistance of legal counsel in cases involving disputes over payment where subcontractors are trying to get the State involved.

- Do not direct or instruct subcontractors or subcontractor employees in performance of work. Work through the prime contractor, unless the contract has specified the scope of technical direction and keep the prime contractor responsible for the work Reduce to writing and provide a copy to the prime contractor of any instructions given directly to the subcontractor.

- Take assignments of payments seriously. Validate the authenticity of an assignment of payment and comply with its terms. Do not pay the prime contractor after notice of a valid assignment. Consult with legal counsel if questions concerning payment arise.

- Ensure, through appropriate prime contract language, that any patented, copyrighted or other proprietary ownership rights of subcontractors are properly licensed or sold to the State through the prime contractor.

ARTICLE 18. EQUAL OPPORTUNITY - AFFIRMATIVE ACTION

The Architect/Engineer agrees to comply with the letter and spirit of the Colorado Anti-discrimination Act of 1957, as amended, and other applicable law respecting discrimination and unfair employment practices (§ 24-34-402, C.R.S., as amended), and as required by Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975. Pursuant thereto, the following provisions shall be contained in all State contracts or subcontracts.

During the performance of this contract, the Architect/Engineer agrees as follows:

(a) The Architect/Engineer will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap or age. The Architect/Engineer will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to the above mentioned characteristics. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoffs or terminations; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Architect/Engineer agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth provisions of this nondiscrimination clause.

(b) The Architect/Engineer will, in all solicitations or advertisements for employees placed by or on behalf of the Architect/Engineer, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap or age.

(c) The Architect/Engineer will send to each labor union or representative of workers with which he has collective bargaining agreement or other contract or understanding, notice to be provided by the contracting officer, advising the labor union or workers' representative of the Architect/Engineer's commitment under the Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975, and of the rules, regulations, and relevant Orders of the Governor.

(d) The Architect/Engineer and labor unions will furnish all information and reports required by Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, and by the rules, regulations and Orders of the Governor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the office of the Governor or his designee for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(e) A labor organization will not exclude any individual otherwise qualified from full membership rights in such labor organizations, or expel any such individual from membership in such labor organization or discriminate against any of its members in the full enjoyment of work opportunity, because of race, creed, color, sex, national origin, or ancestry.

(f) A labor organization, of the employees or members thereof will not aid, abet, incite, compel or coerce the doing of any act defined in this contract to be discriminatory or obstruct or prevent any person from complying with the provisions of this contract or any order issued thereunder; or attempt, either directly or indirectly, to commit any act defined in this contract to be discriminatory.

(g) In the event of the Architect/Engineer's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the Architect/Engineer may be declared

ineligible for further State contracts in accordance with procedures, authorized in Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, and the rules, regulations or orders promulgated in accordance therewith, and such other sanctions as may be imposed and remedies as may be invoked as provided in Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, or by rules, regulations, or order promulgated in accordance therewith, or as otherwise provided by law.

(h) The Architect/Engineer will include the provisions of paragraphs (a) through (h) in every subcontract and subcontractor purchase order unless exempted by rules, regulations, or orders issued pursuant to Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, so that such provisions will be binding upon each subcontractor or vendor. The Architect/Engineer will take action with respect to any subcontracting or purchase order as the contracting agency may direct, as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event the Architect/Engineer becomes involved in, or is threatened with, litigation with the subcontractor or vendor as a result of such direction by the contracting agency, the Architect/Engineer may request the State of Colorado to enter into such litigation to protect the interest of the State of Colorado.

ARTICLE 19. INSURANCE

It is agreed and understood Architect/Engineer shall maintain in full force and effect adequate comprehensive general liability insurance and property damage insurance, as well as workmen's compensation and employer's liability insurance. Architect/Engineer shall be responsible for all claims, damages, losses or expenses, including attorney's fees, arising out of or resulting from the performance of the Services contemplated in this Agreement, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom, and is caused in whole or in part by any negligent act or omission of Architect/Engineer, any consultant or associate thereof, anyone directly or indirectly employed by Architect/Engineer, or anyone for whose acts any of them may be liable. Architect/Engineer shall submit a Certificate of Insurance at the signing of this Agreement and also any notices of Renewal of said Policy as they occur.

ARTICLE 20. PROFESSIONAL LIABILITY OR ERRORS AND OMISSIONS

The Architect/Engineer promises and agrees to maintain in full force and effect an Errors and Omissions or Professional Liability Insurance Policy in the amount of $100,000 minimum coverage or such other minimum coverage as determined by the Principal Representative and approved by the State Buildings Programs. The policy shall remain in effect for the duration of this Agreement and for at least two years beyond the completion and acceptance of the facility. The Architect/Engineer shall be responsible for all claims, damages, losses, or expenses, including attorneys fees, arising out of or resulting from the performance of Professional Services contemplated in this Agreement, provided that any such claim, damage, loss or expense is caused by any negligent act, error or omission of the Architect/Engineer, any consultant or associate thereof, or anyone directly or indirectly employed by Architect/Engineer. The Architect/Engineer shall submit a Certificate of Insurance verifying said coverage at the signing of this Agreement and also any notices of Renewals of the said policy as they occur.

Chapter 1 : INTRODUCTION

Introduction to Contracting for the State of Colorado

No doubt you have seen the previous version of this contract manual, the 3 inch thick *State of Colorado Contract Procedures Manual*. Along comes a new manual (referred to as the *Manual*) and you glance suspiciously at it because it doesn't seem any less threatening. Plus, it's probably supplemented by your own agency guidelines on internal contracting practices. Hopefully, this introduction will bridge the gap between whatever purchasing experience you have had in the past, and the confusing world of State contracting for goods and services. This *Manual* is an invaluable resource, containing the policies, procedures, and source documents of State agencies involved in reviewing and approving the purchase you make and the contracts you write. This introduction will be your first "baby step" in understanding the *Manual*, what some of these strange ***TERMS*** mean, and what some of the State agencies are responsible for doing.

You have all bought something. Many of you have made purchases for companies or businesses or agencies. Let's say you bought a $2,000 computer system. If you were purchasing the computer system for a company or institution, you might have gone to the purchasing office and obtained the forms they use to make purchases. If you purchased the computer system for your family, you probably used whatever sales agreement form the dealer had available. You may have even negotiated a few "extras", like software or manuals. You signed the agreement, pulled out a checkbook, wrote the check, and took delivery. You may have even added in a few dollars for an extended maintenance agreement to cover past the warranty period. Presto! You just wrote a goods and services contract. You paid for the goods and services, the contract, with a "warrant," the State's version of a check.

Commitments and Commitment Vouchers

What you just did, the State does all the time, only it's just not as simple. State employees occupy a position of public trust in using money that is not their own. When a company makes mistakes in commercial purchasing it is free to return the merchandise or re-negotiate to have its needs met. In the State of Colorado, the legislature controls the purse strings and sets the rules about how the State's money is spent. Agencies have many different kinds of requirements for purchasing goods and services (e.g., office supplies and computer programming) for the State and on behalf of State programs (social services, job training programs, child health programs, etc.). Do you just take out your check book and pay? Not within the State system. Even worse, you are prohibited from asking someone to do the work in advance of having approval. Your "ordering" goods or services informally (in advance of getting the proper approvals) could make you personally liable for the amount. We call any kind of order that is a contractual obligation, like ordering a computer or having a training video filmed, a commitment. You are prohibited from making a commitment without complying with the requirements of law, which includes using a proper form for the agreement called a "commitment voucher" (e.g., contract or purchase order)

in the statutes. For clarity, we will use the term commitment document. If you did this unauthorized purchasing in a private company, you might be fired. If you did it at home you might get yelled at. If you do it in State government, it can be a criminal offense, and you might be held personally liable for the amount of the unauthorized commitment.

So, first lesson: *NEVER MAKE A COMMITMENT TO PURCHASE GOODS OR SERVICES FOR THE STATE WITHOUT AN APPROVED VALID COMMITMENT DOCUMENT.*

Getting Started

When most of us face a problem, we try to adapt something that has worked before. Most likely, you will go to someone in your agency to find a purchase order or contract for the same or similar good or service that worked and didn't get anyone in trouble! This is a smart approach that avoids "reinventing the wheel" unnecessarily. So once you have decided who needs to be involved in approval, and have some assurance that you aren't going to be wasting your time starting the process, you will start the vendor selection process--if you have delegated authority--or work with the Division of Purchasing to get a vendor selected. At the end of that process, you will be signing a contract or issuing a Purchase Order, probably one that looks a lot like one that was used before, and starting the approval process.

One Warning: NO contract--including a financial assistance agreement commonly known as a "grant"--is valid until approved by the Controller or his delegate. The Colorado *Special Provisions* that are attached to your contracts say that. [Purchase Orders, we shall see, do not require Controller approval and Attorney General review.] Vendors bear the risk if they start performance before contract approval, so vendors legally can not expect payment until the contract is fully reviewed and signed by the Controller. Consequently, you can't order a vendor to perform in advance of approval either. If you want an effective contract before the vendor starts performance, you have to plan ahead and start the process early enough to get the contract signed before performance of the contract must begin.

The State Controller

The State Controller's office is responsible for honoring (authorizing payment of) valid commitment documents, and for specifying the form of the documents. The State of Colorado Fiscal Rules state that a commitment voucher is "a purchase order, a contract, an approval travel authorization (for travel), an advice of employment (for hiring), or any other document appropriate to the transaction, prescribed by the State Controller". Purchase orders and contracts are the forms of payment used most often.

The State Controller determines not only the form of the commitment documents, but also specifies the offices that must approve these documents. The State Controller must approve all commitment documents in order for them to be valid. In fact, the Controller's signature is so important that the Colorado law says that, "[a]ny state contract involving the payment of money

by the state shall contain a clause providing that the contract shall not be deemed valid until it has been approved by the Controller or such assistant as he may designate."

Never had to worry about this kind of approval before? So, you ask, "How do you get the Controller's approval?"

Just one note before we go any further: these rules apply to "amendments" too. If you get the Controller's approval for buying the $2,000 computer, you can't just go back to the vendor the next day and negotiate a little $400 amendment for three years of service. Think about it. It doesn't make a lot of sense for the law to require the Controller to approve commitment documents if agencies can turn right around and amend them by adding "stuff" and increasing the prices. So anything that is discussed in this summary really applies to amendments too, or anything that changes a contract: the price, statement of work, or terms and conditions.

Spending Authority

If you are new to contracting for your agency, you probably won't be on the cutting edge of issues concerning whether your agency has the authority to buy any specific goods or services or provide financial assistance through grants. Suffice it to say, though, the agency has to have authority. Most of what you purchase will probably involve previously purchased goods or services that are clearly necessary for operation of your agency. In that case, often the only authority issue is: do you have money? Because one of the statutory prohibitions is spending money in excess of appropriations, your agency will have a procedure for setting priorities among purchases. Also, once one of these commitment documents (e.g. contract or purchase order) is signed, an entry will be made (called an "encumbrance") in a computer system (called COFRS), except for higher education institutions, that will tell the Controller that money has been committed against an appropriation, thus helping the Controller and the agency control spending. There are other limits on spending you may encounter. For example, except for higher education institutions, there are limits on an agency's use of lease-purchase as a way of acquiring goods. Construction projects also require specific appropriations and procedures for controlling and accounting for spending. But assuming you have been given the authority to acquire goods or services for your agency, and there is money available, there should be no problem concerning your authority to spend the money. Spending authority and other preliminary planning considerations are covered in more detail in Chapter 2.

Purchase Order vs. Contract

Before we get too far into all of this though, let's learn about a few terms that were introduced earlier.

Purchase Order

When properly used, this document requires less time and effort than a contract because it does not have to be routed to some of the external approving offices. Maybe you have used these in commercial purchasing. When you go into a store, you are often signing a purchase order which

is immediately performed by delivery of the merchandise. In general (subject to exceptions too complicated to bring up here), a purchase order is used by the State for small purchases of services (less than $25,000), and for simple purchases of goods, regardless of amount. The State's issuance of the order and description of the goods, services, price, and delivery terms on the front, coupled with the acceptance or delivery by the vendor, constitutes a valid commitment. Notice that all of the "boilerplate" language, like warranties, indemnification, delivery, prompt payment, and other terms and conditions are printed on the back of the purchase order. Most important, the contractor's signature does not even appear on the purchase order. If you ever had a business law course, you probably learned that this was a form of "unilateral contract," or an offer by one party which the other party may accept either in writing or by performance. Of course, if a good is shipped, this is as valid a "contract" as any other, and the vendor is entitled to be paid. There are times when a purchase order should not be used. Never sign a vendor contract in lieu of using a purchase order. The reasons for this will be covered later.

Contract

We call everything else a contract. Both parties sign the agreement, and it defines the goods or services to be performed, the price or cost, the time for performance or delivery, conditions for termination, how payment will be made, etc. The Controller sets the requirements for a contract (and the format for a purchase order) and each contract has to have something called the *Special Provisions*. A copy of the *Special Provisions* are in the *Manual* at Appendix A of Chapter 6. These *Special Provisions* work like the back of the Purchase Order and contain some of the same clauses, referred to as "*boilerplate*", that protect the State. For example, one paragraph states that Colorado law will apply to the contract. Obtain a purchase order and a contract from your agency so you can see the differences. You will notice one big difference between the purchase order and the contract. A purchase order is self-contained, except for the description of the good or service, the price, and the delivery terms. A contract, on the other hand, has very little written that is *boilerplate*. The *Special Provisions*, for example, say nothing about inspection and acceptance, warranties, payment terms, or any other important issues. The agency has a lot more flexibility on one hand, and a lot more risk on the other hand, when using a contract, because all of those basic contract issues have to be negotiated and written by the parties. Chapter 6, Appendix A, includes model provisions commonly found in State contracts.

Practical Difference Between a Purchase Order and a Contract

From the perspective of someone who is trying to get a contract signed and approved quickly, there is a difference in approvals. An Attorney General legal review is only required of a contract, not a purchase order, because a contract tends to be more tailored to the specific transaction and it generally takes longer for the agency to negotiate and write. This requirement flows from the fact that a "legal set of eyes" is probably a wise idea in a contract, where the agency is given so much latitude in defining the agreement.

The Department of Personnel

Just when you thought you had identified all of the "players", here comes another one, the Department of Personnel. No doubt, even if you did commercial business, you never had to go to the human resources department if you wanted to buy something. But the State is different,

because before you can even think about buying a "personal service," you have to get approval from the Department of Personnel. A "personal service" is defined as hiring a contractor to perform work for the direct benefit of the State, similar to what an employee would do. To further expand on the definition of "personal services", it means any time, effort, or labor performed by a human being. You can now see why the Department of Personnel needs to review personal services agreements.

Without going into too much detail, a few years ago, a lawsuit was brought against the State for laying off State employees and hiring contract employees to do the same work. The initiative was called "privatization". The State lost, and the Colorado legislature passed a law that requires the Department of Personnel to review and approve all "personal services" contracts. This is an extremely complex and sensitive area, but usually the Department of Personnel will approve service contracts where the State does not have the capability of performing the services needed. A contract may also be approved where the State needs to avoid a conflict of interest, such as hiring outside auditors.

What does this mean to you? It means that for any "personal service," you better have approval from the Department of Personnel or know why it is not required. In all agreements for personal services, purchase orders and amendments included, you have to have Department of Personnel approval. The two simplest exceptions to this rule are: 1) one-time, non-recurring personal service contracts for six months or less, and 2) contracts with political subdivisions--City and County of Denver or Larimer County, for example. If these exceptions apply, no coordination or approvals are required from the Department of Personnel. Chapter 3 has more information concerning this approval requirement.

Even when you seek approval to contract for personal services, the Department of Personnel has another important function. They review the contract to make sure the agency is not unwittingly creating an "employment" relationship that could expose the State to IRS claims for federal income tax withholding, liability under workman's compensation statutes, or claims for unemployment compensation. You will be submitting an "independent contractor" certification to the Department of Personnel as part of the review process to insure that what you have is really an "independent contractor" relationship. You will also be putting a clause in your contract reminding the contractor that the contract creates an independent contractor relationship. For more information, turn to Chapter 3 of the *Manual*.

Remember that there is a difference between having a contract reviewed and having it approved. Most all personal services commitment documents, regardless of the dollar amount, have to be reviewed prior to being approved. Just because "the last contract was approved" does not mean you do not have to submit a similar contract for review. This is one of the most common mistakes agencies make, thinking that because a contract is sure to be approved they do not have to submit it for review.

Let's talk about this computer purchase that you may have made personally, and pretend your agency needs one, as well as extended maintenance services for five years. Well, a contract or purchase order to buy the computer (a "good" not a "service") need not be coordinated with the

Department of Personnel. A service contract or purchase order for maintenance services does. It meets none of the exceptions, unless of course you can get someone employed in the City and County Denver to commit to maintain your agency's computer!

Group I, Group II and Undelegated Agencies

Before you go any further with this summary, I suggest that you go to the person who hired you or assigned you to this job and ask this question, "Are we a Group I, Group II, or undelegated agency?" If that person doesn't know, tell them this summary said not to read any further until you get an answer. That is because a lot of what is going to be said about who needs to be involved depends on your agency's purchasing delegation. Some agencies, like the Departments of Corrections, Natural Resources, Human Services, Labor and Employment, and most of the higher education institutions, have delegated purchasing authority and are called "Group II" agencies.

Division of Purchasing

If you are involved in purchasing, the Division of Purchasing has a comprehensive purchasing training program that you should demand to attend at the threat of mutiny! We are not going to cover its material with anywhere near the depth of its training, but you need to know their role in the contracting process.

Unlike your private purchasing experiences, or even those in commercial purchasing, the State has restrictions on how you select a vendor or company to purchase goods or services. With certain exceptions (grant contracts with local governments being one of the biggest), you will learn in purchasing training that contractors must have a chance to "win" our business by bidding on projects. Competition not only equitably distributes the State's business, it also helps insure fair prices for the goods and services we buy. It's not just a matter of fairness, either. If the procedures are not followed, then competitors can "protest" awards of contracts and may even go to court to block their performance. All this means that, even if you know exactly what your contract or purchase order is going to say, and you have written the best contract language in the world, you can't shove it across the table to a company for signature unless you have complied with the procurement code rules for competition in selecting the vendor.

Colorado law requires competitive bidding for public construction projects, called "public works" contracting. Also, Colorado has a Procurement Code that State agencies must follow when purchasing goods and services. The code has lots of provisions governing contract administration, construction contracting, and resolution of disputes in contracts, but the parts that will most directly affect you are the rules governing selection of vendors. Generally, the code applies to all contracts funded with public money except: bridge and highway construction by the Department of Transportation; professional services contracts with architects, engineers, landscape architects, and surveyors; and contracts with other governments.

The Division of Purchasing publishes rules to implement the Procurement Code. Aside from contracts not covered by the Procurement Code, the State Purchasing Director is given the authority to procure or supervise the procurement of all goods and services needed by the State. As you can probably guess, the Division of Purchasing could not hope to do all of this itself, and it delegates purchasing authority to other agencies in the State. Still, even when purchasing authority is delegated, agencies have to follow the rules written by the Division of Purchasing.

Many of these rules have to do with how to select vendors. These requirements, more than probably any other, make State purchasing different than private and commercial contracting. So, where you or a private company can simply walk into a computer retail store and buy computers, the State has some very specific rules. These rules are more completely discussed in Chapter 4 of the *Manual*.

Competitive Sealed Bidding and Competitive Sealed Proposals

The preference in purchasing is for competitive sealed bidding. Sealed bidding is used when requirements for goods or services are well defined, and the agency can write the requirements specific enough so companies can just bid a price. The agency writes an Invitation for Bid ("IFB") document that is sent to bidders (or “offerors”) and that contains the specifications or statement of the work and other terms and conditions. By a date designated in the IFB, the bidders submit their bid in a sealed envelope. The agency opens the bids publicly and reads the prices. The agency makes the contract award (accepts the bid) to the bidder who is responsible (has the capability in all respects to perform fully and with the integrity and reliability which will assure successful performance), responsive (submits a bid that complies in all material respects with the IFB), and has the lowest price.

Another competitive method of “source selection” is competitive sealed proposals. This technique is used when requirements or specifications cannot be formulated with enough specificity so offerors can submit firm, fixed price bids for the contract. In this type of procurement, the agency defines its requirements and the terms and conditions of the subsequent contract with as much specificity as possible and sends out a Request for Proposal (“RFP”). The offerors are asked to submit proposals in accordance with instructions in the RFP. Typically, offerors submit a detailed description of how they intend to do the work, as well as a breakdown of their price or costs. After receipt of proposals, the agency will evaluate the offers and may conduct “discussions” with offerors about their proposals. If discussions are conducted, offerors are given a chance to revise their proposals and submit a Best and Final Offer (“BAFO”). The contract award is made to the offeror whose proposal is most advantageous to the State, price/cost and other factors considered. Typically, the RFP tells offerors that price/cost is not the most important criteria, and technical superiority in a proposal is given more weight and sometimes can “win” the contract award. This is sometimes called a "best value" source selection.

As you can probably sense, these procedures are complicated and are governed by complex statutory requirements and rules written by the Division of Purchasing. About the only generalization one can make is that the procedures are designed to give offerors equal opportunity

to win State business. The two different procedures differ in the amount of information required from the offeror/bidder, the amount of resources necessary by the agency in evaluating offers and selecting winners, and the complexity of the contract that ultimately is signed. The two processes are the same with the emphasis placed on limiting contact with offerors. After the beginning of a solicitation by either sealed bidding or competitive sealed proposals, all offerors should be treated alike in terms of information released. You should be cautious about the nature of communications with individual offerors. Almost all substantive communications are included in IFB or RFP amendments and released simultaneously to all potential offerors.

Delegation of Purchasing Authority

So who does all of this work? This is where the delegations come in. If your agency is a Group II agency, it has delegated authority to do vendor selection, including the selection of the method of procurement and the conduct of the solicitations. If your agency is a Group I agency, it essentially has independent purchasing authority up to $25,000 for services and $10,000 for goods. If you are in a nondelegated agency, well you can't do much--only buy goods and services up to $1,000. For Group I and nondelegated agencies, purchases of goods and services in excess of these limits have to be done through the Division of Purchasing. Be careful: these purchasing delegations do not apply to construction or construction-related contracts.

Along with the delegation limits established by the Division of Purchasing, the Procurement Rules create exceptions to all the competition requirements for small purchases. Makes sense, doesn't it, not to have to send out formal IFBs and RFPs for the one time purchase of a computer worth only $2000? Otherwise the cost of administering the competition is greater than the goods or services are worth. Group II agencies can procure services up to $25,000 and goods up to $5,000 without the benefit of competition. Group I agencies can purchase services up to $25,000 and goods up to $1,000 without the benefit of competition. For nondelegated agencies, the Division of Purchasing also has small purchase authority and can satisfy your "purchase requisitions" for small purchases without competition. By the way, purchases of goods worth more than the "no competition limits" and up to $10,000 (Group I) and $25,000 (Group II) can be done by a less formal process called "documented quotations." You will be trained on that, and can find more information in the purchasing section of the *Manual*. Generally, any good or service worth more than $25,000, no matter who the agency is, has to be procured using competition, *unless* a valid State Price Agreement exists, (see Annex C, Glossary of Terms).

Purchase Orders? Contract? Which one?

When you go to the training by the Division of Purchasing, you will hear a recurring theme. There are issues of vendor selection, e.g. which vendor you can do business with, and there is a different issue of how you record your purchase, e.g. what does the contract have to look like? Now, if you are a nondelegated agency or Group I agency buying something outside your authority, you and Purchasing will be making that decision together. But Group II agencies, as well as Group I agencies buying within their delegated authority, have this additional problem.

Do you use a contract, or is a purchase order the proper commitment document that the Controller will approve?

The purchase order . . . remember the more simplified process . . . is appropriate for goods or services costing less than $25,000 and for simple purchases of goods regardless of amount. Professional services contracts, construction contracts, and real estate leases almost always have to use State contract formats and require legal review. Fiscal Rule 3-1 also says that State contracts must be used whenever purchase orders are not considered sufficient to adequately protect the State. As a practical matter, most agencies purchase consulting and other personal services, regardless of value, using a State contract, mostly because the terms and conditions on the purchase order are not adequate to protect either party. Anytime a vendor wants to start adding lots of terms and conditions that do not appear on the reverse of the purchase order, you are negotiating a "State contract" that has to be approved like any other. Chapter 6 of the *Manual* discusses other considerations in choosing whether a contract better protects the interests of the State.

Delegated agencies have to make these decisions about choosing the proper commitment document where they are purchasing goods or services within the scope of their delegated authority.

Sole Source/Emergency Procurements

Before we get on with special purchases, and discuss the other agencies that are involved, one other topic should be introduced. You may hear people in your agency talk about "sole source" contracts, such as a contract with a vendor where it has the proprietary rights to all the technical data necessary to maintain computer equipment or software. When there is only one vendor who can perform the work, there may be grounds to bypass all the competitive processes. Similarly, where because of true, unforeseen emergencies, an agency does not have the time to compete a contract, there may be grounds to limit competition based on a finding of an "emergency." There is more about these exceptions to competition requirements in Chapter 4.

In the case of your computer and maintenance contracts, how would you procure them? Well, assuming you are a Group I or Group II agency, you can probably use a purchase order to purchase the computer. Unless the vendor will accept the State's purchase order with a description of the maintenance services and the price, you may have to write a contract, signed by both parties, that defines the services. And, **of course you remembered**: the Department of Personnel will have to approve the services acquisition by either method. Either Group I or Group II agencies could execute the commitment documents for this small purchase; nondelegated agencies, on the other hand, would have to submit a purchase requisition to the Division of Purchasing if they can issue a purchase order.

Other Agencies/Special Procurements

We don't want to make this too simple for you! There are a host of other "players" for specialized procurements. Here is just a brief summary of the offices that are required to approve these

purchases. These approval requirements are established by State Fiscal Rule 3-1. Please see Chapter 2 for a more detailed discussion.

State Price Agreements

These are what some people call "blanket ordering agreements." They are price agreements with vendors that set prices and terms of performance for some kinds of goods and services, e.g. computer programming services, that can be ordered by any State agency. Only the Division of Purchasing can negotiate and sign these price agreements. The good news is: any agency, no matter how much delegation it has, can use these price agreements. Some of the price agreements are mandatory, so you need to become very familiar with them as you start working. The Division of Purchasing maintains a list of mandatory and permissive price agreements. Personal services that are ordered off of State price agreements need to be approved by State Personnel, just as any other personal service document.

Real Estate Contracts and the Office of State Buildings Programs

Real estate lease agreements have to be approved by the Office of State Buildings Programs. Unless your agency is one of the few that can do its own construction and real estate transactions, e.g. the Department of Transportation, this office also sets the policy and approves the forms for construction contracts, architect/engineering contracts, and related consulting agreements. Some agencies like the Divisions of Wildlife and Parks and Recreation have independent authority to do these real estate transactions, so if you are in those agencies you need to know the limits of your authority. Also, State Buildings Program delegates authority to approve some of these agreements to some of the larger agencies, like the Departments of Corrections, Human Services, and higher education institutions. In general, these are specialized forms of contracting with formats, procedures and even vocabulary unique to the construction and real estate industries. Because they are so unique, a separate Annex to the *Manual* is reserved for leasing and construction forms and procedures. The Controller or his designated representative is still central to the process, and even though the contract forms are unique, the Controller's signature (or his delegate) still appears on all of these documents that obligate State funds.

Colorado Information Technology Services (CITS)

Contracts involving telephone, radio, microwave, teletype, closed circuit television, video conference, cellular phones, and circuits require the approval of CITS or a delegate.

Division of Central Services

The Central Services director must approve State agency acquisitions for goods and services that are centrally procured. Examples are contracts for motor pool operation/vehicles, vehicle maintenance, printing and binding, graphic design, mail or messenger services, office copying, microfilming, or design of forms. Some of these restrictions are limited to the Denver metro area, but you need to coordinate with that office if you anticipate contracting for these kinds of services.

State Risk Manager

This office manages the State funds for worker's compensation and self-insurance funds to protect the State against lawsuits arising out of negligent acts by employees. The State Risk Manager

also works with the Division of Purchasing to establish insurance requirements for State contracts. You may be working with this office to define suitable insurance requirements in your contracts. Also, the State cannot commit to pay another company's liabilities, called "indemnification." There is a very limited exception in the case of State leases of other people's property, and the State Risk Manager has to approve those kinds of indemnification clauses in contracts.

Routing Contracts for Approval

All approvals are formally done after the vendor selection is completed and the contract is signed by the parties. If you have any question about whether your contract will get approved, you should coordinate with the State Controller's Office (SCO) in advance. After the vendor and your agency have signed the contract, it will be ready for review by the central approvers.

When routing a contract for central approver signatures, a "routing slip" is attached to the agreement prior to sending it around to the various offices. Chapter 8 contains a summary of the approval routing requirements and key information from the offices involved in the central approval process.

In March 1996, the State started using a central computer system to track contracts through this routing process. The agency enters some basic information about the contract, such as their agency's COFRS designation, (e.g. three letter alpha code - HAA for the Department of Transportation), the encumbrance amount, type of contract, vendor name, etc. COFRS automatically assigns the contract a routing number after all of the data is entered. The agency then "screen prints" the CLIN and CLI2 tables, puts it on the top of the contract package and forwards the entire package to the State Controller's Office for routing between those approving agencies. You, of course, have to designate who needs to see the contract. So you have to know all of these rules, and who the applicable "players" are in any given contract. (With regard to the COFRS contract tracking system, the requirements for higher education institutions may vary.) The CLIN procedures and agency accounting procedures may be found in Chapter 7.

The "Big Picture"

Sometimes in the maze of approval requirements, we forget the ultimate objective--to sign a contract that is enforceable and has a price/cost that is "fair and reasonable" for the good or service being purchased. When you start writing contracts, you will learn that--apart from writing nonstandard indemnification provisions and committing future legislatures by signing up for contract obligations extending beyond the current fiscal year (both of which are not problems if you use the Colorado *Special Provisions*), you will see that you have lots of flexibility. None of these offices dictate how you write your contracts. They don't tell you how you must write your statement or scope of work, specifications, what data or reports you need delivered, or what the copyright rights should be in reports, documents, and software. They don't tell you how to link your payments with the delivery of goods and services, so you aren't paying for things before you have a chance to examine them and reject them if they are defective (although an "advance

payment" requires the approval of the Controller). None of those offices will be writing your inspection and acceptance clauses, or defining your warranty rights for you. Nor will they draft clauses that give you the right to terminate the contract if the contractor is deficient in performance. All that is left up to you, although the Division of Purchasing has included some suitable contract clauses in their rules that can be used in contracts to address these problems. Chapter 2 has more information on writing the statement of work and Chapter 6 has examples of the terms and conditions that go into contracts. Chapter 5 discusses pricing.

Office of the Attorney General

People may feel otherwise, but the Attorney General's office really has no policy that it writes in rules and enforces. The Attorney General's office is the advisor to the Controller and is the final stop prior to approval of the State contract by the Controller. Purchase orders and interagency agreements with other State agencies are not reviewed by the Attorney General.

Sure, the attorneys look to see if the Colorado *Special Provisions* are included (and not amended), whether all the exhibits referred to in the contract are attached, and whether the proper parties have signed the contract, but the review goes farther. The Attorney General's office steps back and tries to understand the deal, determines if it makes sense, and assesses whether the statutory and regulatory requirements (and there aren't many) are satisfied. Then the attorneys ask this question, "Is the contract sufficiently definite, the requirements specific enough, and the payment provisions well enough defined, so we know what we are getting, when we are getting it, and for what cost? Are there rights or remedies the State can exercise if performance isn't acceptable, so the State is not paying money without getting fair consideration in return?" This is the "big picture" from the Attorney General's perspective.

As you can probably tell, deciding whether laws and policies are satisfied and the contract is otherwise "legally sufficient" requires the attorney to understand your "deal." Hopefully, the contract and supporting file speak for themselves. Often, though, the attorney reviewing the contract will call you or the program contact to discuss the meaning behind language, apparent inconsistencies or omissions, and other ambiguities in the agreement. If there is unusual language in your agreement--that the vendor put there perhaps--and you don't know the history or rationale behind it, then the contract may be recommended for disapproval. Why? Well, interpretation of a contract in a court usually hinges on what the parties themselves thought the language meant. If you don't know, or you haven't talked about it with the other side, then a disapproval may force you to clarify the language or other aspects of the contract.

A Return Visit to the State Controller's Office

Remember that the contract is not effective until approved by the State Controller or his delegate. Once the contract gets to the State Controller's Office, you are almost "home free"! But remember, the Attorney General is enforcing policies that are in the statutes and rules that govern spending and required elements in contracts. The Attorney General will commonly highlight

potential legal problems for the Controller, who ultimately can approve or disapprove a contract. For example:

1. The Colorado *Special Provisions* not only must be included, they can't be modified unless approved by the State Controller. One "felony" is inclusion of an indemnification provision in the contract that conflicts with the one at paragraph 4 of the *Special Provisions*, without written justification and approval by the Controller. The "capital offense" is including an indemnification provision that requires the State to indemnify the contractor for damages it incurs as a result of contract performance. As we mentioned before when talking about the Risk Management office, such a clause usually is illegal because it violates the Colorado Constitution. Besides, it's not fair. We are paying contractors to do the work. We shouldn't have to answer for their liability. Lesson: read the *Special Provisions*, include them, **never** change them. If you are negotiating a contract that uses the term "indemnify" or "hold harmless", you better get the advice of counsel and be prepared to justify in writing why you need the clause.

2. State Fiscal Rules require that advance payments be approved in writing by the State Controller or an authorized delegate.

3. Any modification/amendment procedure in the contract that attempts to informally change the contract without processing as an amendment will probably be disapproved. The Controller has to approve all commitment documents, including amendments. The Controller requires formal routing and legal review of all amendments by Fiscal Rule. You can't change this Rule by contracting with the other party to permit changes and price increases by mutual agreement. There is an exception: you can use a modification mechanism consistent with the State Controller's policy on contract modifications and change orders, enclosed in this *Manual* in the Policy Letters Annex. For example, the policy has an approved Change Order Letter process that bypasses Attorney General review for use in grant and subgrant programs that provide for benefits to third parties, e.g. contracts for health or social welfare benefits where the volume of services being provided are directly proportional to the level of funding.

4. Attempts to create financial obligations beyond the current fiscal year--the "binding the future legislature" problem--are illegal. That is why the Colorado *Special Provisions* has a clause at paragraph 2 that conditions contract performance on availability of funds. Remember, generally the State appropriates money from year-to-year. Unlike private individuals and companies, you can't agree to a contract that <u>unconditionally</u> extends funding for more than one year at a time. One more reason to include those *Special Provisions* . . .

5. Encumbrance errors can also cause a contract to be disapproved by the Controller. If you cite the wrong source of funds, or there are not enough funds to satisfy the commitment, or the contract has open-ended price/payment provisions or no ceiling on the amount to be paid, the contract will be disapproved.

After Contract Approval - First a Celebration! - Then Contract Management

You can write the best contract in the world, but if no one is inspecting the goods or services to assure their compliance with requirements, money is going to be wasted. Writing a good contract is a giant step towards sound contract administration and management, because it should clearly define the expectations of both parties. But you need to have a process in place to insure that payment is not made under the contract until acceptable performance has been received (hopefully a right given you in the contract . . .). This is a lot simpler to say than to do. As a result of a State performance audit in 1995, and the work of the Contract Management Task Force, a whole chapter has been added to this *Manual* that addresses contract administration issues and responsibilities. The sections in Chapter 10 describe contract monitoring responsibilities, performance remedies, and other key aspects of managing a contract.

Contract Improvement Initiatives in Colorado State Government

In 1994, the central approving offices banded together to find ways to improve the contract approval process by creating a group called the Central Approval Task Force (CATF). Part of that process was the formulation of the Colorado Contract Improvement Team (CCIT), a group composed of representatives from all of the State agencies. The CATF meets monthly, and the CCIT quarterly. The CATF/CCIT structure is designed to foster cross-feed among central approvers and agencies of ideas related to contracting, provide a forum for discussing improvements, and generally serve as a clearinghouse for purchasing and contracting-related information that is important to State employees involved in the process. The CCIT and CATF publish the *Contract User's Resource for Excellence (CURE)* newsletter monthly, and subcommittees have been established to address issues such as contract standardization, coordination of statutes and regulations, improvement to the *Manual*, training, etc. This *Manual* was a byproduct of work done by the CCIT, based on recommendations received from users.

Agencies are encouraged to set up their own "user groups," and you should find out when your user group meets. The CCIT lives and breathes by the quality of these user groups--they are the vehicle to "get the word out" to everyone else in the agencies that are involved in the contracting process.

One Final Note - This Stuff Isn't Easy

You can't just read this summary and expect to do a good job in purchasing or contracting. This is just the road map into the more detailed material in the *Manual*. The Division of Purchasing training will give you much more detailed, invaluable information about vendor selection. Even more important, you have to ask questions of the other purchasing and contracting professionals you work with. If you get contracts back from central approvers disapproved or with comments, make sure you understand why. Share your mistakes, successes, ideas, and experiences. We think you will find opportunities to keep learning and continually improve your purchasing and contracting process.

References

The following is a list of some of the available resources that provide guidance for the contracting process:

⇒ Colorado Revised Statutes

- Title 24, Article 30, Part 14 — Negotiation of Consultants' Contracts
- Title 24, Article 91 — Construction Contracts with Public Entities
- Title 24, Article 92 — Construction Bidding for Public Projects
- Title 24, Articles 101-111 — Colorado Procurement Code
- Title 38, Article 26 — Contractor's Bonds and Lien of Funds

⇒ Code of Colorado Regulations

- 1 CCR 101-1 — Fiscal Rules
- 1 CCR 101-9 — Procurement Rules
- 4 CCR 801-2 — Personnel Rules on Personal Services Contracts

⇒ Policy letters:

- Contract Modifications, Changes, Amendments, and Approval Routing, 1/8/97 (Office of State Controller)
- Purchase Order Modifications/Incorporation of Vendor Contracts, 6/24/96 (Office of State Controller/Division of Purchasing)
- One-Step Grant Applications/Award Contracts, undated (Office of State Controller)
- Routing Waiver Guidelines/Application, 3/14/96 (Office of State Controller)

⇒ Federal Policy, Regulations, and Office of Management and Business (OMB) Circulars

- The Common Rule, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments
- OMB Circular A-87, Cost Principles Applicable to Grants and Contracts (State and Local Governments)
- OMB Circular A-122, Cost Principles Applicable to Grants and Contracts (Private Nonprofit Organizations)
- OMB Circular A-21, Cost Principles Applicable to Grants and Contracts (Educational Institutions)
- Form 1099 Reporting Manual

⇒ Colorado Financial Reporting System (COFRS) Manual

⇒ Newsletters:

- CURE, published by Colorado Contract Improvement Team (CCIT)
- Risky News, published by the Risk Management Office
- State Building News, published by State Buildings and Real Estate Programs

Agency Supplement (Insert)

THIS SECTION IS RESERVED FOR AGENCY SUPPLEMENTARY MATERIAL OR POLICIES RELATED TO THIS CHAPTER, SUCH AS:

- **INTRODUCTION TO THE AGENCY MISSION**
- **OVERVIEW OF COMMON CONTRACT TYPES AND PROCUREMENT METHODS IN THE AGENCY**
- **COMMON PROBLEMS SEEN IN AGENCY CONTRACTS**
- **OTHER REFERENCE/TRAINING MATERIALS AVAILABLE FOR LEARNING AGENCY-SPECIFIC CONTRACTING**

Chapter 2 : PLANNING

The first steps in contract preparation involve defining your agency's need for what the contract will cover, making sure that you have authority to contract for it, and assuring approvals from or coordination with any outside agencies that have jurisdiction over what you are contracting for, particularly in regards to personnel issues with personal services contracts. The planning phase of contracting also involves developing a cost estimate and choosing the appropriate commitment document and contractor selection method. All these activities make it possible to develop a timeline to ensure that your contract is in place so the item or service you need is ready on time. This may seem like a useless bureaucratic exercise, but these simple steps can save time and needless work later in the contracting process.

Defining Need

The first step in the contracting process is to write a brief but clear, concise and complete description of what the contract will cover, i.e. the need the contract will fulfill.

Part of creating a quality contract depends upon your subject matter expertise to carefully define the nature of the relationship between the contractor and the State. This is also known as the *Work Description*. The other parts of a contract include general legal language to ensure that the contract is binding, and enforceable. The brief description written here is the basis of the longer *Work Description* which will be used in the bidding document and later in the contract. The brief work description is used in making decisions to determine if you have the authority to contract, if you need outside agency approvals, the type of commitment document and the type of solicitation method used.

In creating the brief work description in this step, describe the specific nature of the agreement between the State and the contractor. It should include the following categories of information:

1. Detailed description of the goods or services to be provided by the contractor, including technical specifications such as amount and definition of quality; and a breakdown of specific tasks to be completed,

2. Any activities performed by the State, such as reviewing reports and documents, providing data, etc.

3. Time frames such as beginning date, end date, and intermediate or benchmark dates for completion of elements of the contract;

4. Maximum dollars.

- You may also wish to skip ahead to read ***Writing the Statement of Work*** for some basic principles of writing contracts.

- In being detailed and specific in this step, you have begun writing the contract and the contractor selection specification for the invitation for bid or request for proposal.

Authority

Now that you have a good idea of the scope of your contract and have written a draft work description, the next step is to make sure that you have authority and funds before proceeding to the next phases of contracting. To save time later in the contracting process, take the time now to answer these simple questions:

1. Is the activity expressly permitted?

   Check the initiating statutes to verify that your Division is authorized to contract for the services. Footnotes in the Long Bill are not generally considered legal authority to engage in any activity.

2. Are funds available?

   Check the budget (see your budget analyst) to verify that funds are available and that you have the required spending authority to spend the funds. If funds are to become available at a later date (at the beginning of the fiscal year, for example), in many cases it is possible to complete contractor selection and some other steps of contract preparation before the funds are available. Talk with your agency purchasing and accounting sections to find out if their policies covering these situations.

3. Have the proper authorities approved the contract?

   Check with the appropriate authority - i.e. your division director, or the appropriate board or commission - for approval. If the project is something which is part of an integrated departmental plan, a computer project for example, check with the section or group responsible for the plan. Check with the department director if there are any questions.

Interagency Coordination

As a practical matter, if the service you are purchasing is information or analysis, consider whether the service may have been purchased already by another department, which might be willing to provide you with the information. Don't neglect the colleges and universities in the State system. They undertake extensive research in many fields.

If the service is in one of the following areas, the appropriate division director's or delegate’s approval in writing may be required:

Services	Department of Personnel (GSS)
Graphic Design	GSS, Division of Central Services
Printing/Photocopying	GSS, Division of Central Services
Legal Services	Department of Law
Collections	GSS, Division of Central Services
Accounting/Financial Management Services	GSS, State Controller's Office
Communication Devices/Services	GSS, Information Technologies Services
Computers (large orders)	GSS, Information Management Commission
Furniture (office)	Juniper Valley (Correctional Industries)
Microfilm, Microfiche	GSS, Division of Central Services
Photocopiers (metro area only)	GSS, Division of Central Services
Signs, Flags	Juniper Valley (Correctional Industries)
Vehicles (3/4 ton & under) (1 ton vans)	GSS, Division of Central Services
Leases (real estate) and Rights of Way	GSS, State Buildings Program
Capital Construction,	GSS, State Buildings Program
Controlled Maintenance, and	GSS, State Buildings Program
Related Emergency Projects	GSS, State Buildings Program

Personal Services Issues

This is also the time to consider the personal services issues discussed in Chapter 3. If you are contracting for a service you must consider now if the contract will pass the independent contractor test and if it is approved under the privatization rules (Personnel Director's Administrative Procedure, Chapter 13).

Cost Estimate

It is helpful during the planning phase of the contracting process to do a rough cost estimate. Even if your costs are fixed by a pre-determined budget amount, completing a rough cost estimate can give you an idea if your budget will allow you to complete the full range of services contemplated in the brief work description you have written.

Methods for cost estimating are many and varied. If you have some familiarity with the type of service you are contracting for, preparing a rough cost estimate will probably be a simple matter. If you are contracting for a service in an area outside your expertise, you may want to seek help from someone who has knowledge in the subject area. Otherwise, it is possible to complete a rough cost estimate by estimating the number of hours needed to complete each task (from the task list prepared in the brief description of work) and multiplying the total number of hours by an hourly rate appropriate for the trade.

Be sure to read *Chapter 5, Price Analysis*. Your purchasing, budget or accounting office may be able to help you in making a rough cost estimate.

Choose the Appropriate Commitment Document

Once you have the brief work description and a cost estimate, it is time to consider the type of commitment document that is appropriate. Read *Contract vs. Purchase Orders* in the Introduction and *Purchase Order or Contract -- Which One?* in Chapter 6. Knowing whether you are to use a Purchase Order or a Contract will help you plan your project schedule and the documentation required in your contractor selection process.

Determine the Procurement Method

Chapter 4 outlines the different procurement methods available for contractor selection. It is important to consider procurement in the planning phase because of the length of time needed for some procurements. The Request for Proposal process will require quite a bit more time than a sole source procurement, for example.

After you are familiar with the methods outlined in Chapter 4, contact your agency procurement office to discuss which procurement method is appropriate for the goods or service you plan to contract for. Your purchasing contact will want to review the brief description of work and cost estimate, as well as the type of commitment document, in determining the procurement method.

Lead Time Information

In order to assure that contracts and lease agreements are processed, and thus legally binding prior to their effective dates, each agency should establish minimum standards to control the work process and to ensure compliance with Colorado Statutes (Section 24-30-202(1), CRS) and State Fiscal Rules. When establishing these standards, the following tasks must be taken into consideration:

1. Drafting of the Request for Proposal or Invitation for Bid (including assistance by State Purchasing, if required). If the RFP or IFB is for services, you will need pre-approval from the Department of Personnel.

2. Time frames established by State Purchasing and your agency's procurement office and bidders/offeror.

3. As a reminder, bidders/offers must have the following minimum time to prepare their submissions:

    - Invitation for Bids (other than construction): Except as provided under emergency procurement procedures, the minimum time after placing solicitations in the U. S. Mail or by other transmittal methods, the bid opening date shall not be less than 14 calendar days. Reference R-24-103-202a-01(e) and section 24-103-203(3), CRS

    - Request for Proposals: Proposal preparation time shall be set to provide offerors a minimum of 30 calendar days to prepare and submit their proposals. Reference R-24-103-203-07 and section 24-103-203(3), CRS

- Invitation for Bids (Construction): Bidding time is the period of time between the date of the Advertisement for Bids and the date set for opening of bids. In each case bidding time will be set up to provide bidders a reasonable time to prepare their bids, but in no event shall this time be less than 14 days. Reference R-24-103-202b-02(d) and section CRS 24-103-202(3).

4. Final drafting and negotiation of the contract takes considerable time and thought.

- If your agency has a central contract administrator that reviews all contracts, sufficient time must be allowed for the central contract administrator's review and comments.

- Your bidder/offeror may request changes to your proposed contract to clarify ambiguities.

- You may need to ask the Attorney General's Office for assistance.

Each step may add time to the process for revisions and/or consultations. Each agency's procedures vary - be aware of the requirements and plan accordingly. Four weeks allowed for this portion of the process is realistic - simple contracts may only require a few days.

PLANNING LEAD-TIME TABLE

Time frames shown below are ESTIMATES! Agencies will likely set their own lead time requirements. You should plan your schedule, with milestones, and with enough time to accommodate unforeseen delays in the process, committee meetings, revisions and negotiations of contract language with the selected vendor. It makes sense that you determine the desired effective date of the agreement first and then work backwards to determine the start date for the applicable procurement process.

Task	Suggested Lead-time (calendar days)	Agency Lead-time
◊ **Begin preparation of RFP, IFB** (30 days before issuing RFP/IFB)	-180 days	
◊ **Advertise & Issue Solicitation** (30 days to receipt of proposals)	-150 days	
◊ **Receipt of Bids/Proposals** (allow 20 days evaluation/award)	-120 days	
◊ **Contract Negotiations and Award** (allow 30 days to prepare contract)	-90 days	
◊ **Submit Contract for Internal Review** (allow about one month for internal approvals/corrections)	-60 days	
◊ **Route to Personnel, Purchasing/State Buildings** (allow 12 days for review by Department of Personnel offices)	-24 days	
◊ **Route to Attorney General's and Controller's Office** (Allow 12 days for AG and Controller review/approval)	-12 days	
◊ **Performance Begins (Effective Date)**	0 days	

Establish Time Line and Responsibility Areas

Now that you have written the brief work description, considered authority and availability of funds, interagency coordination, the impact of personnel rules, chosen the appropriate commitment document and determined the procurement method, you have all the information needed to establish a time line for your contract. Use the information supplied in the *Planning Lead Time Table* to create the time line.

This is the appropriate time to divide areas of responsibility between members of the team, if there are more than one, and determine which tasks the program personnel will be completing and which are completed by contract and/or procurement office personnel in your agency. Find out which tasks the purchasing agent expects to complete and which must be completed by the program personnel or contract initiator. It is a good idea on complicated projects or projects with many team members to publish the timeline and areas of responsibilities to all team members, including those in your agency contracting and/or purchasing office who have responsibility areas.

Writing Statements Of Work (SoW) And Specifications

Writing the Statement of Work (SoW) is one of the most important steps in contract preparation. Not only is the SoW used in the procurement process, but it becomes a major part of the resulting contract. The SoW includes all aspects of what will be required of the contractor to adequately perform the contract work and the role the State will play in the contractor's performance. It is important to write a clear comprehensive SoW to avoid disputes with the contractor.

If you have written a brief work description, as described above, you have already started on this task. It is important to have a subject matter expert or someone with experience in the subject matter help in drafting the work description. The expert will know what information must be included, what sorts of established standards are common in the field, and what types of formats and information are typically found in work descriptions for this supply or service. For large procurements, it may be necessary to assemble a team of experts, and other players involved in the product or service, to identify required characteristics and deliverables.

If you have not already talked to the procurement and contracts section in your State agency, this is a good time to get them involved. They can review the brief description written in *Defining Need* and work with you to make specific decisions about the type of commitment document (Purchase Order or Contract) and procurement method that will be required. If there are specific formats for various types of procurement documents, find out from your agency contracts or procurement personnel. It will save you time to know the format up front before you begin writing the work description.

It may also be helpful to obtain some sample work descriptions from contracts, Invitations for Bid (IFBs) or Requests for Proposals (RFPs) from other agencies which have bought similar supplies or services in the recent past. Your purchasing contact or the Division of Purchasing may be able to help in obtaining sample work descriptions.

Establishing a Payment Relationship

The four essential elements of any contract are:

- Identification of the parties,
- Term or duration of the contract,
- Service or product to be provided, and
- Payment: rate, how much, when

Chapter 6, *Contract Formats and Essential Elements*, contains a detailed explanation of the essential elements to be included in all State contracts.

The service or product to be provided (and often the payment) are described in the SoW. Essentially, you are establishing a payment relationship by defining: what is expected of the contractor, how the State will measure or verify that the work is complete, and how much and when the State will pay. The method of payment you are planning to employ throughout the contract will have a bearing on the SoW (See Chapter 6, *Types of Contracts*).

Fixed-Price Contracts

In a firm, fixed-price contract, having a clear SoW is important, because the State's obligation to pay is fixed at the lump sum amount regardless of how much it costs the contractor to perform.

Cost-Type Contracts

By contrast, in a cost-type contract, clear statements of work or specifications may be impossible to write because there is uncertainty about the technical aspects of performance.

Performance vs. Method (Design) Specifications

Performance specifications describe a desired outcome, leaving the process used to arrive at that outcome to the contractor. Method specifications (also known as design specifications), while concerned with an outcome, specify exactly how a particular process is to be accomplished. Most contracts will either describe an outcome or specify a process. Contracts can include both performance specifications and method specifications, but it is usually not a good idea to mix the two types of specification in one task.

Performance Specifications

When writing performance specifications, focus on results, outcomes and accomplishments. What must the system do or the agency be able to accomplish when performance is complete? For example, what function must the software be able to perform, with what accuracy, how much data

must be handled in what time frame, what kinds of data, in what languages, and what compatibility is needed?

Method (Design) Specifications

Method (design) specifications are used when it is important to follow specific procedures to achieve a certain outcome. When using method specifications, each procedure and any materials required must be described in detail. Some examples where method specifications will be used include: construction contracts with detailed drawings and specifications, and constructing ground water monitoring wells, where certain testing methods are required.

Define the State's Role

Clearly define the role of your agency in the contract work and the specific contributions of your agency to the end result. Detail any background data or work already accomplished that the anticipated contract will build on, and make it available during the bidding phase of the contract. Specify whether the contractor is entitled to rely on the accuracy of any such background data or work or whether it is merely informational and the contractor is responsible to verify its accuracy to the extent necessary to perform the contract. Define the roles of the agency staff who will administer the contract and monitor the contractor's progress. Describe current conditions and how the contractor's actions will change them. Clearly spell out the resources the State will contribute.

Be Specific: define Quantity and Quality

When writing work descriptions and specifications, be as thorough and as specific as possible. A clear, comprehensive SoW can avoid disputes about what performance was required. If an aspect of performance is not in writing, it is not required of the contractor. The subject matter expert can be of help in identifying the level of specificity that is standard for the particular supply or service you are buying.

Quantity

Quantify the amount, frequency, and/or location required to meet performance, e.g. *The Contractor will provide low dusting in all offices daily and high dusting weekly*.

Quality

Identify the level of quality required for acceptable performance, e.g. *All dusting will be done so as to insure reasonable cleanliness of horizontal surfaces, as determined through customary visual and tactile inspection of the surfaces*.

Note: In defining quantity and quality, it may be helpful to refer to an established standard.

Refer to Established Standards

Again, the subject matter expert can be helpful in guiding you to established national or international standards and/or *brand name or equal* purchase descriptions for the field. These can be helpful in defining products, procedures, quantity and quality levels of performance, as well as testing and performance monitoring methods.

National and International Standards

American National Standards Institute (ANSI), American Society for Testing and Materials (ASTM), and International Organization for Standardization (ISO), publish standards for products, procedures, performance and testing. By using an established standard, you will save time, and also be relying on a standard set for the industry. Use national and international standards by incorporating the relevant portions by reference. For example, *Structural Steel shall conform to the requirements of ASTM A-36, all-purpose steel, which is hereby incorporated by reference.*

Brand Name or Equal

Use *Brand Name or Equal* purchase descriptions to supplement specifications for products. For example, *Anchor bars shall be anchored to a minimum depth of 8 inches into competent rock with Mold Parabond epoxy capsule or equivalent.* When using *brand name or equal* specifications, it is wise to specify the salient characteristics that will be used to evaluate *equal* products, for example: *the equivalency of proposed epoxy will be evaluated based on the documented characteristics of durability, strength, compatibility with anchored materials, performance in extreme temperatures and the terms of standard manufacturer warrantees of performance.* It is important to establish the State as the judge of what is *equal*, and the contract should require the contractor to provide advance submittals describing key materials, require the contractor to identify how the substitute materials are equivalent to the specified brand name, and provide for State approval of the substitute materials before performance.

Deliverables

A deliverable is a work product that is delivered to the State as a result of the service performed in the contract. When specifying deliverables, include the content in descriptive terms similar to those found in the table of contents. Don't forget to specify the format for deliverables, for example a report, documents, data, or software, and the number of copies.

Allow for Monitoring and Final Acceptance

The contract must set up a method to determine if the contractor performed as specified in the SoW. In most contracts it is also advisable to set up some method of communicating with the contractor before the required due date to monitor progress.

Monitoring

Use the work description to establish a method to communicate with the contractor and monitor progress throughout the duration of the contract. Monitoring can include periodic written or verbal updates, meetings, or the submittal of deliverables at the completion of subtasks.

Even when using a performance specification, it is possible to determine subtasks which the contractor must accomplish in order to achieve the objective of the contract. Set a specific timetable for completion of tasks and a schedule for submittal of deliverables, required meetings, presentations or other activities.

Final Acceptance

The work description should clearly spell out the final product or end result of the contract, and how the State will determine that the contract has been completed as expected. Issues discussed above under **Be Specific: define Quantity and Quality** and **Refer to Established Standards** come into play here. In clearly establishing the supply or service of the contract, the work description also sets a standard for acceptance of the end product. The work description must also establish a procedure to receive the end product and accept or reject it based on specific factors.

Some Issues to Consider

The following list includes some, but certainly not all, issues that may come under consideration when writing your work description:

- Bilingual capability;
- Designation and qualification/experience/education of key management personnel;
- Minimum hours of performance;
- FTE minimums;
- Minimum requirements for management structure and supervisory presence;
- Employee dress and identifications;
- Employee security requirements;
- Employee education requirements for security and confidentiality;
- Rules for securing and safeguarding State property;
- Designated holidays where no work is performed;
- Quality control program requirements;
- Software delivery, data delivery, manual delivery, and other data requirements;
- Location of Performance;
- Responsibility for printing of reports--agency or contractor;
- Does the SoW pass the *news reporter test*: Does it answer who? what? when? where? how? and why?

Always bear in mind that the more input you have concerning the qualifications of the contractor's staff, the more you need to be concerned about maintaining the independent contractor relationship.

The following issues also should be clearly addressed in the contract because they significantly affect pricing by the contractor:

- Conflicts of interest/organizational restrictions;
- Agency internal reviews-submission and revision requirements;
- Existing State facilities or State property which may be used by the contractor;
- Personnel available, and their roles, who will work with contractor;
- Minority and women owned business participation;
- Travel and per diem rates to be included in the total cost, and/or those paid in addition to the total cost;
- Insurance requirements;
- Bond requirements.

Agency Supplement (Insert)

THIS SECTION IS RESERVED FOR AGENCY SUPPLEMENTARY MATERIAL OR POLICIES RELATED TO THIS CHAPTER, SUCH AS:

- **AGENCY LEAD TIME INFORMATION**
- **PRESOLICITATION REQUIREMENTS SUCH AS COORDINATION WITHIN THE AGENCY**
- **FORMAT FOR THE "STATEMENT OF NEED" OR OTHER PRESOLICITATION DOCUMENT USED IN THE AGENCY TO START THE PROCUREMENT/CONTRACTING PROCESS**
- **BUSINESS STRATEGY PLANNING AND MEETINGS REQUIREMENTS FOR COMPLEX PROCUREMENTS/CONTRACTS**

Chapter 3 : PERSONAL SERVICES

Introduction

This section is your guide if you are considering using an independent contractor instead of a classified employee to perform personal services for the State. With very few exceptions, the Personnel Director is legally required by the Privatization Program to review and approve your use of a contractor for these services. The State Personnel Director has assigned staff to perform this review that is distinct and separate from other reviews conducted by the State Purchasing Division and the Office of the State Controller. Some of the Privatization Program's unique characteristics are that the State Personnel Director must review and approve the contract no matter what type of encumbrance document is used or the source or amount of the funds being spent. The State Personnel Director's responsibility to review and approve the contract cannot be delegated.

Work which benefits the State is generally performed by State classified staff. These State employees perform "personal services". Privatization is the use of independent contractors rather than State classified staff to perform work that has been needed or will be needed by the State. The Personnel Director's review and approval of personal services agreements is to assure the constitutional and statutory protection of classified system employees. The main consideration being that State work cannot be performed by independent contractors if it causes the separation of State classified staff.

Background

The guidelines for allowing privatization of State services are more fully set out in statute and interpretive administrative rules. Chapter 13 of the Personnel Director's Administrative Procedures contains the rules governing privatization. These rules provide the criteria by which the acquisition of personal services by independent contractors is justified and define the relationship between the State and the persons providing the services.

As mentioned previously, certain agreements are not subject to review by the Department of Personnel staff assigned to perform the duties required by the Privatization Program. They are as follows: transactions to acquire goods and commodities having no service component other than delivery and/or installation; intergovernmental agreements; agreements for the lease and/or purchase of real property; agreements involving personal services exempt from the classified system; and services of a non recurring nature that are able to be performed within six months.

If your agreement is not exempt from review, begin considering whether the services you intend to acquire will be approved. You will need to make some preliminary determinations such as:

- Will the services directly or indirectly result in the separation of State classified staff?
- Are the services available within the State classified system?

- Are the services provided substantially different from those of classified staff?
- Is the contracting for services authorized by statute (post April 7, 1993)?
- Will contracting for the services result in cost savings?
- Will the level of quality be maintained?
- Will the public interest outweigh the economic advantages of contracting?

Recommended Approach

First obtain an information packet from the Department of Personnel staff to perform the duties required by the Privatization Program. The packet contains copies of the pertinent statutes, administrative procedures and forms as well as background information. Next, determine if your acquisition is exempt from review by the program. If not, then determine if the acquisition "implicates" or does "not implicate" the State classified system. The term "implicate" as used by the program means that if the services being acquired are available within the classified system, the acquisition "implicates" the system. The converse is true of the term does "not implicate". Either way, the statute and administrative procedures specify the exact circumstances that provide grounds for the acquisition.

Program forms are used to demonstrate and present the agency's determinations and factual assertions about the necessity of acquiring the services outside the classified system. The Certification for Personnel Service Agreements Form is required with all submittals for review and is used to certify the need to go outside the system as well as establishing the independent status of the contractor. For certain submittals, a **"Cost Analysis Form**" along with a **"Certification Form"** must be submitted. The cost analysis form compares the cost of acquiring services from a contractor versus using State classified staff. The certification form is the Department of Personnel's permanent document and will not be returned to your department.

A distinct program service is the "pre-approval process". Prior to issuing a formal bid proposal [(i.e. - Request for Proposal (RFP) or Invitation for Bid (IFB)], the agency seeking bids should work closely with the Department of Personnel staff assigned to perform the duties required by the Privatization Program. The staff reviews the scope of work as outlined in the bid to make sure a basis exists to approve the services obtained from independent contractors. Staff then issues a pre-approval letter which allows the agency to bypass a second review after a vendor is selected and an encumbrance document is executed. Failure to submit to this pre-review could jeopardize the successful outcome of the entire formal bid process.

The following is an outline intended to guide the novice through the important points of the Privatization Program procedures. The reader is expected to refer to the actual State Statute and procedure language for interpretation and guidance when it is cited in the outline.

Please note: The word contract refers to any type of State agreement regardless of what it may be called (i.e. - contract, purchase order, etc.).

I. Personnel Director's Administrative Procedures

(Rules P13-1-1 through P13-1-13; Sections 24-50-501, *et seq., CRS)*

A. Agreements for personal services are governed by these rules and subject to review and approval by the Personnel Director.

B. Knowing the meaning of the following key terms is essential:

- Contract
- Services
- Personal Services
- Purchased Services
- Independent Contractor

These definitions are contained in the Personnel Procedures (P13-1-1). One must be familiar with the requirements of the Personnel Rules, as a whole, when executing personal services agreements.

II. Key Exceptions To Privatization Review Requirements

A. The Privatization Program procedures and review requirements apply to almost all personal services acquisitions with very few exceptions; the main exceptions are as follows:

1. Agreements to acquire goods and commodities: If the transaction is for the purchase of goods or commodities and does not have an ongoing and significant service component other than delivery and/or installation, it is exempt from program review.

2. Agreements for the lease and purchase of real property.

3. Intergovernmental agreements - - contracts between State agencies, the State and its political subdivisions, other states, the federal government, or any combination of these. (Section 24-50-508, CRS; Rule P13-1-2)

4. Limited term agreements:

    a. The service is not expected to recur on a regular basis (Section 24-50-513, CRS Rule P13-1-2). Foreseeable need is the key here. Reviewer looks for patterns, even irregular patterns of need. For example, vacations and illness requiring fill-in temporary staff can be expected (based on past patterns). Because these situations can be expected to recur, the agreements for these services may be reviewed. Accidents causing need for temporary staff are considered as not recurring and fit the limited term exception as well as the “emergency” and are approved on that basis.

b. The services to be acquired can be performed in 6 months or less and are non-recurring (Section 24-50-513, CRS Rule P13-1-2.). **In addition,** the contracting agency must place written certification (self certification) of this exception in the contract file at the agency. You may use the Certification form, see sec. VI(A) below, or place a signed note in the contract file certifying that the contract is exempted from program review.

5. Contracts involving personal services exempt from the Civil Service (Personnel) System (Rule P13-1-4), e.g.,

   a. An employee of the legislative/judicial branches of government.

   b. Attorneys

   c. Educators in higher education institutions.

6. Program waiver of successive review of individual agreements for services may be obtained from the Personnel Director upon written request (Rule P13-1-6).

   a. The contracting agency submits written request for waiver of successive approval. The waiver request is not a form -- contact the Personnel Director's office for a sample of a written request to follow as a model.

   b. You must review agreements waived for several years to assure that facts supporting the original approval have not materially changed. The program reserves the right to audit you for compliance with the terms of the waiver.

   c. This waiver excuses you from having to submit each personal services agreement for individual program review but does <u>not</u> excuse you from listing the transaction on the annual report **unless** the transaction is considered intergovernmental.

B. ***An agreement for personal services must clearly fit one of these exceptions or it shall be subject to Privatization Program review***.

III. Grounds For Approval

Personal services agreements **must** create an <u>independent contractor relationship</u>. Privatization Program procedures recognize two types of personal services agreements:

- Those that implicate the State Personnel System, and
- Those not implicating the State Personnel System.

A. **PERSONAL SERVICES AGREEMENTS <u>IMPLICATING</u> THE STATE PERSONNEL SYSTEM**

- **Section 24-50-503 CRS; Procedure P13-1-3. These are agreements with independent contractors for services normally provided, or presently performed, within the State Personnel system, except:**

1. The agreement **will not** be approved if it would result directly, or indirectly, in the separation of certified employees from State service [Section 24-50-503(2) CRS; Rule P13-1-3].

    - It is critical that the acquiring agency be able to attest that no FTE will be affected.

2. The contract must meet **<u>all</u>** of the conditions set out in Section 24-50-503 CRS; Rule P13-1-3) to be approved:

    a. **The proposed contract meets a cost savings test**. One critical requirement in the comparison of contractor costs to State employee costs, is that the contractor's Cost of Benefits must equal (cannot be less than) State employee Cost of Benefits. If the contractor has no Cost of Benefits (does not pay benefits), or the Cost of Benefits is less than the State's, you must factor in the necessary dollar amount to bring the contractor's benefits cost in line with the State's Cost of Benefits. [The program requires mandatory use of its Cost Analysis form, see sec. VI(B) below]; and,

    b. The proposed agreement contains the specific provisions set out in Rule P13-1-3.

3. **Submit required forms** with agreements for review: **Certification** and **Cost Analysis** [see VI(A) and VI(B) below].

B. **PERSONAL SERVICES AGREEMENTS <u>NOT</u> IMPLICATING THE STATE PERSONNEL SYSTEM: Section 24-50-504 CRS; Procedure P13-1-4. These are contracts with independent contractors for services sufficiently different from, or not normally provided by, those available within the Personnel system.**

1. Personal services agreements creating an independent contractor relationship must be reviewed and are permissible. These agreements must conform to ***any one or more*** of the conditions detailed in Rule P13-1-4; some limited examples include:

a. New State programs (coming into being after April 7, 1993) with specific statutory authority to contract, certain existing State programs and services not available within the Personnel system, etc., as detailed in Rule P13-1-4. Note that a footnote in the Long Bill does not constitute "statutory authority".

b. Service agreements as components of acquisitions of real or personal property must be reviewed and approved.

2. Purchased services agreements that create independent contractor relationships are must be reviewed and approved (Rule P13-1-5).

- These are agreements with public or private entities authorized to provide services benefiting specific groups or individuals in the public **at large**, not individuals in the legal or physical custody of the State[see Rule P13-1-1(C)].

3. **Submit Required Certification form** with all agreements for review, see VI(A) below.

C. **PRE-APPROVAL PROCESS**

1. Agreements for services requiring review and approval may be sent to the Personnel Director prior to award and execution of the agreement only when a formal solicitation process is to be undertaken (Rule P13-1-7). This advance approval avoids problems that may arise on review of final executed agreements which do not comply with Privatization Program requirements.

D. **PROCUREMENTS THROUGH PRICE AGREEMENTS**, Rule P13-1-8.
These are acquisitions of personal services under official price agreements.

1. See Rule P13-1-1(F) for definition of Official Price Agreements.

2. All procurements for personal services under official price agreements by a State agency or institution are still subject to the review and approval process provided within 24-50-501 CRS, *et seq*. and these rules.

IV. Limitation On Use Of State Temporary Employees

Both types of personal services agreements, III(A) and III(B) above, are subject to Rule P13-1-13.

A. The State constitution restricts the time a person may work in the same occupation for the State as a State temporary employee up to six months in a 12 month period.

B. However, a person may work as a State temporary employee for six months, then be hired as an independent contractor performing functions **completely unrelated** to the temporary work originally performed as a State temporary employee.

V. Other Policies

A. Annual reporting. Rule P13-1-9; (Section 24-50-510 CRS) requires that all agencies report all information about agreements for personal services by September 30 annually. The reports must be submitted in the format requested by the program.

- Each summer the Department of Personnel provides a reminder and written instruction on the preparation of the annual report.

B. ***Mandatory clause.*** Rule P13-1-11 requires that all personal services contracts contain a clause that defines the independent contractor relationship created by the contract. Clause A16 in Appendix A to Chapter 6 sets out the prescribed language.

C. Veterans preference. Section 24-50-511 CRS; Rule P13-1-10 sets out requirements for utilizing contractors who give preference to hiring veterans of military service.

VI. Forms Instructions

Personnel provides forms to accompany the agreement. They are enclosed at Appendix A. The individual preparing the contract must use these forms to demonstrate compliance with each requirement (Rule P13-1-12):

A. **CERTIFICATION FOR PERSONAL SERVICES AGREEMENTS/ INDEPENDENT CONTRACTOR CERTIFICATION (Rule P13-1-12)**

This two page form must accompany all agreements submitted for program review approval and is a permanent document retained by Personnel. The Certification form is used to demonstrate need and provide justification to meet the Personnel Director's conditions, as outlined above, as well as to certify that the contractor is an independent contractor.

B. COST ANALYSIS FORM (RULE P13-1-3)

This form submitted along with the certification form is required with all agreements that "implicate" the Personnel System, i.e., the services are available within the Personnel System. It contains all of the elements required for a cost analysis; your own form may never be used, however, if you wish to attach an additional page with information in narrative form you may. See part III(A)(2)(a) for directions on how to fill out Cost of Benefits section of this form.

PRIVATIZATION PROGRAM SUMMARY

I. The rules require review and approval of all personal services agreements by the Personnel Director prior to work being performed.

II. The exceptions to review are:

- Goods and commodity transactions
  - Agreements to acquire goods and commodities
- Non-recurring service contracts less than/equal to six months in length, Rule P13-1-2
- Intergovernmental agreements, Rule P13-1-2.
- Services exempt from Civil Service (Personnel) System, Rule P13-1-4.
- Approval waiver for same type agreements for a program, Rule P13-1-6.

III. The two main categories of personal services agreements subject to review and approval are:

Contracts implicating the Personnel System, Rule P13-1-3

- Services that may be performed within the System, however, there is need (meeting the criteria) to contract outside of the system.
- Must meet cost savings test.
- Certification ***AND*** Cost Analysis forms required.

Contracts not implicating the Personnel System, Rule P13-1-4

- Services are for new programs, or not available within the System, etc.
- Certification form required.

IV. Six month limitation for contract/temporary employment combination, Rule P13-1-13.

V. Mandatory clause required, Rule P13-1-11.
Annual reporting required. Rule P13-1-9.
Veterans Preference, Rule P13-1-10.

VI. Forms required:

- Certification form required with all contracts, Rule P13-1-12.
- Cost Analysis form required with all contracts implicating Personnel System, Rule P13-1-3. Cost savings to the State may not be attributed to contractor's lower Cost of Benefits.

Appendix A: Personnel Review Forms

Certification for Personal Services Agreements (2 pages)

Personal Services Contracts—Cost Analysis Form (2 pages)

CERTIFICATION FOR PERSONAL SERVICES AGREEMENTS

(Please fill out this form accurately and completely and provide all information requested including explanations.)

Your Department/Institution Name: _____

Contract Routing #: _____ **P.O.#** _____

Amount: _____ **Contractor:** _____

Term of Agreement: From _____ **To** _____

1. Briefly describe: **a.** the type of services and skills to be purchased; **b.** whether and why it is a specialized skill; **and c.** identify who is the direct beneficiary.

   a.

   b.

   c.

2. Post April 7, 1993, are there any specific statutory citations (not footnotes to the Long Bill) which require an outside contractor to provide this service?_____If yes, cite statute **and attach a copy** to this form.

3. Have these services presently or previously been performed by classified staff?_____ If yes, please provide an explanation of a) When; b) What job class was utilized; and, c) Why did the agency decide to contract out these services?

4. How long have you been purchasing these services through agreements? _____ years. Are these services on-going and for an indefinite period of time? _____Yes _____ No

5. If the contractor is an individual, has he/she previously been an employee of the state either as a state temporary employee or as a permanent employee? _____ Yes _____No If yes, give last date of employment _____.

6. We attest that the acquisition of services from the independent contractor will not result in the separation or displacement of classified staff. _____ Yes _____ No

7. **Review/Approval Criteria:** The following are statutory and/or procedural citations by which all personal services agreements will be evaluated by the State Personnel Director. Please identify those criteria that would make this request an approvable agreement.

_____ *The contract meets all of the relevant cost savings test.* ***A "Cost Analysis" form must be completed and attached to this form.*** *(Refer to CRS 24-50-503; Director's Procedure P13-1-3)*

_____ *The contract is for an existing state program never performed by state employees. Or, the contract is for an existing state program which is different in scope or policy from the programs carried out by state employees. (CRS 24-50-504 (2)(a); P13-1-4 (C).*

_____ *The contract is for a new state program (created after 4/7/93) which statutorily authorizes the performance of the program by independent contractors. (CRS 24-50-504 (2) (b); P13-1-4 (D).*

_____ *The contracted services are not available within the state personnel system, or cannot be performed satisfactorily by state employees, or are of a highly specialized or technical nature. (CRS 24-50-504 (2) (c); P13-1-4 (E).*

_____ *The services are incidental to a contract for the purchase or lease of real or personal property. (CRS 24-50-504 (2) (d); P13-1-4 (F).*

_____ *The contract is needed to protect against a conflict of interest, or to ensure independent and unbiased findings in cases where there is a clear need for a different, outside perspective. (CRS 24-50-504 (2) (e); P13-1-4 (G).*

_____ *The contractor will provide equipment, materials, facilities or support services that could not feasibly be provided by the state in the location where the services are to be performed. (CRS 24-50-504 (2) (f); P13-1-4 (H).*

_____ *The contractor will conduct training courses for which appropriately qualified state personnel system instructors are not available. (CRS 24-50-504 (2) (g); P13-1-4 (I).*

_____ *The services are of an urgent, temporary or occasional nature. (CRS 24-50-504 (2) (h); P13-1-4 (J).*

_____ *This is an intergovernmental agreement. (CRS 24-50-508; P13-1-2)*

_____ *The services provided are for a term of six months or less and are not expected to recur on a regular basis. (CRS 24-50-513; P13-1-1 (B)*

_____ *The contract is for purchased services. (The acquisition of services which directly benefit specific groups or individuals in the public at large.) (CRS 24-50-504 (3); P13-1-1 (C)*

Explain your selection of any items checked above (the area below is to be used for your explanation).

Personal Services Certification:

Independent Contractor Certification: We certify that the contract or commitment voucher is indeed an independent contract that does not create an employee relationship and that these documents contain the required independent contractor language as part of the Director's Procedures (P13-1-11).

If "No" is marked, don't submit your agreement for review because it cannot be approved.

_____ **Yes** _____ **No**

Department/agency certification: We hereby certify that the attached agreement for personal services meets every criterion stated above and that all responses on this certification are true and accurate, to the best of our knowledge.

Dated this _____day of _____,19_____.

By:

_____ _____

Agency Representative Title/Work Phone Number

PERSONAL SERVICES CONTRACTS

Cost Analysis Form

This two sided cost analysis form must be completed for any personal services agreements which are to be approved pursuant to Section 24-50-503, C.R.S. (1995 supp.). Submit this form in addition to a certification form.

- Department or Institution: _____

- Division or Agency: _____

- Contract Services Provided: _____

- Term of Contract: _____

- Titles of Affected Classified Employees: _____

  _____

- Number of Classified FTE Affected: _____

- Name & Phone # of Person Completing Cost Analysis: _____

  _____

CONTRACTOR COSTS (a):				STATE EMPLOYEE COSTS (a):				PROJECTED SAVINGS: (Identify Fund Source)		
								Present	Succeeding Years	
Direct Labor (Specify Titles)	Est. Hours	Hourly Rate	Est. Cost	Direct Labor (Specify Titles)	Est. Hours	Hourly Rate	Est. Cost	199 - 199	199 - 199	199 - 199
Direct Labor Total			$	Direct Labor Total			$			
Cost of Benefits (b) (_____% of pay):			$	Cost of Benefits (30% of Pay):			$			
Indirect Overhead Costs:			$	Indirect Overhead Costs (c):			$			
Continuing State Oversight Costs:			$							
Other Direct Costs:				Other Direct Costs:						
Travel:			$	Travel:			$			
Per Diem:			$	Per Diem:			$			
Equipment:			$	Equipment:			$			
Materials:			$	Materials:			$			
Other:			$	Other:			$			
Total Contractor Costs:			$	Total State Costs:			$			
				GF:			$			
				CF:			$			
				CFE:			$			
				FF:			$			

(a) Identify assumptions used in calculating costs. Indicate any rate increase the contractor proposes to impose during the term of the contract.

(b) There shall not be included any savings to the state attributable to lower health insurance benefits provided by the contractor. (CRS 24-50-503 (1)(a)(IV)). Thus, if the contractor's lower health insurance benefits equal $50 per month, this total amount must be added to the contractor's total costs before savings to the state can be evaluated.

(c) Those costs shall be included only if the costs can be attributed only to the function in question and would not exist if that function were not performed in state service. For such purposes, "Indirect Overhead Cost", means existing administrative salaries and benefits, rent, equipment costs, utilities and materials. (CRS 24-50-503 (1)(a)(II)).

PERSONNEL RULES (AGENCY INSERT)

THIS SECTION IS RESERVED FOR THE STATE PERSONNEL RULES GOVERNING PRIVATIZATION REVIEW (IF DESIRED) OR OTHER AGENCY POLICIES/PROCEDURES RELATED TO THIS CHAPTER.

Chapter 4 : VENDOR SELECTION

Introduction

The following review of vendor selection methods is brief, since this is a contract procedures and management manual and not a procurement manual. The procurement process plays a significant role in the contracting process, and as such needs to be considered. The procurement method used has a large impact on contract planning, due to the varying lengths of time required to prepare different procurement documents and to conduct the actual procurement process.

It is always important to consider the resultant contract when conducting any procurement. When this is done effectively, it should be clear as to what type of contract the vendor is expected to enter into as a result of the procurement, and all expectations that are required to be completed before a contract can be executed. If there is a particular contract form that is required, include the form with the procurement documentation so that the vendor is aware of all the terms and conditions that will be included in the contract. Clearly spell out all required submittals before the contract can be awarded.

Group I, Group II and nondelegated procurement agencies have differing dollar thresholds for the types of procurement methods reviewed below, (See *Group I and Group II Agencies* in the Introduction). The dollar thresholds are not included in this manual but can be determined by contacting the section, program or office in the agency that handles procurement.

Also, agency specific information may be included at the end of this chapter in the section entitled ‘Agency Supplement”.

Bid Information and Distribution System (BIDS)

The Colorado Bid Information and Distribution System (BIDS) is an electronic notification system which uses commodity codes to notify interested vendors of State bids. A target date of September 1997 has been established where BIDS will begin using general category descriptions in lieu of commodity codes. BIDS is mandated by State Statute and required to be used for all purchases where competition is solicited. If BIDS indicates that a commodity is "closed", notification of potential bidders outside of the BIDS system is prohibited. For commodities that are not closed, it is permissible to notify vendors who are not in the system and allow them the opportunity to compete. Vendors can register in the BIDS by contacting the Colorado Division of Purchasing or any State purchasing office.

Vendor Selection Methods

Exempt Procurements

The Colorado Procurement Code applies to all purchases except for the following:

- Highway and bridge construction;
- Contracts where no public funds are expended (this includes revenue-generating contracts);
- Contracts where the vendor is specifically named in the grant or gift from which you are expending funds;
- Procurement by Legislative and Judicial Branches and the four elected officials in the Executive Branch: Governor, Treasurer, Secretary of State, and Attorney General.
- Contracts for professional services (architects, engineers, surveyors, landscape architects, and industrial hygienists). Although exempt from the Procurement Code, competition is conducted through the use of a Request for Statements of Qualification. Price cannot be used as a consideration in the award. (See Statements of Qualification, below.);
- Items bought for resale;
- Intergovernmental purchases, (i.e. another State agency, political sub-division, other state or federal government agencies, counties, cities, or countries), and
- Procurements otherwise authorized by law (where vendor selection criteria are specified).

Printing is exempt from the Colorado Procurement Code, but is covered by another statute. The Division of Purchasing has oversight jurisdiction for the purchase of printing.

State Price Agreements

State Price Agreements, also called State Awards, are "contracts" for goods and services used throughout State Government. The solicitation is conducted by the Division of Purchasing and the resulting agreement made available for use by all State agencies and institutions.

When making any purchase, first check to see if the goods or services are on a State Award. If the item is on a State Award, no additional vendor selection needs to be done. The State agency or institution, after obtaining any required prior approvals, may issue a commitment document (purchase order or contract) pursuant to the agency's purchasing delegation agreement. Most

State Awards are permissive, meaning that it is not required that an agency use the award. However, using a permissive State Award saves time and money. Mandatory State Awards MUST be used.

Small Discretionary Dollar Purchases

Small dollar purchases are those below the dollar threshold where competition is required by the Procurement Rules. The dollar threshold at which competition is required varies depending on the agency's level of delegation. This also varies by the type of purchase being made: commodity, service or construction. If you are unsure about the dollar thresholds requiring competition, find out what they are from your agency purchasing contact or the Division of Purchasing.

The dollar threshold above which a purchase order or contract is required is established by State Fiscal Rules. State agencies and institutions, however, may establish a lower limit. According to State Fiscal Rules, purchases below $3000 may not require a purchase order or state contract (see page 6-2). When is doubt, ask your State agency or institution purchasing contact.

Documented Quotes

Generally, all purchases over $25,000 require formal competition, see "Competitive Sealed Bidding and Competitive Sealed Proposals". For purchases above the dollar threshold requiring competition, but below the dollar threshold where formal competition is required, an informal bidding process referred to as "documented quotations" is used. All documented quotes must be entered into the BIDS System. Quotes may be received from vendors by hand, mail, telephone or facsimile.

The time frame allowed for vendors to respond to a solicitation for documented quotes varies depending on the amount of time vendors need to return a quote for the particular purchase and the needs of the agency. Talk to your purchasing contact to find out if your agency has a minimum time frame for documented quotes and if there is a prescribed format for quotes or any other requirements.

Competitive Sealed Bidding

Competitive sealed bidding, used for construction, commodities, and service purchases when they can be defined in such a way that price is the only determining factor for selection. Competitive sealed bidding is required by the Procurement Rules for purchases over $25,000, when objective criteria can be written. State agencies and institutions may establish lower dollar thresholds. The time frame that the bid solicitation must be advertised is a minimum of 14 calendar days.

Competitive sealed bidding will be handled by your agency purchasing office. Ask your agency contact what policies are in place for your agency.

Competitive Sealed Proposals

Competitive sealed proposals is a solicitation method used when the procurement officer determines in writing (R-24-103-203-02) that use of competitive sealed bidding is either "not practicable" or "not advantageous" to the State. Competitive sealed proposals are generally used when factors other than price are to be evaluated or when objective criteria cannot be written. Unlike competitive sealed bidding, competitive sealed proposals use a request for proposals (RFP) to solicit proposals from vendors. The RFP allows discussions with the vendor prior to award for the purpose of clarification and/or to obtain a best and final offer. The RFP process allows evaluation of the relative merit of vendor proposals using criteria other than price. RFPs are also used when objective bid specifications cannot be prepared in sufficient detail to allow vendors to propose firm, fixed prices, or where a discussion with the vendor is necessary in order to understand the proposal. Your agency purchasing office is responsible for the RFP process and will assist you in preparing the RFP and conducting evaluations. Remember that if the RFP is for personal services, pre-approval from the Department of Personnel is required. Contact your agency purchasing contact before beginning the process to find out your agency's procedures, time frames, and required forms.

The following is an overview of the RFP process:

1. Obtain sample Request for Proposals (RFP) and Statements of Work (SoW).

2. Prepare the solicitation document, especially the SoW and specifications. Preparation of SoW and specifications is **CRITICAL** to the success of the entire project. See Chapter 2 for guidance on writing a SoW.

3. Conduct pre-procurement data gathering and obtain any required pre-approvals, such as the Department of Personnel for all personal services.

4. Draft RFP and model contract. Develop procurement timeline. Include in the RFP at least a narrative description of evaluation factors (including price) and their relative weights. Include provisions requiring submission of cost or pricing data in support of the proposal if required, see R-24-103-403-02.

5. Prepare RFP issuance package.

6. Furnish RFP to parties whose approval is needed, attend meetings and make needed changes; make needed copies.

7. Identify commodity codes under which RFP will be issued. (A target date of September 1997 has been established for the State will begin using "plain English" categories instead of commodity codes.)

8. Establish evaluation committee.

9. Review evaluation process with committee members, including conflict of interest disqualification.

10. Verify with the agency purchasing contact that the solicitation was posted on BIDS.

11. Conduct pre-proposal conference, if any.

12. Prepare and distribute written answers to vendor inquiries, if any.

13. Receive and time stamp proposals; identify and flag any confidential data. Be sure to notify procurement officials if proposals are not sent directly to them.

14. Verify proposal compliance with mandatory solicitation requirements.

15. Prepare and distribute rejection letters for non-responsive bidders. A non-responsive vendor in competitive sealed proposals is one who submits an unacceptable proposal, defined as one not reasonably capable of being made acceptable through discussions. A proposal requiring substantial or major revisions or rewrite would generally not be considered responsive.

16. Conduct evaluation, including site visits, if any.

17. Obtain proposal clarification, if needed.

18. Select finalists, those offerors in the *competitive range*. The *competitive range* consists of those proposals determined to be reasonably susceptible of being selected for an award.

19. Prepare and distribute finalist notification letters.

20. Conduct oral or written discussions with those finalists in the competitive range.

    A. *Discussion* is the process of communication between the State and offerors to clarify proposals and to insure that offerors fully understand and are responsive to the solicitation requirements. Offerors must be accorded fair and equal treatment in discussion and revision of their proposals.

    B. Discussions may be held in writing or orally to clarify proposals and permit adjustments in services to be performed and in costs and/or prices. Discussions may consist of written notice of deficiencies, oral presentations/system demonstrations and face-to-face meetings with offerors. Discussions need not be done orally.

        - Auction techniques are prohibited. Auctions include disclosure of competing offerors' costs/prices; indicating to an offeror a cost or price that must be met to obtain further consideration; advising an offeror of their price standing relative to other offerors; or successive rounds of requests for the *best and final offer* with primary objective to obtain price concessions.

- *Technical leveling* and *technical transfusion* are also prohibited discussion techniques. *Technical leveling* means helping an offeror to bring their proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from an offeror's lack of diligence, competence or inventiveness in preparing the proposal. *Technical transfusion* means disclosing technical information or approaches from proposals to other competitors in the course of discussion.

C. Offerors must be given equal opportunity to discuss and submit revisions to proposals. Normally this is accomplished by formally requesting *best and final offers* (BAFOs) at the conclusion of discussions with a date set for receipt of BAFOs. It is wise to caution offerors that substantial proposal revisions which do not adequately identify the changes and explain the scope, risk and reasons for the revisions--as well as the impact on price/cost--may be unfavorably considered during the final evaluation. Commonly, proposal revisions are submitted by *change page* and not complete republication of the proposal.

21. Collect best and final offers on the date established for its submission.

22. Prepare Evaluation Committee report and recommendation, identifying winning bidder, including written determinations regarding the waiver of any technical irregularities, etc.

23. Present report to agency management and procurement officials; obtain approval.

24. Announce procurement results.

25. Prepare appropriate commitment documentation, usually a contract.

Statements Of Qualification

Contracts for professional services (architects, engineers, land surveyors, landscape architects, and industrial hygienists) generally use a Statement of Qualification process. Although exempt from the Procurement Code, competition is conducted and award is based solely on qualification. Price cannot be used as a consideration in award. More information can be found in *Annex A, State Buildings Programs*. Contact your agency purchasing contact before beginning the process to find out your agency's procedures and required forms.

Sole Source Procurement

Sole source procurements are allowed by the Procurement Code when only one item or service will meet the need of the State and when only one vendor can supply that item or service. If a proprietary item is required, a sole source circumstance may exist:

- Where the compatibility of equipment, accessories or replacement parts is the paramount consideration and the items are only available from one vendor.

- Where a sole supplier's item is needed for trial use or testing.

- Where a sole supplier's item is to be procured for resale.

- Where public utility services are to be procured, as in the case of a monopoly.

When there is doubt that the product or service is sole source, competition should be solicited. All sole source purchases, exceeding discretionary dollar limits, must be approved by the State Purchasing Director or the State agency or institution purchasing director, as appropriate. Ask the agency purchasing contact for a sole source purchase request form.

The time to request sole source approval is before negotiating a contract and before the vendor signs the contract. The approving official may not agree that your vendor is the sole source, and may require that competition be solicited.

Insufficient time for solicitation of bids is not sufficient reason to justify a sole source procurement.

Emergency Procurements

Section 24-103-206 CRS provides for emergency procurements. The statute declares that such procurements may be authorized by the State Purchasing Director, the head of a purchasing agency, or a designee of either officer when there exists a threat to public health, or safety under emergency conditions, as defined by rules.

An emergency condition, as defined by R-24-103-206-01 of the Colorado Procurement Rules, is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failure, or such other reasons as may be proclaimed by the using agency, and approved by the director, head of a purchasing agency, or designee. Such conditions create an immediate and serious need for supplies, services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten:

- the functioning of State government, or its programs,

- the preservation or protection of property, or

- the health or safety of any person or persons.

Any State agency may make an emergency procurement when an emergency condition arises and the need cannot be met through normal procurement methods. However, approval by the State Purchasing Director, or a delegate, must be obtained prior to the procurement.

Emergency procurements are to be made with such competition as is practicable under the circumstances, and a written determination of the basis for the emergency and for the selection of the particular vendor must be prepared and placed in the contract file.

Only the quantity of goods or services necessary to alleviate the emergency may be purchased under emergency conditions.

Special Circumstance Procurement

There are times when circumstances arise that preclude the use of normal procurement methods. In these instances, the State Purchasing Director or the State agency's or institution's purchasing contact may approve the use of documented quotes above the normal dollar threshold. Some examples of special circumstance procurements are:

- When source selection is designed to identify multiple qualified providers with the intent is to make an award to all who are so identified and where fees or reimbursements are predetermined and not negotiable.

- When conditions and fees are fixed, all offers are to be accepted or rejected and availability of providers is limited.

Competitive Negotiation

This vendor selection method may be used only in two circumstances:

1. The State agency or institution has conducted a solicitation and was unsuccessful in identifying a winning vendor, or

2. There are not enough vendors to establish "adequate competition" (at least 3).

Under either of these circumstances, the agency may negotiate directly with qualified interested vendors. The agency must conduct the discussions without revealing the content of any discussions to any other party. The winning vendor is the vendor who makes the best offer to the State. After the winning vendor is identified the agency must then document the discussion and the basis for determining that the winning offer was the best offer.

Best Value Sealed Bidding

This vendor selection method is a new variation of competitive sealed bid. What makes this different is that the agency may request and allow bidders to include alternatives, enhancements, and options on top of a "base Bid". Bidders must meet the minimum specifications and may then try to convince the agency that their bid provides the best value by offering these alternatives, enhancements, and options.

Additional Vendor Selection Options

Additional vendor selection options are available for situations where special circumstances exist or where pre-qualification of a vendor is important. The State agency or institution purchasing contact should be consulted for assistance in using one of these additional vendor selection options.

Lease And Capital Construction

Capital construction uses many of the procurement methods described above, but laws require certain additional procedures and the use of specific forms. Refer to the State Buildings Annex for details, or contact State Buildings Programs.

Real estate leases require the use of specific forms. See *Annex A*, or contact State Buildings and Real Estate Programs.

Agency Supplement (Insert)

THIS SECTION IS RESERVED FOR AGENCY SUPPLEMENTARY MATERIAL OR POLICIES RELATED TO THIS CHAPTER.

STATE PROCUREMENT CODE AND RULES

(AGENCY INSERT)

THIS SECTION IS RESERVED FOR AGENCY INSERTION OF THE PROCUREMENT CODE AND RULES (IF DESIRED).

Chapter 5 : CONTRACT PRICING

Introduction

Contract Pricing Defined

The objective of purchasing is to obtain goods or services at fair and reasonable prices. "Contract pricing" is the term commonly used to describe the process for analyzing prices and/or costs to determine whether the price of the goods and services are fair and reasonable. The method of contract pricing differs depending on the nature of the service and the availability of competition. The discussion in this section refers generally to commercial contract pricing principles. Cost analysis of grant contracts is somewhat different, and resembles more closely cost analysis in "cost reimbursement" contracts, where analysis of specific cost elements (not an overall price) is most important. This discussion will first cover "price analysis," most relevant to firm, fixed price contracts, and then turn to cost analysis principles used in noncompetitive and cost-type contracts.

Other Economic Considerations

"Life Cycle Costs"

The price of a good or service is only one aspect of its cost. The total cost of ownership can include costs such as transportation, storage, administration, as well as the costs associated with maintenance, productivity, or other post-delivery costs associated with defects or failure, such as warranty costs.

"Best Value" in Source Selections

These other economic considerations are sometimes evaluated in negotiated procurements to determine which offerors offer the best combination of technical superiority and cost. Pricing considerations and cost analysis offer an additional opportunity, not only to achieve a fair and reasonable price, but also to assess whether the offeror understands the nature of the requirement and is offering a reasonable, comprehensive technical approach.

Contract Types

Closely related to price/cost analysis concepts is the choice of contract type: the type of cost/price analysis is dependent somewhat on contract types. The choice of contract type, e.g. fixed price or cost reimbursement, is an important initial consideration when conducting competitive procurements. In a "sole source" environment, sometimes the choice of contract type may be part of the negotiation and a result of discussions during cost and price negotiation. For a discussion of types of contracts and the risks associated with each, see Chapter 6. For a discussion of the impact of contract type on contract management, see Chapter 10, section 2.3.

Statutory and Regulatory Requirements

State Fiscal Rules and the Controller Statute

Section 24-30-202(2), CRS requires the State Controller to examine each contract to determine whether prices or rates are "fair and reasonable". As a practical matter, the State Controller depends on agency price analysis to determine whether prices or rates are "fair and reasonable".

Procurement Statutes

Section 24-103-403, CRS (1988) requires contractors to submit and certify "cost or pricing data" prior to the pricing of some contracts awarded by competitive sealed proposals or pursuant to sole source authority, or the pricing of change orders or contract modifications (over $500), unless:

1. The contract price is based on adequate price competition;

2. The contract price is based on established catalog prices or market prices;

3. The contract price is set by law or rule; or

4. It is determined in writing that the requirements of the statute may be waived, and the reasons for the waiver are stated in writing.

Federal Grant Contracts

The Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, referred to as *The Common Rule*, establishes the cost principles applicable to grants funded with federal money. In general, the rule says:

1. A state must expend and account for grant funds in accordance with state laws and procedures for expending and accounting for its own funds. See *The Common Rule*, Section .20(a).

2. Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs. See *The Common Rule*, Section .20(a)(5).

3. Grant funds may be used only for the allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors, and reasonable fees or profit to cost-type contractors. See *The Common Rule*, Section .22(a).

4. Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications to determine the reasonableness of the

proposed contract price and, where there is no price competition, a profit that is "fair and reasonable." See *The Common Rule*, Section .36(f).

Price Analysis

Unless there is adequate price competition, some form of price analysis is required for any purchase of goods or services. How the price analysis is conducted depends on the value of the purchase and the circumstances surrounding it.

Definition of "Price Analysis"

Price analysis is defined as the examination of the offeror's/bidder's price proposal or bid by comparing it with reasonable criteria, without examining and evaluating separate elements of the costs (e.g. overhead and profit) making up the price.

Price Analysis for "Full and Open Competition"

Where there is adequate competition, as in invitations for bids and most requests for proposals, submission of competing offers or bids satisfies the need for price analysis. Generally, where there are at least two qualified, responsive sources who have responded to the solicitation, or only one offeror responds but the nature of the requirement does not give an unfair advantage to that competitor, the lowest bid or proposal normally provides a "fair and reasonable" price. Of course, some other means for assessing price reasonableness may also assist in price analysis.

Other Methods of Price Analysis

Where there is competition, price analysis is easier. Where, however, a contract is "sole source," or conditions are otherwise not favorable for competition, then other means of price analysis must be found.

Established Catalog and Market Prices

Prices widely publicized in catalogs or price lists, such as the General Services Administration Federal Supply Schedule prices, may serve as a basis for price analysis for supplies and services that are similar in nature. Consider requesting from contractors recent sales summaries establishing that the prices are offered to a significant number of buyers. In some industries, there may be established or well known market prices for certain supplies or services that are not unique to one seller.

Prices Set by Law or Regulation

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

Historical Prices

An agency may have had similar supplies delivered or services performed by the same or other contractors. When comparing historical prices, consider:

1. How conditions have changed;

2. Whether there are "mobilization" or other one time setup or non-recurring charges;

3. The effect of inflation or deflation;

4. Whether the contractor should be or has been able to take advantage of "learning curves" in achieving efficiencies.

Independent Cost Estimates

If an agency has the expertise or resources, it may be able to develop independent cost estimates of the costs of doing the work, from which it can evaluate proposed prices. These estimates require an expert analysis of the quantity and nature of labor and material that will go into the contract performance, and application of expected cost rates such as those for indirect costs, overhead, and profit.

Documenting Price Analysis

Where "full and open competition" has not been an adequate basis for price analysis, the contract file should explain the basis for the price analysis, and the conclusion that the price is fair and reasonable. An abstract of bids is sufficient where there is competitive bidding. The price negotiation memorandum should contain:

1. Information that was considered;

2. Weight given to information and why; and a

3. Rational explanation of why that information led to the conclusion that the price was fair and reasonable.

Relationship between Price Analysis and Negotiation

Sometimes, the absence of information from which to analyze reasonableness of prices can lead to fact-finding questions used during negotiations, where there is no "full and open competition." For example,

1. Does the contractor have price lists or catalogs?

2. Can the contractor identify a market price or rate that is readily identifiable?

3. How can the contractor otherwise support the reasonableness of the rate or price?

If information adequate to support price analysis cannot be obtained, then you may have to request "cost or pricing data" as required by the Procurement Code in order to conduct cost analysis.

Cost Analysis

Price analysis focuses on a comparison of the total price against objective indicators of reasonableness, such as competitors' prices, catalog or market prices, prices of similar work, etc. Sometimes, market conditions are not suitable for price analysis, e.g. "sole source" situations, pricing of modifications to contracts, "cost reimbursement type" contracts, etc. In those cases, "cost analysis" is used to determine whether the price to the State will be "fair and reasonable."

The purpose of cost analysis is likewise to arrive at a price that is "fair and reasonable." But costs tend to vary among companies, based on the capabilities of management, the efficiency of labor, and the quality and amount of subcontracting.

"Cost Analysis" Defined

Cost analysis is an evaluation of actual or anticipated costs. Successful cost analysis requires application of experience, knowledge, and judgment to cost data. The purpose is to forecast expected contract costs and assess an appropriate profit. Cost analysis is useful for establishing negotiation objectives for cost/price negotiation.

Analyzing Specific Cost Categories

Variable Costs/Direct Costs

These are costs, such as labor and materials, that vary directly in relation to the quantity of the product or service being ordered. Usually, these costs will be priced in proposals as "direct costs," those costs that are being directly incurred for contract performance, and which do not benefit other aspects of the contractor's business. These costs are traceable directly to the work being performed on the contract. Not only is a reduction in direct costs worth more than any other element of cost, direct costs are usually the basis for "indirect cost" charges also, i.e. overhead is usually computed as a percentage of direct costs.

- Direct costs are a product of both quantity and cost. For example, proposed costs for material may include a contingency for rework that should be analyzed. Similarly, cost of labor will vary depending on the number of hours of labor being proposed, which should likewise be analyzed based on your own estimates.

- Try to determine how much of the direct costs are proposed for "mobilization" or "set up," one time costs associated with beginning performance. The assumptions in proposing these costs may be ripe areas for negotiation.

- Labor costs and salaries are related to the skill/education of labor being employed. Evaluate proposals to insure that the labor skills are appropriate for the work being proposed.

- In contracts involving repetitive labor operations, look for "efficiencies", such as use of learning curve analysis.

- The location of the work may affect the rates for both labor and materials. Make sure rates conform reasonably to rates in the geographical area where work will be performed. The Bureau of Labor Statistics provides current wage rates for different job categories in different geographical areas.

- Evaluate costs for capital equipment, special tooling or equipment, etc. Consider providing State equipment for use during performance.

- Be wary of "internal charges" or "markups" on subcontracted work or materials, or internal transfers of labor or material, where the additional cost proposed is not reasonably related to actual costs to the company.

Indirect Costs

"Indirect costs" can account for 30% or more of the cost of a project. Some of the common categories for these "indirect cost pools" are general and administrative overhead, engineering overhead, materials overhead, manufacturing overhead, and selling expense. They are all indirect costs and vary in the way they are allocated and recovered in pricing. In general, there are two basic distinctions: between those that benefit the business as a whole and those indirect costs that benefit specific production/service operations of a company.

Fixed Costs/General and Administrative Overhead

Fixed costs, sometimes referred to as "sunk costs," are costs that do not change with volume of contract performance or specific product/service lines. Home office expenses, facilities costs, corporate officer and home office salaries, some utilities, depreciation expenses, advertising, and research and development are examples of costs that commonly are considered fixed costs. These costs are typically recaptured using "overhead markup," usually applied as a percentage of direct and other indirect costs. Most companies have an established an overhead rate that is based on previous financial performance.

Semi-variable Costs/Other Indirect Costs

All costs are not either totally variable (e.g. direct costs) or fixed. Some costs are more closely associated with specific service or manufacturing activities in a company. Utilities, for example, are partly fixed and partly variable. How these kinds of costs are allocated is dependent on the contractor's accounting or "cost accounting" system. Usually, these other indirect costs are

equitably allocated against a unit of production or service, such as hours of labor or units of manufacturing. The per unit variable costs are dependent on the volume of manufacturing or service production.

"Reasonableness" and "Consistency" in Cost Allocation

There is no single, common method of allocating all of the indirect costs/overhead. Although your familiarity with an industry may provide ranges of expected indirect costs rates, each company will have different accounting systems and different rates. What you should try to insure is reasonableness and consistency in the allocation of all indirect cost. The State should always be treated equitably in how the contractor is pricing its proposals and allocating its costs to the different cost categories. Further, you should challenge any known allocation systems that require the State to pay for indirect cost in an overhead pool that is inconsistent with cost allowability rules in the Procurement Rules or Federal standards governing grants. For example, fines and penalties are a common category of cost that is "unallowable" .

Of course, this level of cost analysis presumes that you have the data necessary to conduct it, either through contractor submission of cost or pricing data or availability of an audit done recently on a company.

Example:

Simplified example of costs for computer installation/software development:

Direct costs	
Equipment	$10,000
Labor (1000 hours)	$40,000
Subcontractor	$3,000
Indirect costs	
10% (Equip. handling)	$1,000
10% (Sub markup)	$300
Subtotal	$54,300
20% Overhead	$10,860
Total Costs	$65,160
Profit	$6,516
TOTAL PRICE	$71,666

Requesting "Cost or Pricing" Data

Without data to analyze, you cannot perform cost analysis. In procurements, or before negotiating modifications to contracts, you ask the contractor to submit cost or pricing data. In solicitations, the requirement for cost or pricing data is part of the request for proposals, so offerors are on notice of the need to submit the data when they submit their proposals. With respect to changes or modifications, the requirement for cost or pricing data should be included in a contract clause.

The scope of the data you request can vary, from simple budget submissions showing projected expenditures (not really "data," except for the unit prices for categories such as salaries disclosed on the budgets) to much more detailed factual descriptions of historic indirect and overhead rates, salary and benefit breakdowns for all categories of labor, materials costs, subcontractor quotes, etc. The example above is probably the most simplified example of cost or pricing data that would ever be requested. In high value contracts, you may also want the offeror to submit subcontractor quotes concerning subcontracted work, as well as historical employee salary rates and material costs.

The following is an example of a solicitation clause requiring submission of certified cost or pricing data by offerors:

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

A companion clause for cost or pricing data submission in modifications and changes is at Clause B2, Appendix A, Chapter 6.

Profit

Unless you are dealing with a nonprofit entity, the final large component of total price is the profit. There are no formulas about a reasonable profit. In fact, profit is sometimes the cost element that is likely to be negotiated away first by a firm that is motivated in getting your business. One caveat: sometimes profit may appear to be negotiated away, when in fact there

may be conservative estimates in other cost categories that a contractor expects to "beat" during performance.

As a general rule, though, a contractor is entitled to receive a "fair and reasonable" profit. In general, profit should be a reward for efficiency and the risk assumed by a company. 10% profit is a common profit baseline for commercial, fixed price contracts having moderate risk and only incidental amounts of subcontracting.

Cost plus percentage cost contracts are illegal (section 24-103-501, CRS), and they make little sense, because there is no incentive for the contractor to restrain costs. A "cost plus percentage cost" contract is one which gives a contractor a fee based on the costs incurred during performance. By contrast, contracts are commonly negotiated and negotiation objectives established using profit as a percentage of total estimated cost, i.e. computing the "return of the investment" of time and money. The difference is: the profit or fee is fixed once the negotiation is finished and price agreement reached.

Here are some general considerations in evaluating and negotiating profit:

- A contractor assuming higher technical and/or cost risks should be entitled to more profit. Similarly, a contractor merely passing through someone else's productive effort should receive less (or no) profit.

- Generally, higher profit is justified per unit on low volume sales than larger orders, particularly where there is risk from mobilization or setup.

- Companies in high tech, rapidly developing and changing technologies are entitled to greater profit, because they have higher training and development costs to stay competitive.

- Companies who make substantial capital investments during performance are entitled to a higher profit.

- Consistently higher quality justifies higher profit.

A Note About Grants

The section above on *Statutory and Regulatory Requirements* lists federal requirements related to price and cost analysis. Note that formal cost or price analysis is required when grantees are "procuring property and services under a grant."

Requirements, generally applicable to grants, are found in *The Common Rule*. However, individual programs are often governed by more specific federal requirements in the Code of Federal Regulations, e.g. 34 CFR Part 80 (Education), 45 CFR Part 92 (Health and Human

Services), 24 CFR Part 85 (Housing and Urban Development), 29 CFR Part 97 (Labor), 44 CFR Part 13 (Federal Emergency Management Agency).

Considerations in Cost Analysis

Analysis of grant or subgrant proposals tends to be more like "cost analysis" than "price analysis," because subgrantees are typically local governments or political subdivisions with diverse organizations and financial management systems.

Apart from "procurements of goods and services," the financial management requirements for financial assistance grants focus on "expenditures" consistent with cost accounting standards. Payments are typically based on the actual costs incurred, unlike most commercial contracts. The audit oversight and cost allowability rules also help to assure "reasonableness" of expenditures.

- Agency personnel should have a working familiarity with applicable cost accounting standards for grants in order to do cost or budget analysis. To be payable, costs generally have to be reasonable, "allocable" to cost objectives, and not "unallowable" (e.g. fines and penalties, entertainment expenses, etc.) The cost accounting standards governing federal grants are:

  - OMB Circular A-87 - State and Local Governments.

  - OMB Circular A-122 - Private Nonprofit Organizations, other than Higher Education.

  - OMB Circular A-21 - Educational Institutions.

- Involve field personnel and technical experts in proposal analysis; they will be able to assess the reasonableness of proposed costs and apply the federal cost accounting standards to the proposed work or project.

- Direct costs, e.g. labor costs/salaries or projected equipment/materials costs, are still ripe areas for up-front analysis of budget or other cost proposals. Evaluate whether salary levels, experience/education requirements are appropriate for the nature of work being performed, and whether the projected numbers of hours/FTE are appropriate for the level of effort.

- Besides evaluating the quantity and cost of supplies/equipment, be aware that *The Common Rule* specifies different disposition and title vesting provisions for equipment (supplies with useful life of more than one year and acquisition cost of over $5,000).

- Indirect cost rates are often negotiated by a "cognizant federal agency", such as the Department of Health and Human Services. In those cases where there is an approved rate, an individual State agency will not be responsible for evaluating indirect costs.

Matching Requirements

Also, unlike commercial contracting, the cost or budget analysis in grant contracts has to include evaluation of the "matching" or "cost sharing" rules governing the program. Matching funds provide an added incentive to the contractor to satisfactorily perform, because some of the contractor's money is at risk along with that of the state or federal government. See *The Common Rule*, Section .24, Matching or Cost Sharing.

Procurements Under Grants

When procuring goods and services under grants, *The Common Rule* establishes pricing requirements similar to those in the Colorado Procurement Code.

1. Cost and price analysis. Grantees must perform a cost or price analysis in connection with every procurement action including modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation.

    - Grantees must make independent estimates before receiving bids or proposals.

    - Cost analysis must be performed when the offeror is required to submit elements of its estimated cost, e.g. professional, consulting, and architectural engineering services contracts.

    - Cost analysis is necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications and change orders, unless price reasonableness can be established based on

        - Catalog or market price of commercial products sold in substantial quantities to the general public; or

        - Prices set by law or regulation.

2. Profit. In grant contracts where there is not adequate price competition, or in any case when cost analysis is used, agencies must negotiate profit as a separate element of price for each contract for which there is inadequate price competition or when cost analysis is performed. *The Common Rule* requires consideration of

    - Complexity of the work to be performed;

    - The risk borne by the contractor;

    - The contractor's investment;

    - The amount of subcontracting;

- The quality of its record of past performance; and

- Industry profit rates in the surrounding geographical area for similar work.

3. Cost plus percentage of cost methods of contracting are not permissible (same prohibition as in the Colorado Procurement Code).

Price Negotiation in Commercial Contracts - Considerations

In competitive sealed bidding, there is no flexibility to negotiate prices with the successful bidder. By contrast, the competitive sealed proposal (RFP) process permits price negotiations prior to submission of "best and final offers." And in a sole-source situation, of course, negotiation of the price or cost will be a significant part of the contract negotiation.

Most companies have flexibility in their pricing. Initial proposals probably do not contain the "bottom line" price, and the price may be adjusted once the parties further clarify the scope of the work. While companies generally want to recover their direct costs, the usual objective in recovering indirect costs is to insure that the project recovers its "fair share." However, depending on a company's outlook on a specific service's or product's profitability, there may be flexibility in negotiating indirect cost components of a price. So remember to:

- Challenge assumptions in the pricing proposal because most prices are subject to adjustment, based on principled negotiations;

- Ask for "cost and pricing data" when required by the Procurement Rules or as necessary to perform adequate price/cost analysis;

- Press for a comprehensive understanding about what is "driving" the contractor's price proposal;

- Press for information on direct rates for labor, e.g. what labor rates were used and how they were priced;

- Evaluate whether the experience/education for the labor categories are appropriate for the work being performed;

- Determine what the "direct costs" are (which must be recovered) and the indirect costs, which may be subject to negotiation;

- Find someone familiar with the contractor's indirect cost/pricing practice, or with customary ranges of indirect cost rates in the industry;

- Press for information on and critically evaluate "markup" on supplies and other subcontractor work/services

- Evaluate the sources, costs, and quantities of key supply/material elements of a contractor's proposal;

- Determine what profit margin is being proposed by the contractor, and formulate arguments for a lower profit margin if appropriate;

- Understand and evaluate the contractor's labor hour estimates for key aspects of the work, and have your own estimates prepared by people who understand the State's requirement;

- Ask the contractor to demonstrate how its pricing proposal integrates "efficiencies" (e.g. learning curve analysis) where appropriate;

- Consider the availability of State-supplied equipment/service to lower costs;

- Determine how much is being paid for unspecified "mobilization" costs;

- Evaluate how much "contingency" is being proposed;

- Determine availability of "quantity discounts", (those discounts commonly offered to the contractor's customers who order large quantities of supplies or services), "seasonal discounts", or "cash discounts" paid to customers who pay "in full";

- Make sure you understand all of the contractor's cost categories in cost reimbursement-type contracts;

- Formulate pricing objectives after price/cost analysis to integrate into the contract negotiation;

- Consider options available from trading price or cost for delivery times, quality, and warranty coverage; and

- Insure that the contract terms reflect the agreement on the price, the type of contract, and the payment provisions

Chapter 6 : WRITING THE CONTRACT

Introduction

This chapter is divided into two basic parts. If you are experienced in contract drafting or simply want to use the model contract provisions, you can turn to the appendices of this chapter where model contract provisions and brief commentaries concerning their use and a model amendment and interagency agreement formats can be found.

Otherwise, the first part of this chapter is designed to be a description of the process of writing the contract, as well as some of the more common considerations when choosing a contract type. It also includes detailed discussions of other topics, such as ratification, insurance requirements, and contract signature authority, largely adapted from David Kaye's and Barry Ryan's Attorney General Appendix in the 1993 version of the *Contract Procedures Manual*. This Chapter will focus on overall contract structure and terms and conditions. Development of the statement of work is covered in Chapter 2.

Personal Liability -- An Introductory Caution

You cannot incur or order an obligation, e.g. goods or services from a contractor, without first processing a purchase order or contract in accordance with State Statutes. Section 24-30-202(3), CRS says that "[N]o person shall incur or order . . . the incurrence of any obligation against the State . . . for any expenditure not authorized by appropriation <u>and approved commitment voucher</u> . . .. Any such obligation is void *ab initio* [from the beginning] and incapable of ratification, and the persons incurring it are jointly and severally liable therefor."

This means that if you orally ask a contractor to perform services for the State, before you have executed a contract, you risk being held personally liable. The statute gives the contractor only one remedy: it can personally sue the individual who asked it to perform services. Alternatively, the agency or institution can seek a special bill from the legislature authorizing the ratification.

State Controller policy requires that contracts be routed to enable seven (7) working days' review and processing time by the Attorney General and State Controller's Office. Contracts that are not routed to permit final approval in accordance with this policy require a written explanation of why they are late, called "delay letters," but they do not necessarily cause a problem with unlawful ratification. This is because a contract that is signed by the parties contains the "Controller's approval" clause at paragraph 1 of the *Special Provisions*, that conditions the State's financial liability on approval by the State Controller. Because this condition is in the contract, no obligation has been "incurred or ordered" within the meaning of the statute.

For that reason, though, the "made date" of the contract, i.e. the date it is signed, must be on or before the date that performance starts on the contract. One caveat: a contractor doesn't have to start work before approval by the State Controller, because in a sense it is acting as a "volunteer" until the State Controller approves the contract. Never allow a contractor to begin performance believing that the contract has been fully executed and the State's financial obligation unconditional, when in fact the Controller has not approved the contract. Clause A4 in Appendix A has a suggested technique for linking performance time to the actual Controller's approval date where time is of the essence and the contractor will not start performance until the State financial obligation is "final," after State Controller approval.

Purchase Order Or Contract -- Which One?

Sometimes, purchase orders are used improperly simply to avoid the formal contract approval process: no Attorney General review or State Controller approval of purchase orders is required. However, there are principled reasons for drawing a distinction other than expediency. Agencies need to be fully aware of the risks the State is subjected to by improper use of purchase orders. This section gives guidance about when to use a purchase order versus a contract.

A contract is the generic name given to any agreement between two or more parties. A contract may be oral or written, but State law requires that all payments of money by the State be documented in some form of writing, known as "commitment vouchers." Contracts and purchase orders are two examples of "commitment vouchers." Certain small purchases require only evidence of delivery (invoice) while larger purchases require more formal, advance written agreement in order to set aside ("encumber") the funds before the obligation to pay is created. For State Fiscal Rule purposes, written agreements to pay money (including payments under grants) have to comply with approved commitment voucher forms; they must be one of two generic types: purchase orders or contracts.

State Fiscal Rule 2.2 clearly defines when other forms of "commitment vouchers," e.g. invoices and statements, may be used in lieu of either a contract or purchase order. The use of a purchase order is required by Fiscal Rule 2-2 when acquiring goods or services for over $3,000 (or lesser amount if established by the state agency), unless a State contract is required based on the guidelines in Fiscal Rule 3-1. Certain kinds of transactions, e.g. routine utility bill payments, conference registration, and membership dues payments, may be paid without using a purchase order or contract, no matter how much the amount. Disbursements within the categories of Fiscal Rule 2-2 require the use of an invoice or a statement that clearly describes the service or item being, purchased as well as the amount.

The distinction between a contract and a purchase order is an important one, assuming that the exceptions noted in Fiscal Rule 2-2 do not apply.

Purchase Orders

A purchase order is a unique type of pre-printed State form or agreement which may be used when permitted by Chapter 3 of the State Fiscal Rules. These agreements are different from traditional written contracts in three critical ways. First, they constitute a delegation of the Controller's approval authority to the purchasing agent; they may be executed without the approval of the Controller or Controller designee. Second, no legal review is required. Third, they are usually signed only by the State, not by the vendor or contractor. This third feature is highly unusual in that contract law and common sense generally dictate that both parties must sign a contract in order for each to be bound by it. All of these purchase order distinctions from traditional contracts have one factor in common, which accounts for their streamlined treatment. Properly used, purchase orders adequately protect the State without a formal contract and its accompanying oversight.

Purchase orders are designed for the purchase of goods (not services) under Article 2 of the Colorado Uniform Commercial Code (the "UCC"), located at Title 4, Article 2, CRS (Volume 3). Article 2 of the UCC is an entire body of statutory law governing the sale of goods. Article 2 is an attempt to simplify and lend predictability to commercial transactions for goods by specifying what are reasonable expectations, obligations, and rights of parties where they intentionally or accidentally failed to address a certain issue in a written contract. These laws supplement virtually every agreement for the purchase or sale of goods, except consumer transactions dealt with elsewhere in law. Purchase orders are an attempt by the State to streamline administration by utilizing this body of law to supplement simple one or two page documents with certain pre-printed "*boilerplate*".

The additional protections of law supplementing a properly used purchase order have resulted in a determination by the Controller that review by the Attorney General and the State Controller's Office is not necessary.

Purchase orders are not intended to be used to acquire ongoing services having a significant value over an extended period of time. They may be used to order one-time repairs, maintenance, or construction services up to certain dollar amounts where rules permit and the State is adequately protected. See Chapter 3 of the Fiscal Rules. It is critical to remember that there is no body of law like Article 2 of the Uniform Commercial Code governing services contracts, and the State is therefore protected only by what you write in the agreement. As a general rule for services, if there is any question about whether or not the vendor is an independent contractor, or if you cannot adequately describe what you expect of the vendor on the purchase order form, a formal contract executed by both parties should be used. Remember, the Fiscal Rules provide that any questions as to whether or not a purchase order adequately protects the State should be referred to the Attorney General.

In addition, purchase orders for services in excess of $25,000 are not permitted by the Fiscal Rules, with few exceptions. One of the notable exceptions is use of a purchase order to order from a basic ordering agreement entered pursuant to State-wide procurement awards—known as State-wide "price agreements." Frequently utilized services may be centrally bid by the Division of Purchasing for all agencies. Supplies may be ordered from State Price Agreements using purchase

orders, regardless of contract amounts. Some State Price Agreements for services have adequate contract terms and conditions that permit orders to be placed using purchase orders, regardless of the order amount. The Division of Purchasing will designate those State Price Agreements for services that permit orders to be placed using State purchase orders regardless of the order amount. Of course, contracts may still be used (and in some cases may better protect the interests of the State) when buying from a price agreement. Of course, contracts may still be used (and in some cases may be required) when buying from a price agreement.

Contracts

Under the Fiscal Rules, any commitment to pay money which is not a purchase order must, by definition, be a "State contract" and must be treated as such. Regardless of what label you use (memorandum of understanding, cooperative agreement, grant, *etc.*) the procedures specified in Chapter 3 of the Fiscal Rules apply. Except in certain cases noted below, all contracts must utilize the standard contract form found in Fiscal Rule 3-1 that includes the Colorado *Special Provisions* (a copy is included in Appendix A of this chapter). Notice that most of the important terms, such as the statement of work/specifications, as well as "*boilerplate*" clauses, are not on the *Special Provisions* and have to be developed by the agency. This is in contrast to a State purchase order, which has provisions on its reverse side governing payment, delivery, etc.

For real property transactions (leases, capital construction contracts, etc.) the State Controller and the Attorney General have approved different formats for these requirements. They are still "contracts," as distinguished from purchase orders; they use special forms due to their unique legal nature and frequency of use. Unless your agency has a statutory exemption from State Buildings Programs for the particular type of transaction involved (e.g. Divisions of Wildlife/Parks, and the Department of Transportation), you must use these approved State Buildings forms.

With respect to other types of contracting, however, there are no prescribed forms. This section will discuss necessary elements of any contract, and Appendix A contains many model provisions to assist you in developing your own contract format for your unique situation.

So, which one? A Purchase Order or A Contract?

Fiscal Rule 3-1 requires use of a State Contract when:

1. Acquiring personal services costing over $25,000, including maintenance and service agreements;

2. Leasing land, buildings, or other office or meeting space when rental is more than thirty days.

3. Acquiring architectural services, industrial hygienist services, engineering services, land surveying, and landscape architectural services;

4. Expending capital construction or controlled maintenance project funds in excess of $25,000, except that a purchase order may be used in lieu of a contract up to $50,000 where the plans and specifications for the expenditure have been prepared by or reviewed and approved by a licensed architect or engineer;

5. Protecting the interests of the State can only be accomplished by using a State Contract because other commitment vouchers are not considered sufficient to adequately protect the State.

As has been mentioned, the last of the criteria is the most difficult to apply. It means more than just having both parties sign the contract. In fact, you can make a purchase order "bilateral." A bilateral contract is one where both parties are bound to a promise of future performance. State contracts are bilateral, because both parties sign, the vendor promising to deliver and the State promising to pay. Normally, these contracts have at least some period of time during which they cannot be terminated by one party. A normal purchase order is “unilateral”—not bilateral because the vendor is not promising future performance—but can be made “bilateral” by having the contractor send a written acknowledgment agreeing to the terms of the purchase order. A purchase order without a written acceptance (acknowledgment) by the contractor is essentially a State promise to pay <u>if</u> the contractor performs, and not a binding promise by the contractor to perform.

"Protecting the interests of the State" means more: it means that you cannot adequately define the State's rights in the transaction using the "*boilerplate*" on the reverse of the purchase order. If you need substantially more language to define payment provisions, rights to data and software, confidentiality and other records maintenance requirements, termination provisions, etc., then you should be writing a bilateral contract and routing it for review. On the other hand, if the purchase order terms and conditions, as supplemented consistent with the Controller's and State Purchasing Director's memorandum ("Purchase Order Modifications/Incorporation of Vendor Contracts," June 24, 1996, included in the Policy Letters Annex B) are adequate to protect the State’s interests, then the purchase order may be sufficient. Ultimately, this is an agency or institution decision. Contact the State Controller's Office or Attorney General's Office if you have any questions about whether a purchase order will adequately "protect the interests of the State."

Types Of Contracts

General

Types of contracts differ in the nature of the requirement (supply, service/grant, interagency, or construction) as well as the payment method (fixed price, cost reimbursement, time and materials). If you have competitively procured the contract using either an invitation for bids (IFB) or request for proposal (RFP), the type of contract is set for you. In an IFB, typically the resulting contract will be a firm, fixed price (or “lump sum”) contract. In an RFP, other types of contracts may be used, but you have limited flexibility in changing the type after the award is

made. Otherwise, you risk a protest by other competitors who claim that the basis for competition was changed.

Interagency Agreements

When one State agency or institution purchases from another, the agreement is called an "interagency agreement". Although approval of the State Controller is required, the form of the contract is different, see Appendix C for a model interagency agreement.

Grants

Many State agencies write grant contracts, which provide for financial assistance to other governmental entities or nonprofit organizations consistent with the requirements of federal or State programs. Even though these agreements have various names, including "pass through" grants, memoranda of understanding, cooperative agreements, etc., and may not involve disbursement of money appropriated by the State general assembly, they still require disbursement and are State contracts for purposes of compliance with the Fiscal Rules. Of course, some of the terms and conditions and approval requirements are different in these kinds of contracts. But they are contracts nonetheless, and usually contain obligations by the grant recipient (known as a subrecipient or subgrantee) to use the funds for specific purposes; account for money in accordance with specific cost accounting standards; submit to audits by State and federal authorities; and sometimes "match" the funds provided by or through the State. Section C of Appendix A to this Chapter has provisions commonly included in federal subgrant contracts written by the State.

Service vs. Supply Contracts

In general, requirements (what the State is buying) can be characterized as either services, where the predominate value to the State is labor, and supplies, where a specific item or system is delivered on a delivery date. Of course, contracts can also be combinations of both, as is the case in "studies contracts", where services are often an element of the performance, with delivery of a study, report or other deliverable due at certain times--or at the end--of performance. Whether the contract is a service or supply contract affects the "implied warranties" that may be applied, the nature of inspection and rejection under the law, remedies of both parties, and the applicability of the Uniform Commercial Code, which governs "transactions in goods" (not services). Chapter 10, Section 2.5, highlights the basic differences between service and supply contracts and the impact on contract administration. In general, though, while the Uniform Commercial Code defines many rights and obligations of parties in supply contracts, service contract rights and obligations must be defined in the contract.

Quantity/Payment Terms

In general, there are three common kinds of payment terms used in State contracting. They are firm, fixed price ("lump sum") contracting, cost reimbursement contracting, and time and material

(or "labor hours") contracts. In terms of quantity, there is a type of contract known as an "indefinite delivery" contract, where the specific quantity of the supply or service cannot be forecast, and the parties agree on a rate of payment for the units of supply or service as they are delivered. Chapter 10, Section 2.5, has more information concerning the distinctions between these kinds of contracts

Firm, Fixed Price Contracts

In a firm, fixed price contract, the contractor is entitled to payment of the agreed price upon successful delivery and acceptance of the supply or service, regardless of how much the performance costs the contractor. This is the easiest payment type to administer, because there generally is no need to retain an audit right or require contractor accounting of direct and indirect costs. It also represents the lowest cost risk to the State, because the amount paid is certain. However, low cost risk implies a well defined statement of work/specifications to permit adequate initial contract pricing. See Chapter 5 for more information regarding contract pricing. Clause A5, Appendix A to this chapter, shows a model provision for specifying a firm, fixed price contract type.

Cost Reimbursement Contracts

The other end of the scale in complexity, and highest in cost risk to the State, is the cost reimbursement contract. In these types of contracts, typically the contract performance is so difficult to define, contractors cannot “price” the contract on a fixed price basis.

Simply put, in these contracts the State pays the contractor the actual cost of performance of the work. Cost reimbursement contracts have clauses that require the State to pay the contractor’s "reasonable, allowable" costs. Allowable costs are those that are "allocable" to the objective of performance and not prohibited by the standards governing cost allowability, e.g. you cannot reimburse the cost of fines and penalties, even if directly related to performance of the work. "Allocable" means the cost being claimed is being spent for purposes of contract performance. This gets complicated when dealing with "indirect costs," i.e. overhead, benefiting lots of "cost objectives" other than your contract. Grant contracts are hybrid cost reimbursement contracts, with the cost accounting rules set out in OMB circulars. The State rarely uses cost reimbursement contracts for commercial contracting. In fact, the statutes require a written determination that the use of a cost reimbursement contract is likely to be less costly. See Section 24-103-501, CRS. Clauses A6, B2, C5, and C7 are suggested clauses for use in cost reimbursement contracts. Chapter 10, Section 2.5, discusses the impact of this type of contract on contract administration.

Time and Material/Labor Hour Contracts

Time and material contracts are useful in efforts where service level is the primary objective, or it is difficult to otherwise price the "deliverable." These are "open-ended" contracts often priced "per unit" of labor hour where the specific quantity, e.g. hours of computer programming services, are not known. These contracts have higher cost risk for the State than firm, fixed price contracts.

Contracts should include agreed per hour labor rates (that includes all costs, both direct and indirect, and profit) and include a ceiling amount that the contractor cannot exceed. Ceilings should be monitored, and it is preferable to include a contract provision making the contractor responsible for reporting when the extent of the State's obligation exceeds a percentage (e.g. 80%) of the ceiling. Contracts should also set a not-to-exceed ceiling for materials and supplies, and define the scope of reimbursable supplies and materials. These contracts differ from cost reimbursement contracts in that the State is agreeing to a “fully burdened” (e.g. overhead and profit included) rate for labor, unlike cost reimbursement contracts, which require complex cost accounting and actual payments of costs, including indirect costs. Be sure that the extent of the contractor’s obligation is well defined, i.e. the parties understand whether the contractor is promising to successfully complete within the ceiling amount or is promising only a specific number of labor hours at the agreed price.

Administration of labor hour and material contracts is more difficult than administration of fixed price contracts. See Chapter 10, Section 2, for a discussion of the administration responsibilities.

Indefinite Delivery Contracts

Indefinite delivery contracts are another kind of open-ended contract, where the State reserves the right to order additional units of service or supplies (e.g. add machines to hardware maintenance contracts) at an agreed rate or unit price. These are considered indefinite delivery contracts because the State does not know at the beginning of the contract when and how many of the supplies or service units it needs.

"Estimated quantities contracts" are one kind of indefinite delivery contract that establishes a minimum quantity that the State is obligated to order. The contracts usually also set maximum quantities and limits on the "per order" orders issued to the contractor. The State is obligated up to the minimum specified, and can choose to order more up to any stated maximum quantity specified in the contract.

"Requirements contracts" are the second common type of indefinite quantity contract that requires the State to satisfy all of its requirements for the service or supply under the contract. If the State doesn't, and satisfies the obligation in-house or with another contractor, the State may be in breach. Of course, there is less State flexibility using this kind of contract—the State is locked into using one vendor for the period of the contract. Ideally, the State receives better prices in return. Mandatory State price agreements entered into by the Division of Purchasing would be an example of such a contract.

The State Controller's policy on "Contract Modifications, Changes, Amendments, and Approval Routing" (included in the Policy Letters, Annex B) approves of these contract types and identifies conditions for their use. Clause B22 in Appendix A to this chapter is an example of an indefinite quantity clause.

Task Orders

One other type of contract that is similar to an indefinite quantity contract is the “task order” contract. This kind of contract can be used for recurring services, the specific nature of which

cannot be defined at the beginning of the contract. For example, the Department of Labor and Employment has used such a contract for its underground storage tank cleanup. The basic contract sets all of the terms and conditions. It also contains agreed rates for labor, indirect costs and overhead, and other significant aspects of the pricing of the work. A contract clause sets out the procedure for the task assignment, the task proposal, and the price negotiation using the agreed rates. So long as the task is issued consistent with the Controller's policy, no Attorney General review is required. Clause B23 in Appendix A is a model task order provision. The State Controller's policy permitting execution of task orders without Attorney General review is in the Policy Letters Annex.

Cost and Price Ceilings

Fiscal Rule 3-1 requires each contract to specify a "maximum contract amount." How you specify a contract amount, however, has more significance than just complying with the Fiscal Rules. The contract amount and payment methodology also help define the contract type.

For example, firm, fixed price contracts obligate the contractor to complete performance for the specified price. It does not matter that the contractor spends more or less doing the work; the contractor gets paid the contract price if performance is successfully completed.

A cost reimbursement contract, on the other hand, is a "best efforts" contractual obligation with no promise by the contractor that the work can be completed within the estimated cost, or the "not to exceed" cost, known as the "ceiling." The contract ceiling cost would be included in the contract, notifying the contractor when work must be stopped and additional funding sought.

In between these two extremes are time and material/labor hours contracts having "not to exceed" amounts. Administrators must know whether the "not to exceed" is merely an encumbrance or accounting mechanism, or a promise by the contractor to complete the work within the ceiling amount specified. The distinction is important when rejecting performance or giving the contractor other technical direction, in order to know whether the contractor may have a claim for additional costs if the contractor has reached the ceiling amount. In a "best efforts" contract, the contractor would merely stop work when it reached the ceiling amount, even though the objective of the contract had not been achieved. Unlike a fixed price contract, where the contractor must complete the work for the price specified, the State would have no remedy against the contractor in a "cost-type" contract, except to add more money so the contractor could continue performance. Consequently, it is important not only to specify a contract amount or ceiling, but to be clear in a contract about the parties' intent—whether the objective is expected to be satisfactorily completed within that ceiling.

Contract Formats And Essential Elements

A Note About Approved Formats and "Waived Contracts"

As has been mentioned, the Fiscal Rules say very little about contract format, other than requiring use of the *Special Provisions*. Leases, capital construction contracts, architect-engineer

agreements, and construction-related consulting agreements (procured using the procedures in Part 14, Article 30, Title 24 of the Colorado Revised Statutes) have formats set by the State Buildings Program.

If you are using a pre-approved contract format (approved through the State waiver process) known as a "waived" contract, then your agency can execute contracts without Attorney General review (and sometimes State Controller approval) using that contract format WITHOUT MODIFICATION. Other than changes to the statement of work/scope of services, name of the contractor, performance periods, cost, etc. identified and approved with the waiver, there are no modifications permitted if you still want to treat that contract as a "waived" contract for purposes of eliminating central routing and approval. Of course, sometimes contractors insist on negotiating different terms. In that case, the contract would be routed for approval just like any other, and the considerations in this section may assist you in negotiating any of those provisions that need to be changed. The Policy Letters Annex has the waiver forms and instructions.

Contract Drafting and Structure

Using Previous Examples

It's a good idea to start with a previous contract that was used for a similar purchase in the past. You don't want to reinvent the wheel, but the "if it worked once, it will work again" philosophy has limits and pitfalls, as was pointed out by the Attorney General:

> *"One of the most frequent problems in contracts is the assumption that language previously approved will work in every future contract of a similar type. The facts must be virtually identical for this assumption to be valid. In annually recurring government contracts to distribute State or federal money, this problem is rare precisely because the facts do not change much from year to year. Conversely, contracts for unique or custom applications, such as computer hardware and software products, or for expert consultants, must begin with careful thought about which contract provisions fit the facts. Most "boilerplate" will work from one contract to the next, but there is typically at least one provision which doesn't fit the facts.*
>
> *The best example I can give is the use of personal services contract "boilerplate" allowing either party to terminate on 30 days notice. All too often this provision is haphazardly thrown in to a contract for a custom product. Although the primary element of the effort is services necessary to produce the product, the State would almost never want to allow the contractor to simply give notice and walk away in the middle of a project for any reason. Contract drafters must think carefully about how "boilerplate" actually affects the bargain they have made."*

Approach To Contract Drafting

Fundamentally, the purpose of any written contract is as a reference document, to record the terms of an agreement to prevent misunderstanding and conflict as to those terms at a later time. Most often, conflicts over contracts arise significantly after the signing of the contract when memories prove to be unreliable. With this in mind, clarity of the terms and completeness of the issues addressed are of primary importance. Contract drafters must know the subject matter and concerns of the parties thoroughly enough to be able to anticipate potential areas of disagreement and specifically address them in the contract. Ideally, once a contract is written and signed (also known as being "made" or "executed") by the parties, the effects of changes in conditions, e.g. assignments, "acts of God," etc., have all been agreed to beforehand.

Thoroughness and precision are necessary for another important reason. Contract law usually views the text of a written contract as the entire agreement between the parties, and clauses are often found in contracts to this effect. This view has a double effect. It prevents additional or differing terms which are not in the text from being presented in court as part of the agreement between the parties and, in doing so, forces the terms actually in the text of the contract to be as inclusive as possible. For example, if a contract purports to list all the sites to be covered by a maintenance contract, additional sites not mentioned in the contract cannot be covered without supplementing the contract to add those sites. If the same contract were to have a list of maintenance sites "including, but not necessarily limited to," a list appearing in the contract, then additional sites might not be excluded. This principle is not limited to lists, it actually affects every clause in the contract.

Contracting for the State is an exercise in balancing often conflicting interests between different entities in the State government, needs of the project or work being contracted for, fiscal concerns, State law requirements, the vendor or contractor, and the State's project managers. It is important to remember that as a contract drafter for the State, your primary concern should be the benefit of the State as a whole, or more specifically, the taxpayers of the State and not necessarily the interests of specific project managers, vendor relationships, or even your specific State agency. Although there can be little or no leeway for negotiation on State law requirements, all of the other concerns listed above can be balanced in order to obtain the best contract situation for the State.

The best contract situation for the State does not necessarily entail squeezing every advantage out of the vendor as possible. While onerous and unnecessarily harsh contract provisions may be perfectly legal, they could have negative repercussions in the future that could outweigh the initial gains made in such a contract. Vendors or contractors who have had bad experiences in contracting with the State may demand more money on future contracts to do the same work in order to offset the increased risk they would bear under such provisions. They may not be able to obtain acceptable coverage from insurance companies who would perhaps be unwilling to incur increased risk. In addition, stories of unfortunate private contractors who have been wronged by an oppressive State agency make for great drama on the evening news.

Similarly, the best contract situation for the State may not necessarily mesh with what the project manager wants from the contract. It is not uncommon for provisions that are required by the

State to be objectionable to project managers. Conversely, State project managers may unknowingly want terms and conditions in the contract that are ill-advised or even illegal. Part of the contract drafter's responsibilities are to act as a buffer between what the project manager and/or the Contractor wants, and what the State requires by law.

Drafting - Be detailed

The more detail a contract contains about the responsibilities of the parties, the better it is. One of the more frequent problems we have encountered in reviewing contracts is the lack of detail. In drafting an agreement, care should be taken to provide as much detail as may be necessary to understand what is being agreed upon. As simple as this sounds, it is a frequent problem. Those who are intimately involved with a project become so familiar with what is to be done, that they forget to spell it out. Often, it is useful to have an expert or someone familiar with the service or supply, but not involved with the contract, to read the contract and identify any significant ambiguities that may need to be clarified. Contracts should, of course, also be carefully reviewed for typographical and other drafting errors. Also, the mathematical calculations should be carefully checked.

Essential Elements of a Good Contract.

Good contracts, (containing something more than the minimum necessary to make it binding) contain the following six basic parts, in the order indicated:

1. Identification of the parties at the outset and proper signatures at the end in behalf of each.

2. Factual recitals or "WHEREAS" clauses which describe certain essential facts in existence at the time the contract is entered into. Factual recitals are used to state critical facts upon which you relied in entering into the contract or to educate the reader (a judge?) in understanding your agency's general intent. These recitals can be very important tools in a contract. As is evident from the standard forms, State contracts use this portion of the basic contract for representations to those in the approval process that certain minimum requirements have been met (*e.g.*, availability and location of funds, source of legal authority to enter into the particular type of contract, procurement methodology, necessary approvals obtained, *etc.*). You should use this portion of the contract the same way. That is, to describe any facts you consider important to the reader's understanding of your frame of mind in entering into the contract. As a matter of form, you may omit the cumbersome legalese "WHEREAS" if, and only if, you utilize the heading "RECITALS" at the beginning of this section of the contract. An example of this conversion is shown in the discussion of "Contract Amendments" in Appendix B.

3. A description of the service or product being purchased. Hopefully, if you conducted a competitive solicitation, this was already written so it will form the basis for the awarded contract. Chapter 2 has guidance on writing a Statement of Work (SoW).

4. Payment amount, including the rate and timing of pay.

5. The performance period and dates when supplies or other deliverables by the contractor (such as preliminary designs, reports, software) are due.

6. Terms and conditions. Often called "*boilerplate*," these clauses are important because they define the relationship between the State and contractor, i.e. inspection rights, rights in documents and software, default procedures, liquidated damages for delay, and the like. In addition to language required by law (e.g. the *Special Provisions*) and your particular transaction (in federal grants, for example), there are a number of provisions generally advisable in most contracts. These are set forth in the model contract clauses in Appendix A to this chapter. You should familiarize yourself with these provisions and their use so that when you are drafting from scratch or tailoring other forms to your needs, you will be in the habit of thinking about what "*boilerplate*" may be useful to "tighten up" your contract.

Description of Essential Elements

Each of these elements must be handled with as much clarity as possible. They are discussed below in more detail.

Identification of parties

The preferred method of referring to Colorado State agencies is "the State." Leases are one common exception to this rule, where "lessee" and "lessor" are used uniformly. The preferred term of reference for private parties is "contractor." Frequently other terms are used in standard purchase agreements or printed maintenance agreements. As long as it is made clear that such words as "customer," "client," or "purchaser" are intended to refer to the State, there is no problem. These designations are appropriately set forth in the introductory paragraph of the document. Public entities are often referred to as the "County," "City," or "District." This should present no problem as long as the references are consistent. However, since the State's contract form uses the term "contractor" throughout, where the form is used it is usually necessary in that event to identify the contracting party both ways in the introductory paragraph of the document (*e.g.*, XYZ Corporation, hereinafter referred to as "XYZ" or the "Contractor"),

Contracts with public agencies should be entered into with the public body itself, not with an administrative division. For example, you should contract with the "City of Aurora" and not with the "Aurora Division of Parks and Recreation." Contracts with counties should be entered into with the Board of Commissioners of the County.

With respect to interagency agreements, there is more flexibility, but Fiscal Rule 3-1 does require that the parties be clearly identified and comply with other specific requirements. Appendix C is a model interagency agreement.

Service or Product Provided

If your contract is a result of an invitation for bids (IFB) or request for proposal (RFP), the statement of work or scope of work should have been included with the solicitation. Incorporate that portion of the IFB or RFP that defines the work, as well as the part of the contractor's proposal that is intended to be contractually binding and describe its approach to satisfying the requirement. Careful here: make sure you use an "order of precedence" clause to define what will

govern when there are conflicts or inconsistencies in the RFP/IFB and the contractor's proposal. An example is at Clause A3 in Appendix A.

If you have not competed the requirement using an IFB or RFP, you will have to write the statement or scope of work. Describe, in as much detail as possible, what you expect the contractor to do and when it must be done. In service contracts you may not exercise day to day control over the means and methods of the contractor's work without risking collapse of the independent contractor relationship. To ensure you get what you want when you want it, use sufficient detail when drafting the amount and timing of payments. Refer to Chapter 2 of this *Manual* for tips on drafting requirement, i.e. the scope of work or statement of work.

Payment

Payment provisions consist of three distinct essential elements. The total (maximum) State financial obligation, the periodic increments when partial payments will be made (monthly, quarterly, etc.), and the rate at which payment is earned (e.g., unit price of goods or labor rate for services). Each of these should be expressly described. Advance payments require approval of the State Controller, so usually payments should be made only after delivery of the service or supply. Sometimes a contractor insists on "progress payments." Where you are paying for services based on progress and completion of individual milestones, such as design submissions, project planning reports, or other deliverables, consider withholding some portion of the fee or price (5-10%) until delivery is made and the final product inspected and accepted. Also consider the risk to the State if the contractor files for bankruptcy or becomes insolvent. Will sufficient work product be available (and delivered before progress payments) so the State is assured of getting something of value? (See Appendix A, Clause A6, for an example of a progress payment provision.)

Term or Duration of the Contract

Every contract must have the date it is made and the starting and ending dates of performance, or contain a clause that gives the State the right to terminate the contract for convenience. The date it is made may also be the date the contract begins ("effective date"). State contracts may not be made after they are effective because the Controller's statute requires that the contract be executed and approved before an obligation to pay money arises. Further, the Fiscal Rules require that every contract contain a specific ending date or a sufficient detailed description of an event from which the contract termination can be determined. The Controller and Attorney General interpret the Rule to mean that a date certain must be used in all cases unless the nature of the performance is such that it is dependent upon actions or events not under either party's control (e.g., hiring an attorney or expert witness for litigation may be until the trial or any appeal is concluded).

For contracts governed by the Procurement Code, performance periods (including options) cannot exceed five years unless approved in writing by the State Purchasing Director. See Procurement Rule R-24-103-503.

When time is important, and the contractor's schedule is tight and tied to the State Controller's approval of the contract, often an issue arises if the approval occurs later than expected. Earlier

in this chapter, the problem of late contracts was discussed, but the fact remains that some lawful contracts are approved after the parties expected performance to begin. What happens to a performance period or delivery date that was tied to contract approval? A suggested solution to the problem of accommodating delays in the approval process would be the inclusion of a standard contract provision which provides that where the contract is submitted to the State Controller on a date later or subsequent to the effective date set forth in the contract, then the effective date is automatically postponed until the date the Controller approves the contract, and any performance and payment obligations are adjusted proportionately in the contract. Clause A4 in Appendix A has a suggested clause.

Other Matters

Terms and Conditions

The clauses in Appendix A address many common contracting issues. Chapter 2, page 2-8, has a list of other issues that may be important to clarify in a contract. Similarly, the checklist in Chapter 9 may be used in defining the need for other terms and condition.

Exhibits

Documents are attached to contracts for a variety of purposes and are referred to by a variety of names, such as, exhibit, attachment, addendum, or appendix. It is often necessary or appropriate to attach schedules, charts, and forms, as well as documents containing narrative provisions to be incorporated into the contract. For example, if an exhibit contains terms that the parties wish to have incorporated into the agreement, they should say so. If a form is attached as an example or specimen copy of the form to be used in making a report, this should be explained.

However these may be designated and for whatever purpose they are used, exhibits should be clearly identified and their use or purpose explained in the body of the agreement, as well as being separately numbered and internally paginated (*e.g.*, Exhibit A, page 1 of 10, page 2 of 10, *etc.*). If you select only portions of a document for inclusion (*e.g.*, contractor's proposal), you should repaginate the portions included to make a new, complete document or clearly identify in the contract the portions being incorporated.

Generally, whenever the terms of a document referred to in a contract affect the responsibilities of the parties, it should be attached as an exhibit. There are some exceptions to this rule which may be applicable. For instance, a price agreement can be referred to by its RFP or award number. Also, published laws need not be attached, but merely cited (*e.g.*, statutes, rules, regulations, *etc.*). For voluminous policies or manuals which are not formally published laws, where the Contractor already has them anyway, these may be incorporated by reference by citing the title of the document, its date, and other identifying information. Otherwise, they need to be attached and properly labeled.

Where the State leases an office and the lease requires adherence to building rules and regulations, they must be attached to the lease, properly identified as an exhibit, and incorporated into the lease.

The provisions of all exhibits should be carefully compared with the language of the contract, both the standard contract or lease clauses and the specific responsibilities. Any inconsistencies or ambiguities should be clarified. If it is determined that a clause in an exhibit is not applicable, it should be crossed out, with all parties initialing the change. One of the most persistent problems in reviewing State contracts and leases is that of inconsistencies between the body of the contract or lease and exhibits. This occurs most often where vendors or lessors insist you use some or all of their forms or standard conditions. Computer hardware and software contracts are another example of such conflict problems. This problem can be avoided by a careful reading of the documents. State contract provisions should always be expressly controlling over contradictory provisions in exhibits.

Bidding and Other Competition Considerations.

The Colorado Procurement Code governs most payments of money by the State, but certain types of goods or services have special bidding procedures outside the Code. Whenever a question arises as to whether or not any services or equipment should be let for bids, the Division of Purchasing should be consulted. This requirement is met in some instances by a "price agreement" which is an award made after a bidding process by the State to a company providing a particular type of goods or services. The award is available for a specified time period (1-5 years) for State agencies to utilize when they wish to acquire goods or services of that type. A price agreement is, in effect, a blanket procurement available for agencies to procure from. Where the spending agency wishes to enter into a purchase contract with such a company, the purchase order or contract should refer to the price agreement by its RFP or award number, and a copy of the price agreement should be routed with the contract during approval.

Where a particular contract has been arrived at through a bidding process specific to that transaction, the specifications and relevant portions of the IFB/RFP and winning bid or proposal must be attached to the contract file when it is submitted for central approval. Also, make sure the relevant portions of the proposal or bid, e.g. the statement of work descriptions, are either attached as exhibits or “incorporated by reference” by citing the title of the document, its date, and other identifying information. Portions of the specification may be attached to the contract as exhibits and incorporated into the contract. Also, the contract should specifically indicate in the factual recitals ("WHEREAS") that the matter was let for bids in accordance with the State Procurement Code and that the contractor was the "lowest responsible bidder." The "IFB/RFP Number" assigned by the Division of Purchasing should be used to identify the bid.

The terms of the contract may not go beyond the matters bid. For instance, if the solicitation called for a 1 year term, the contract cannot be for more than 1 year. Similarly, additional goods or services which were not the subject of the bid may not be contracted for without additional competition.

Matters, clarified by negotiation after award, which modify the RFP and Proposal should be made controlling over those two documents by inclusion in the body of the contract or by a separate exhibit expressly made controlling in the event of a conflict. For example, a negotiated item resulting in agreement not clearly set forth in either the RFP or the proposal should be described in the contract or in a third exhibit, and the contract should clearly state that these items are

controlling. References to the RFP, proposal and other exhibits should always provide a controlling order in the event of a conflict. Clause A3 in Appendix A is an example of such an "order of precedence" provision. Generally, the controlling order would be the contract, any negotiated provisions in an exhibit, the RFP and, finally, the proposal. To make this work most effectively for the State, the critical performance elements should be pulled out of the proposal and put in the contract, or when describing the scope of work in the contract, make specific reference to portions of the proposal. In this way, the contract and RFP effectively become controlling as to the offer accepted and the controlling order provision leaves the proposal last in order of preference.

How Do I Deal with Vendors That Insist I Use Their Forms?

This problem has been around for a long time, and Al Jewell, a First Assistant Attorney General who had 20 years of experience in contracting, gave this advice in a 1988 version of the Contracts and Procurement Code Manual.

> *[T]he obvious solution to this problem is to utilize your RFP in order to eliminate the vendor's objections to the use of State contract forms and format. The specimen contract must include not only the pre-printed pages, but also the format of the final contract you intend, including all "boilerplate" provisions, scope of work, etc. The invitation to bid shall specify that a condition of the vendor's response shall be that the State contract resulting from the award to the successful bidder will be in the form of and as set forth in the said specimen contract. In the event some of the vendor's forms are included as attachments or exhibits in the final contract, care should be taken to compare the language of the attachment to that of the contract and to provide that where there are contradictions or inconsistencies, the terms of the (State) contract shall always supersede, manage, and control those of any exhibit or attachment. Further, the terms and conditions of the RFP shall also supersede and control those of the response or of any exhibits or attachments of the vendor.*
>
> *Where the agency fails to properly provide for the final contract format in the RFP and it is impossible to refuse to allow use of the vendor's forms, or parts of the forms, then extreme care must be taken to insure that none of the terms and conditions contained within the vendor's forms are unacceptable in whole or in part. Any such terms and conditions shall be deleted and the deletions initialed by the contracting parties.*

This remains good advice today. If the vendor wants their forms used, they must be reviewed word-by-word and inconsistencies resolved in the language. The forms may be included as an attachment to the State contract. Most vendor forms will likely have a lot of deletions and other edits, or perhaps clarifications in the main body of the contract. Do not rely on an "order of precedence" clause to take care of these problems.

The State Controller and Purchasing Director have policy guidance on incorporation of vendor forms in purchase orders (See "Purchase Order Modifications/Incorporation of Vendor Contracts", included in the Policy Letters Annex to this *Manual*). We recommend that you read and follow the policies in that memorandum with respect to incorporating vendor provisions/agreements in State contracts as well.

Insurance Requirements

Introduction

As a matter of policy, the State generally requires that its contractors maintain certain minimum types and levels of insurance. This policy stems primarily from procurement requirements to select responsible vendors and fiscal policy to adequately protect the State. The types of insurance a State contractor should have are as follows:

- Comprehensive or Commercial General Liability (CGL)
- Professional Liability (for licensed professionals)
- Automobile Liability
- Workers' Compensation
- Unemployment

Each of these is discussed below. As a preliminary matter, however, it is important to note that liability insurance is a policy matter while workers' compensation and unemployment are required by laws which apply independently to State contractors. Liability insurance is requested by the State in an effort to ensure the contractor has the minimum financial capability to defend itself from lawsuits and pay claims where liability exists while continuing to effectively perform State contracts. Additional insured status for the State enables the State to be protected by the contractor's insurance policy when the State is sued along with the contractor for something which is the contractor's responsibility. The State has its own liability coverage for claims alleging the State is at fault. State liability and insurance is discussed below as well.

In contrast to contractor liability insurance, workers' compensation and unemployment are requirements of law which contractors must meet without regard to the existence of any contract with the State. The State requires compliance with these laws as a condition of receiving public funds primarily to ensure that independent contractor status is maintained. Otherwise, the State might be held liable for the obligations of the contractor for injuries to the contractor's employees or subcontractors, or for contractor layoffs, when the State does not budget for or pay premiums for such protection.

Standard State Insurance Requirements

The standard State of Colorado insurance requirements for inclusion in procurement solicitations are shown in Clause A15 at Appendix A.

The dollar amounts are derived from the State's maximum liability exposure in the Colorado Governmental Immunity Act, Section 24-10-101 *et. seq.*, CRS as amended. In many cases the State is immune from liability for injuries it may cause ("governmental immunity"). Nevertheless, as a matter of policy, the standard dollar limits are to be used, unless a compelling case can be made for an exception, because it is impossible in most cases to anticipate when the State is or is not immune from liability. Further, our primary concern is to contract with a responsible contractor capable of satisfying its reasonably foreseeable liability. In some cases, where the standard in the particular industry calls for higher limits, you should consider asking for more. Where the standard is lower in a particular industry, as with some private non-profit corporations, you may accept lower limits, but only after consulting legal counsel for an analysis of whether the State is adequately protected. It is important to assess in advance the appropriate insurance requirements for the industry involved and adapt the solicitation (or contract if non-competitive) to your needs after obtaining approval from the appropriate procurement official and legal counsel.

Regardless of dollar amounts, however, the State should always be named an additional insured on contractor's Commercial General Liability (CGL) Insurance. This enables the State to request the protection of the contractor's insurance policy when both the State and contractor are sued for something the contractor did or didn't do. A complete discussion of additional insured matters is set forth below. The important thing to remember is that this requires an amendment to the insurance policy and you must get written evidence that this has been accomplished (preferably a copy of the endorsement, not just a certificate of insurance).

Governments or "Political Subdivisions" as Contractors

For cities, towns, or counties which object to the standard insurance requirements, it is acceptable to use the following:

> *If the Contractor is a "public entity" within the meaning of the Colorado Governmental Immunity Act, CRS 24-10-101, et seq., as amended ("Act"), the Contractor shall at all times during the term of this Contract maintain such liability insurance, by commercial policy or self-insurance, as is necessary to meet its liabilities under the Act. Upon request by the State, the Contractor shall show proof of such insurance.*

This may also be added to standard insurance requirements sections in a form contract where the agency has both public and private contractors in the same program and a single contract form is desired.

<u>Note</u>: Page 21 contains a "sample" insurance certificate, which is used as an example and discussed in text that follows.

This page is intentially left blank for the "sample" Certificate of Insurance.

Certificates of Insurance: Overview and Instruction

The following discussion accompanies the sample certificate of insurance that is shown on the preceding page. Before getting into particular coverage types and dollar limits, you must first examine the certificate to make sure the following exist:

- Name, address, and telephone number of issuing insurance agent;
- Correct complete name and address of the insured (contractor). Note that this information must match exactly the W-9, the contract, and the COFRS (or approved State agency or institution accounting system's) vendor file;
- Insurance companies should be listed and the corresponding "Company Letter" should appear beside each type of coverage so that it is clear which company is providing which coverage;
- A current "Issue Date" in the upper right corner; and
- Original signature of the issuing agent.

Always check the "insured" name at the top of any certificate of insurance to make sure it is your contractor and not a parent or subsidiary of the contractor that is actually doing the work.

Liability insurance

Liability insurance protects entities and individuals against loss for injury to people or property. It is written to cover risks likely to be encountered in the particular activities the insured engages in. The insurance company will defend the insured against lawsuits, and pay damages to those who successfully make a claim against the insured, up to the dollar limits of the policy. Your homeowner's policy protects you against such risks you may encounter as a homeowner.

Comprehensive General, Commercial General, or Professional Liability

"Comprehensive General Liability" or "Commercial General Liability" ("CGL") and "Professional Liability" (or Errors and Omissions) insurance are written for business activity as opposed to home ownership. Professional Liability protects against the risks of professional malpractice or negligence and is available only to licensed professionals (e.g., architects, doctors, lawyers, etc.). Commercial General Liability is the most common form of business insurance and is used by businesses of all non-professional types. Unless you are contracting with a licensed professional, CGL is the type of insurance you will be expecting State contractors to carry.

"Occurrence-Basis" and "Claims Made" Policies

Liability insurance may be written on an "occurrence" basis or on a "claims made" basis. The standard certificate of insurance form contains a place to mark one or the other. Occurrence-based liability insurance pays where the injury occurred during the policy period and is the most common type. Claims-made liability insurance pays where the claim (lawsuit) was made or filed

within the policy period and is typically the only type available for professional liability policies. An explanation of the reasons why Professional Liability is "claims made" is beyond the scope of this *Manual*. What is important is that you should never accept claims-made CGL; you should always demand from contractors who are not licensed professionals CGL written on an "occurrence basis," which must be maintained throughout the contract period so that there will be insurance protection for injuries occurring during the life of a contract. The claim or lawsuit may be made years later--after the contract is over--and the contractor may have no insurance in force at that time. The insurance company which carried the policy during the contract period (when the injury occurred) is contractually obligated to defend and pay the claim whenever it is made (up to the statutory time limit for the injured person to file a lawsuit).

In professional services insurance, and other policies which commonly do use a "claims made" policy, make sure that you include a suitable "tail" on the policy requirement. This means that the policy has to be kept in force for a specified period after contract termination or expiration that is equal to the applicable "statute of limitations" on law suits. The purpose is to make sure there is insurance coverage for an adequate period of time after the end of the contract, when claims are most likely to be filed. The standard provision at Appendix A, Clause A15, requires a two year "tail," that will protect the State in most cases of probable liability. You may want to discuss the "tail" period with your assigned assistant Attorney General, to make sure that the period specified in the contract is adequate to protect the State from probable claims that may be filed under your contract.

Always ask for a certificate of insurance and make sure the CGL section has been marked ("X") for "Commercial General Liability" and "Occurrence." The sample certificate of insurance on page 6-20 illustrates these requirements.

Policy Limits (Dollar Coverage)

The standard form Certificate of Insurance shows a section entitled "Limits." In this section, there are several different terms with dollar amounts next to them. An "aggregate" limit is the most the insurance company will pay for all claims for damages during the policy period. Aggregate limits are general as to all claims and specific as to certain types of claims.

"General Aggregate"

General Aggregate should be at least $1 million. This is the maximum amount the insurance company will pay during the policy period (the dates shown just to the left) regardless of the number or type of claims for all CGL coverage shown. Thus, if the contractor is successfully sued during that period, the total amount of CGL insurance available for a claim involving the State's contract would be reduced accordingly. This does not apply to "Products-Completed Operations"; the dollar limit specifically stated for that coverage is the total amount the insurer will pay for that risk during the policy period.

"Products-Completed Operations Aggregate"

Products-Completed Operations Aggregate should be at least $600,000. This is the maximum dollar amount available during the policy period for injuries caused by the contractor's product or service. This covers bodily injury and property damage caused by the contractor. The insurance

company will not pay more than the accompanying dollar limit for all such injuries during the policy period. The general aggregate does not apply. Thus, in the sample certificate on page 6-21, $600,000 is the total annual limit.

"Personal and Advertising Injury"

Personal and Advertising Injury should be $600,000. This refers to economic injuries, such as civil rights violations, or injuries to the reputation or business of another person or entity, such as libel, slander, or similar claims of injury to anther' person's ability to engage in their business or profession (i.e., substantially reducing someone's ability to earn income from their product or labor). Again, the insurance company will pay only the dollar limit stated for all such injuries during the policy period. Here, the general aggregate would apply, to allow claims for 2 or more separate occurrences up to $1,000,000 per year.

"Each Occurrence"

Each Occurrence means the maximum amount payable for one claim or incident, regardless of which type of injury coverage applies. Thus, if the contractor had $600,000 limits on each of the Personal & Advertising Injury and Products - Completed Operations coverage (as required), a claim by the same person for both bodily injury and personal injury totaling $750,000 would obligate the insurance company to pay only $600,000. The contractor would be liable for the remaining $150,000. Note the relationship to the General Aggregate. In the hypothetical given, the insurance company would pay $600,000 and only $400,000 would be left for the remainder of the policy period to pay all other claims regardless of type. If the $600,000 was entirely under Products-Completed Operations, aggregate limits for that coverage would be exhausted and nothing would remain for those risks. $400,000 would remain for all other risks.

Note: It is recommended that all State contracts contain a provision requiring that if any aggregate limits are reduced by claims paid or made during the contract period, the contractor shall immediately obtain additional insurance to restore the full aggregate limit. State Purchasing's standard insurance requirements for solicitations (Clause A15 of Appendix A) contain such a provision.

"Fire Damage"

Fire Damage pays for property damage by a fire caused by the insured. The amount should be at least $50,000 for any one fire. This is not coverage for a typical "act of God" fire covering the insured's own premises (i.e., business location or your home). Fires which burn down your own building are covered by standard property casualty insurance discussed below.

"Medical Expense"

Medical Expense is a per person limit on medical expenses incurred by persons the insured causes injury to. It is not unusual to see these limits as low as $5,000 per person. The reason for such dollar amounts is beyond the scope of this discussion.

"Automobile Liability Insurance"

State law requires all automobile owners to carry a minimum amount of liability insurance for injuries or damage they may cause to others while operating a motor vehicle. State law requires a very low amount of insurance--$50,000 per occurrence. This is why the State requires its

contractors to carry $600,000, a better approximation of the maximum risk to the State under the Governmental Immunity Act.

Note that the State requests $600,000 "Combined Single Limit." In contrast to various types of injuries and specific dollar amount for each discussed above under CGL, this requires $600,000 per occurrence for any combination of bodily injury or property damage to any number of people. This insurance should be carried for all autos used by the contractor in its business, whether or not State personnel or recipients of State benefits are transported by the contractor. Again, the State is looking for responsible contractors as much as for protection from suit when beneficiaries are actually transported. Sole proprietors or professionals using a single vehicle of their own, not transporting others under the contract, may use their own automobile liability with lower limits, but it should always be at least $100,000 per person, $300,000 per occurrence.

You should always expect covered automobiles to be indicated with an "X" for either "Any Auto," "All Owned Autos," or "Scheduled Autos." Scheduled autos should be listed in an attachment. "Hired Autos," "Non-Owned Autos" or "Garage Liability" should never be the only coverage indicated; these may be in addition to one of the first three types, but never alone. An individual or small firm may typically have only "Scheduled Autos," just as you and I have insurance for only the specific vehicles we own. Larger contractors may typically have "Any Auto" or "All Owned Autos" because of the large number and types of vehicles they may have in their fleet. "Hired Autos" are vehicles that come with drivers and "Non-Owned Autos" are those leased or rented without accompanying drivers. Again, these should appear only in combination with one or more of the first three listed types.

"Excess Liability"

The contractor may meet the CGL and Automobile Liability limits by a combination of basic insurance for those risks and what is called "Excess Liability." When this is offered, it should be "Umbrella Form," so indicated by an "X" in the appropriate box. The total limits of CGL plus Excess Liability, and Automobile Liability plus Excess Liability, should each equal or exceed the required dollar limits.

"Workers' Compensation"

These limits are set by law. The general form certificate should indicate $500,000 if insurance is provided by a commercial insurer. If insurance is provided through a government entity, such as Colorado Compensation Insurance Authority ("State Comp."), a separate certificate of insurance on State Comp. or other government letterhead should be provided showing statutorily required coverage is in place.

Agency personnel should not be advising contractors about workers' compensation requirements. Generally, however, an individual operating as a sole proprietor, and not using other employees during the course of contract performance, would not be required by law to pay either unemployment taxes or obtain workers' compensation. The same rule applies to performance of services by the named partners of a partnership that has no other employees. Consequently, in cases where the contractor is exempt from the requirements, there is no need to insist on receipt of any forms or certifications. In any other case, normally the entity will be able to provide

evidence that it has workers' compensation coverage. There is an exception for corporate officers or members of limited liability companies (LLCs). (Section 8-41-202, CRS) They may elect to reject workers' compensation coverage; this election most commonly is made by officers of small, closely held corporations. The election must be made by filling out a form WC43 ("Rejection of Coverage by Corporate Officers or Members of a Limited Liability Company") or substantially equivalent form (Rule IIID1, Election to Reject Coverage, pp. 3.01-3.04, 7 CCR 1101-3), and providing the form to the insurance carrier (if any) or to the employer compliance unit of the Division of Workers' Compensation.

Special Items

Near the bottom of the standard certificate there is a blank space for other matters ("Description of Operations/Locations/Vehicles/Special Items"). This should always indicate your agency as an additional insured. This does not mean additional insured status has been obtained (the actual endorsement is better), but it is a good indication the insurance agent knows he is supposed to request it. This is the appropriate start to the process of actually getting additional insured endorsements to the policy. Make sure the certificate so states before going any further with performance. It is recommended that you actually see the endorsement, unless you have worked with the agent in the past and are confident in the accuracy of the certificate. If there is any confusion about the additional insured endorsement, consult the procurement office or legal counsel.

Certificate Holder

Insurance certificates provide no legal rights. Notice the disclaimer in bold type at the upper right hand corner. Being a certificate holder simply means the insurance company, through its agent, has your agency name on file and will attempt to provide you notice of cancellation. The contractor is independently required by the solicitation/contract to provide notice of cancellation, usually 60 days. See the standard requirements in Clause A15, Appendix A.

Property Casualty Insurance

The State has a commercial insurance policy for damage to its property by fire or other "standard perils." If you are asked to carry casualty insurance by a contractor for property leased or purchased on an installment basis, you should first contact the Risk Management Office of the Department of Personnel and make arrangements to have such property listed on the State's policy. DO NOT wait until after delivery of the goods to do this.

State General Liability Insurance

In the mid-1980's the State found itself unable to purchase CGL from commercial carriers. The State began to self-insure for CGL and the Risk Management Office was born.

The Risk Management Office will, upon request by a contractor, issue a certificate showing State CGL coverage. The Risk Management Fund covers only the liability of State agencies and employees, and no one else may be named an additional insured. Further, the State may not

promise to use self-insurance to contractually meet any liability except in property leases. See the discussion about indemnification that follows.

Indemnification And Limitation Of Liability

If a contractor insists on negotiating "indemnification" provisions, or otherwise excluding damages, limiting damages, or disclaiming warranties, be aware there are limitations on your authority to do so.

When you promise anything other than timely payment of money available and encumbered for the purpose, you are potentially promising something State government may not do. Provisions requiring the State to indemnify or hold harmless the other party are the best example of this type. It is not possible in this context to detail every such problem. However, a single, guiding principle will help you avoid falling into this trap:

> ***You may not promise anything on behalf of the State which may create a claim against funds held by the State unless you have an appropriation to pay for it.***

This principle springs primarily from the Colorado Constitution at Article V, Section 33 and at Article XI, Section 1. Promising in-kind performance or any consequence for State failure to buy or perform must be carefully evaluated. The Attorney General's office will never approve an indemnification or hold harmless unless it has been discussed with and approved by it in advance. If a vendor/contractor requires that the State promise to do or pay something for which you have no money, do not execute such a contract without consulting legal counsel. You may, of course, promise to provide in-kind services or delivery of some product, if you have the appropriations for such services or products. In such cases, you should always use a future funding contingency (Special Provision 2), even for in-kind performance. Although the State is not directly promising money to the particular contractor, the funding to provide in-kind performance by State employees or with State-owned materials is still dependent upon general operating appropriations in future years.

When the State leases property, there is a limited exception to the general prohibition on indemnification. Statutory authority exists to indemnify lessors under limited circumstances. See Section 24-30-1510(3)(e) and (4), CRS, as amended. This should only be done when absolutely necessary to reach agreement. The following lease provision is the only acceptable way to accomplish this result:

> *The Lessee shall defend and hold harmless the Lessor against claims arising from the alleged negligent acts or omissions of the Lessee's public employees, which occurred or are alleged to have occurred during the performance of their duties and within the scope of their employment, unless such acts or omissions are, or are alleged to be, willful and wanton. Such claims shall be subject to the limitations of the Colorado Governmental Immunity Act, CRS 24-10-101 to 24-10-120, as now or hereafter amended.*

This provision is commonly called a "Senate Bill 64 hold harmless." Use of this provision in a lease means the State Risk Manager must approve the lease. Route the lease to Risk Management Office after State Buildings, with written direction to the State Risk Manager specifying where he should look (what page) to find the SB 64 provision.

Whenever a contractor wants the State to include a provision spelling out what happens if the State does not timely or properly do something, consult legal counsel. You may, of course, agree to pay interest on late payments, but such provisions should be expressly subject to Section 24-30-202(24), CRS (12% annual interest from 45 days after payment due, but no liability for interest arises "if a good faith dispute exists as to the State's obligation to pay all or a portion of the account"). The term for timely payment and the rate of interest may be modified by agreement of the parties, but anything worse than 18% and less than 30 days is generally unreasonable and unwise. In any event, always include the statutory caveat that interest is not owed during any period where a good faith dispute as to all or part of the account exists.

Contractors commonly want the State to sign limitations of liability or exclusion of damages. You can negotiate limits to contract "breach" damages for failure to perform up to the standards required in the contract, but you cannot cut off a contractor's liability for death, personal injury, and damage to property. The State Controller's and State Purchasing Director's memorandum, "Purchase Order Modifications/Incorporation of Vendor Contracts," June 24, 1996 (included in the Policy Letters Annex) states the current policy with respect to these limitation of liability provisions:

1. Agencies may not agree to the exclusion of consequential damages, i.e. Section 4-2-715(2), CRS (transactions in goods), unless those damages are defined as excluding damages or claims arising out of bodily injury (including death) or damage to tangible property. For example,

   > *"In the event of breach, contractor shall not be liable for incidental or consequential damages as those damages are defined in the Uniform Commercial Code, except that for purposes of this exclusion, consequential damages shall not include damages or claims arising out of bodily injury (including death) or damage to tangible property."*

2. Agencies may agree to limitation of remedies/liability provisions, i.e. Section 4-2-719, CRS (transactions in goods), so long as those terms are similarly defined as "excluding damages and claims arising out of bodily injury (including death) and damage to tangible property." The model provision above is acceptable.

The purpose of these limitations is to preserve the right of the State to hold the contractor liable for personal injury and damages to tangible property. Consistent with these limitations, though, agencies may agree to limit contract damages or remedies that are available to the State in the event of breach by the contractor of its contract obligations.

You are strongly encouraged to seek the assistance of legal counsel when faced with a request by a contractor that your agency agree to limit liability or exclude damages.

Signature Authority

Introduction

This discussion identifies applicable requirements concerning the authority of a contractor to contract with the State and describes the source of contract authority for various private and governmental entities.

Authority

To protect the interest of the State in a contract, the State agency should ensure that: (1) the contractor has authority to enter into the proposed contract; and (2) the individual ("signatory") signing the contract on behalf of the contractor has the authority to legally bind that contractor to the obligations of the contract.

To ensure compliance with such requirements, the State agency needs to identify the legal status of the contractor, review applicable statutes, and other available documents concerning the contractor's authority to enter into the proposed contract, and notify the contractor of actions the contractor must take (if any) to ensure that the contract is authorized and/or is signed by an individual authorized to take such action.

The existence and extent of the contractor's authority to enter the proposed contract, and whether the authority has been properly delegated to the individual signing the contract, can be determined from several documents/sources including, without limitation: applicable statutes; articles of incorporation, by-laws, and resolutions of corporate contractors; partnership agreements of partnership contractors; charters of home rule local government contractors; and powers of attorney.

Failure to ensure compliance with such requirements could result in the absence of a valid contract and the lack of any contract enforcement rights in the State, since a contract entered into by a contractor without proper authority may be either completely void or voidable by the contractor.

Agents

Regarding questions of contract authority, a State agency should be aware that contractors act through individuals who are "agents," such as an officer of a corporation (president, vice president, treasurer, etc.), a general partner of a partnership, or an official of a local government, and that the authority of such agent to enter a proposed contract on behalf of the contractor may be limited, or non-existent.

Knowledge of both the type of agent (special, general, or universal), and any limitations on the authority of that agent, will help the State agency to determine whether the agent has authority to enter the proposed contract on behalf of the contractor. Generally, the individual/agent/signatory who signs the contract on behalf of the contractor has only the authority that the contractor has either expressly or impliedly delegated to that individual.

If the contract in question deals with a subject matter that is within the general and usual nature and custom of the business of the contractor (*e.g.*, "a contract with an engineering firm for engineering services"), then a general agent such as a "general manager" will likely have the authority to execute the contract. On the other hand, if the type of contract is unusual for that type of contractor (*e.g.*, "a contract with an engineering firm to convey real estate"), then an agent may not have such authority absent express authority from the governing body of the contractor.

Types of Contractors

The State contracts with various types of contractors that have different legal status, including: general and limited partnerships; for-profit and non-profit corporations; joint ventures; special districts; municipal and *quasi*-municipal corporations; statutory and home rule local governments; and individuals doing business either by trade names or as sole proprietors.

Depending on its legal status, the authority of a particular contractor to enter into a contract, the authority of an individual to sign that contract for the contractor, and the statutes and other documents describing such authority, will vary. The legal status of potential contractors, and the applicable statutes and other documents that describe their respective contract authority and limitations, are described in the following section, along with specific guidance on obtaining signatures from these entities.

General Requirements for Contract Signatures

All of the documents (contract and any application or proposal) must be signed by individuals authorized to bind the "Contractor" to a contractual relationship. Organizations such as corporations having separate legal status from the individuals should have a second attesting signature by the corporate secretary or equivalent, certifying that the person who signed for the organization is properly empowered to do so. All signatures must be original ink on all four copies of the contract (no photocopies). The Contractor name on the signature page must match exactly the full legal name on its organizational documents, any application, proposal, or bid documents, the W-9, and page 1 of the contract. The name must be expressly consistent throughout, legibly printed or in typewritten form. Real property sales and purchases are special cases where other requirements may apply. See "Real Property Contracts" below.

Individuals (Sole Proprietorships)

An individual who is the "Contractor" must use his or her name, sign, and indicate position or title as "Sole Proprietor." Individuals using trade names must include any trade name in the "Contractor" name (*e.g.*, "John Doe d/b/a JD Company"), but still sign as "sole proprietor". The personal social security number of the sole proprietor not having a trade name or employees must be used. At year end, the State reports all payments made to the personal social security number of an individual with no trade name or employees to the Internal Revenue Service on a Form 1099. Sole proprietors having a trade name or employees may use either their personal social security number or their federal employer identification number. Use the IRS Form W-9 to verify consistency throughout.

Corporations

General

Colorado corporations are governed by the Colorado Corporation Code, Sections 7-1-101 through 7-10-113 (for-profit) and 7-20-101 through 7-20-108 (non-profit), CRS Specific statutory powers and authority include those described in sections 7-3-101 thought 7-3-104, 7-5-109, 7-5-112, and 7-22-101, CRS. In addition, the articles of incorporation and by-laws of a corporation may expressly describe the authority of the corporation in particular contract situations. Finally, corporations have implied powers to do all things reasonably necessary to carry out the business of the corporation.

A corporation's Board of Directors has general authority to contract for and manage the corporate business. The Board acts by resolution. The Board of Directors can delegate this contract authority by resolution to any of the officers of the corporation. Generally, officers of the corporation do not have authority to sign contracts solely by virtue of their office; instead, that authority must be expressly delegated to them by the Board of Directors either in the articles of incorporation, by-laws, or by resolution.

In addition to express authority, there is a presumption that a corporation president has implied authority to sign a contract within the customary and usual course of the corporate business, and that a vice-president also has such implied authority when the president is not available. However, neither the secretary nor a treasurer would have such implied authority.

Signature

Corporations must specify the state of incorporation (*e.g.* "The Petroleum Company, Inc., a Colorado Corporation"). The contract must be signed by both the president as the binding official and the corporate secretary, attesting to the president's power. If the corporate by-laws expressly so provide, the contract may be executed by another corporate official (*e.g.*, a vice president). Nonprofit corporations whose chief executive officer is not called a "president" in the by-laws shall use such title as is provided in the by-laws (*e.g.*, "Executive Director"). The secretary's attestation is still required. Similarly, the attesting signature may be that of assistant corporate secretary, if the by-laws expressly so provide. If the corporation possesses a corporate seal, it must be affixed. If not, it will be presumed the secretary's attestation is such a seal. The corporation's federal employer identification number, as shown on the W-9, must be used.

Partnerships

General

Partnerships are governed by the Uniform Partnership Act and the Uniform Limited Partnership Act, as described in sections 7-60-101 through 7-60-143, 7-61-101 through 7-61-130, and 7-62-101 through 7-62-1201, CRS In addition to such statutes, there are three other kinds of evidence of authority of a partnership:

1. The agreement of the partners between themselves;

2. The course of business of a particular partnership; and

3. The course of business of similar partnerships in the locality.

All general partners are co-owners and have the inherent authority to make contracts, provided that the contracts concern the customary and usual business of the partnership. However, a limited partner does not have authority to contract for the partnership.

Signature

Partnerships must specify the state of organization and the type of partnership, general or limited (*e.g.*, X,Y,Z, a Colorado General Partnership). The contract must be signed by a "general partner," whether it is a general or limited partnership, and the signatory's position or title must be so stated (*e.g.* "A,B,C, a Colorado Limited Partnership," by "The Oil Corporation, a Colorado Corporation, its General Partner," signed by the appropriate corporate officers). The partnership's federal employer identification number, as shown on the W-9, must be used.

Limited Liability Companies

General

The "limited liability company", or LLC, is a relatively new kind of business entity, in which the personal assets of the "members" are not liable for the debts of the LLC. The general provisions governing limited liability companies are in Part 7, Article 80, Title 7 of the Colorado Revised Statutes. LLCs are established by the filing of "articles of organization" with the Secretary of State. LLCs have the power to sue and be sued and to enter contracts. The power to contract on behalf of the LLC is commonly granted to one of the LLC "members" known as a "manager," and if management is vested in the "manager," no contract or liability can be incurred on behalf of the LLC except by one or more of its managers. As a practical matter, it is wise to insist on seeing a copy of the articles of organization where the agent is not signing as a "manager."

Signature

Where management is vested in a manager, debts and contracts may be incurred on behalf of the LLC only by one of its managers. If the management is reserved to the members, a member may be authorized to enter into the contract. However, if other than a manager is signing the contract, request articles of organization or other evidence of the extent of the member's authority.

Joint Ventures

A joint venture is a partnership for a specific limited purpose. If the joint venture has a name, a separate taxpayer identification number, and a joint venture agreement establishing authority of one of the joint venturers to execute contracts pertaining to the scope of the venture, the contractor name should be the joint venture name and the contract must be signed by the authorized joint venturer (*e.g.*, "Oil Exploration and Storage, a Joint Venture by the Pipeline Corporation, a Colorado corporation, its Managing Venturer"). If such an agreement exists, agencies should obtain a copy and verify the signature authority and purpose of the joint venture.

Without such a name and agreement, the contract must be in the name of all (*e.g.*, "Q.R.S. and Oil Company, Inc., a Joint Venture"), and must be signed by each such joint venturer. In such case, a new paragraph must be added to the contract which provides that each venturer, by name, is jointly and severally liable for all obligations of "Contractor," and that one of the venturers will be the payee on both the warrant and the 1099. The non-payee venturer(s) must expressly agree to

look solely to the payee for payment. The State's need to have a single payee name and taxpayer identification number requires that the contract be consistent; the State may only write one warrant for each obligation and it is up to the venturers who have not formally organized under a joint venture name to divide the payment accordingly.

Further, the signature of each joint venturer in any case must follow the same guidelines herein applicable to itself individually (*e.g.*, "Q.R.S. and Oil Company, Inc., a Joint Venture, by Q.R.S., a Colorado General Partnership, and by "Oil Company, Inc., a Colorado corporation"). In the example given, Oil Company, Inc. would need the signature of its president and attestation of its corporate secretary, subject to the same exceptions set forth for all corporations. Q.R.S. would need the signature of a General Partner.

Governments and other "Public Entities"

A municipal corporation (city), county, or district has only the authority that is expressly granted, and that is necessarily implied in that which is expressly granted, and that which is otherwise essential to the declared purposes of the corporation. Any reasonable doubt concerning the existence of authority is resolved by the courts against the corporation.

Colorado has both home rule and statutory municipal corporations. The same is true for counties. Home rule municipal corporations are organized by charter under Article XX of the Colorado Constitution, while statutory municipal corporations are organized pursuant to Title 31, CRS. Home rule counties are organized by charter under Article XIV, Section 16 of the Colorado Constitution, while statutory counties are organized under Title 30 of the Colorado Revised Statutes and have the authority described in sections 30-11-101, *et. seq.*, CRS.

The home rule charter, or the State statutes described above, are the sources of all express contract authority of a municipal corporation/county. Whether a municipal corporation or county has implied authority to contract must be determined on a case-by-case basis.

Power to contract generally resides in the legislative body unless such power is legally placed elsewhere by: (1) the organizational document (constitution, charter, *etc.*); or (2) by legislative act (statute, ordinance, resolution, *etc.*). Regardless of which individual purports to have power to sign the contract, all such contracts should be attested by the signature of the county, city, town, or corporate secretary, or equivalent, and the entity's seal must be affixed. All public entities should have a seal. The following describes power to sign for different types of entities:

Counties

Colorado counties are single branch governments (*i.e.*, legislative and executive powers reside in the county commissioners). Except as otherwise described below, the "Contractor" should be the Board of County Commissioners by the chairperson or vice-chairperson. County contracts must be signed for the Board of County Commissioners. Officials other than county commissioners may sign only when you are provided a current written resolution of the county commissioners appointing such person to sign contracts (*e.g.*, county manager).

- "County" or "district" boards of health have authority to contract with the State, pursuant to Section 25-1-507(1)(f), CRS The power resides in the board of health, and only the president of the board may sign, unless there exists either by-laws or a current resolution of the board empowering the "public health administrator" or director to

execute contracts. In that case, the public health administrator or director (who may also be secretary to the board) may execute the contract. Attestation may be by any official expressly authorized by the board of health to make attestations.

- "County" or "district" boards of social services have authority to contract with the State, pursuant to Section 26-1-115 and 26-1-116, CRS The power resides in the board of social services, and only the chairperson of the board may sign, unless there exists either by-laws or a current resolution of the board authorizing the county director or the district director of the county department of social services to execute the contract. Attestation may be made by any official expressly authorized by the board to make attestations.

Statutory Cities and Towns (Non-Home-Rule)

Contracts with cities and towns which do not have home-rule charter status must be signed for the city or town by the mayor. A city council or town board of trustees may, by current ordinance, authorize some other official to sign, but be careful.

- For statutory cities and towns having mayoral form (sections 31-4-102 and 31-4-302, CRS), if the mayor is not a voting member of the council, he has the final veto power over contracts as Chief Executive. It is advisable to have the mayor sign in every case.

- For statutory cities having "city manager" form, the power to contract always resides in the city council and only current resolution or ordinances of that body may authorize the mayor, the city manager, or someone else to execute contracts. In such municipalities, the city manager is the chief administrative officer and would be the official normally expected to be given such power (sections 31-4-207.5 and 208, CRS).

Home-Rule Cities and Towns

Only the governing body (city council) has the statutory power to contract. Contracts with home rule municipalities must be signed for such municipality by the officials given such powers under the home-rule charter. In most cases, this will be the mayor, but some home-rule municipalities require additional signatures (*e.g.*, Denver City Auditor). If the charter expressly permits, this power may be delegated. Current, formal written action by such official(s) or body is necessary to authorize such a delegation (ordinance, resolution, *etc.*). Again, it is advisable to have the mayor sign in every case.

Special Districts

Regarding contracts with special districts or other *quasi*-municipal corporations, a State agency should consult the applicable statutory provisions of sections 32-1-101 to 32-1-850, and 32-2-101 through 32-13-114, CRS, respectively, regarding the nature and extent of their contract authority.

Contracts with special districts or authorities should be in the name of such district or authority and signed by the head of the legislative body (*e.g.*, board of directors, commissioners, *etc.*). Current written delegation is required to empower a non-legislative official. Some special

purpose authorities, however, may be corporate bodies with separate legislative and executive "branches." Each such case should be handled by examining the statutes creating the authority (powers and duties) and its governing "charter," or "by-laws," *etc.*, to determine where the power to contract resides. Where clear authority exists, the chief executive officer may sign the contract (*e.g.*, president, executive director, *etc.*).

Other Cases

Any fact situation not addressed by these instructions should be handled by starting with the basic contract authority principle, that power to contract resides in the legislative body unless law, by-laws, or current delegation of such authority permits otherwise. Look for the ultimate source of power in any entity and find a clear trail of contract signature authority down to the particular official or person who proposes to sign your contract. Agencies are encouraged to seek legal advice whenever a question of signature authority arises.

Note: The contractor name must be precisely consistent throughout, starting with the documents by which the entity was legally created, then the W-9, the application, proposal, or bid, and, finally, the contract. Entities having trade names should use the true legal name first, followed by the trade name (e.g., "X, Y, Z, Inc., dba the X Co."). The vendor file in COFRS should use the true legal name with the taxpayer identification number for that entity. Using the previous example, the COFRS vendor would be "X Y Z, Inc.", using its taxpayer identification number shown on the W-9 form. Any inconsistencies may be cause for disapproval of the contract and can lead to further delay in payment while the correct name is determined and the documents made consistent.

Funding Obligation Authority

If a contract obligates the contractor to provide all or part of the funds needed to perform the contract work (*e.g.*, a match requirement in a grant agreement), and if the State agency will be performing or contracting with a third party to perform the contract work in reliance upon such funding, then prior to the State agency's execution of the contract the agency should request the contractor to take formal action to ensure that the contractor:

- Currently has available the total amount of such funds; and
- Has authorized/obligated/set aside such funds exclusively for the contract purpose.

As a practical matter, such action is necessary, regardless of the type of contractor, in order to prevent incomplete performance of the work and to protect the State against claims by the third party contractor, which might result if the contract work had to be terminated prematurely due to lack of such funding.

In addition to the practical concern, such action may also be constitutionally required with certain types of contractors in order to ensure a valid contract.

Article X, Section 20 of the Colorado Constitution (Amendment 1 of the Taxpayers Bill of Rights, hereinafter "TABOR") prohibits any contractor "district" (such as a local political

subdivision) from creating, by contract, a ". . . multiple-fiscal year financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years."

If a proposed contract requires funding from such a contractor beyond the fiscal year in which the contract was executed then the contract may be void and unenforceable, in violation of Section 4(b) of TABOR, unless the contractor has obligated and set aside up front all of its funding needed for the contract. Such "up front" action by the contractor will ensure that "adequate present cash reserves are pledged irrevocably", consistent with TABOR.

Real Property Contracts

Articles 30 through 44 of Title 38, CRS describe general requirements for signatures on real property contracts. Also, see "Signatures On Documents Affecting Title to Colorado Real Property", 12 *The Colorado Lawyer* (January, February, and March 1983).

An "acknowledgment" can be important in the execution of real property documents because it is *prima facie* evidence (under Section 38-35-101, CRS) that the conveyance was executed with proper authority, if the person acknowledging is an officer or director of a corporation or a partner of a partnership. See Section 38-35-101(2) for the language to be used.

In addition, a State agency should be aware of the following specific real property provisions applicable to particular types of contractors:

1. Section 7-60-110(1) provides that any general partner can convey title to property in the partnership name, provided that such conveyance carries on the business of the partnership. If the conveyance did not carry on such business, the property could be recovered by the partnership. Therefore, if it is not clear that the conveyance carries on such business, the State agency should consider requiring all the general partners to sign the conveyance.

2. Section 38-30-166, CRS, regarding joint ventures, seems to require that all members of the venture sign to convey an interest in real property.

3. Section 38-30-144, CRS governs conveyance of real property by corporations. Also under Section 7-5-112(2), CRS, a corporation does not have authority to dispose of "all or substantially all" of its property without shareholder approval. The document conveying the corporation property must: contain the official corporate name; be signed by the president; and be "acknowledged."

4. A conveyance of real property by a statutory municipality/county is governed by Section 38-30-141, CRS, which authorizes conveyance by either a special commissioner or by the chief executive official of the municipality/county. Also, there must be a prior resolution/ordinance approving such a transfer.

5. Section 38-35-116(1), CRS provides that an individual owner of real property must sign any document conveying that property in the same name in which title was received. Section 38-35-116, CRS provides guidance on three basic variations of that name. And, both spouses do not have to sign such document where the title is in the name of only one spouse.

6. If an individual holds title as a sole proprietor under a trade name pursuant to Section 7-71-101, CRS then the individual should sign the document using the trade name: "ABC Company" by "individual." Further, pursuant to Sections 38-10-108, 38-10-109, 38-30-123, and 38-30-124, CRS, a written power of attorney is required for an agent to convey title to another individual's property.

7. Finally, Section 38-30-118, CRS provides that a seal is not necessary for the proper execution of any contract conveying real property, and witnesses are not necessary for proper execution unless a statute specifically requires it. 24 C.J.S. *Deeds*, Section 35 (1956).

Power of Attorney

A power of attorney is a written instrument which provides express authority for an individual/agent to act on behalf of a contractor. The agent is called an "attorney-in-fact." A written power of attorney describes the existence, and extent, and any limitations of an agent's authority with respect to contracts. The power of attorney need not be in any particular form, but must carry on its face convincing evidence of its genuineness. If a power of attorney is provided as evidence of authority to contract, legal advice should be sought, either by consulting the agency's assistant Attorney General prior to State execution, or by attaching the document to the final contract for review by the Contracts Attorney. Generally, anyone who is not an officer employed by the contractor requires a power of attorney to sign for the contractor. For sole proprietors, a power of attorney would be required for anyone other than the sole proprietor himself or herself.

Recommendations

The following should always be considered when writing State contracts:

- Prior to contract execution, a State agency should examine applicable statutes and should request (from the contractor) and review other pertinent documents appropriate to the legal status of the contractor, as described above. You would also be well advised to familiarize yourself with statutes governing entities you regularly do business with. Such examination and review will help the State agency to determine: (a) that the particular contractor has authority to enter into the proposed contract; and (b) that the particular signatory has authority to sign the contract on behalf of the contractor.

- If, after such review, the agency still has a question concerning the authority of the contractor to enter into the contract, the agency could ask the contractor to submit written evidence of its authority. Where submitted, such evidence may be referenced in the contract and attached thereto as an exhibit, for example: "The authority of contractor to enter this contract by the signature below is established by a duly adopted [resolution], attached hereto as exhibit ____."

- To help ensure contractor funding authority, the State agency may, where the contract requires the contractor to provide funding for the contract work (especially where the contractor is a "district" under TABOR), request the contractor to adopt, through its governing board, and submit with the executed contract, evidence of its funding authority in a form appropriate to the type of contractor (*e.g.*, a resolution by the

Board of Directors of a corporation or by a Board of County Commissioners, and an ordinance by a City Council, *etc.*). To be effective, such document should expressly provide that the contractor has the total amount of such funds currently available, and that (as a result of such document) it has taken action to obligate or set aside such funds for that particular contract purpose. Such document could also expressly identify the particular individual/agent/signatory that is authorized to execute the contract on behalf of the contractor.

- To help ensure contractor signature authority the State agency may, by cover letter attached to the executory contracts sent to the contractor for signature, advise the contractor in writing that the contract must be signed by an individual/officer/signatory who has express authority to take such action for the contractor.

- Another way for the State agency to help ensure contractor signature authority is for the State agency to require that the contractor's signing of the contract be acknowledged, as described in the real estate section above. To "acknowledge" in this context is to have a second person sign the contract, thereby stating that the signatory has authority to sign the contract and bind the contractor to its terms. Such acknowledgment is *prima facie* evidence of authority and may protect the interests of the State.

- Another way for the State agency to help ensure contractor signature authority is for the State agency to require the signature of the individual signing for the contractor to be "attested." "Attestation" is the act of witnessing the signing of an instrument, and then subscribing it as a witness. This is different than an "acknowledgment," which can only be performed by those authorized by law. The "attestation" can be performed by any person as long as that person knows that the individual signatory had authority to sign the contract for the contractor. (It is not helpful to have the office secretary, or a janitor, or any other person with lack of knowledge of the signatory's authority, perform the attestation.)

Further, the by-laws of corporations frequently require the signatures of two officers on any instruments binding the corporation. In such a case, unless a State agency ensures that the corporate contractor complies with such by-laws by requiring such attestation, the contract may be void or voidable by the contractor and the State agency may thereby be at risk. Signing by a corporate officer authorized to take such action, and attestation by the corporate secretary, fulfills this requirement and protects the State. Such attestation establishes presumption of signature authority.

Intellectual Property Issues

One common problem in contracts is the reservation of lots of rights in documentation, without requiring any delivery of documentation or data. The standard clause that says the State “owns” all rights in documentation delivered under the contract means little if the contract never requires delivery of software documentation, for example. So, as you read this discussion about “intellectual property rights,” do not forget that the contract has to specify what documentation, e.g. software documentation, must be delivered. Otherwise, the contractor probably is not required to deliver any.

Patents, Copyrights, and Trademarks

Some of the most valuable aspects of goods and services are not the actual supply, software, report, or other deliverable, but the right to copy the deliverable in the future, to modify it, to transfer it to other companies or individuals, etc. These rights to copy, modify, and transfer are embodied in a separate set of property rights called "intellectual property rights."

A patent, for example, is a right created under federal law, granting the inventor the exclusive right to use a patented invention. No other company or individual may then use that patented invention without permission, usually granted through a "license" or assignment of the right to the invention. In a sense, this grants a monopoly to the inventor for protection of the idea.

In transactions in goods governed by the Uniform Commercial Code, a sale includes an implied warranty (i.e. promise) that seller has the necessary title to the goods, and that the goods will be delivered free of the claim of any third party by way of infringement or the like. (Section 4-2-312, CRS) So if a holder of a patent tries sues the State for infringing its patent by using a purchased supply, the State can sue the seller under the implied warranty of title and against infringement. Consequently, be careful about disclaimers of warranties; do not permit a vendor to disclaim the warranty of title and against infringement.

Copyrights are somewhat different. They apply to "works" rather than inventions and do not protect the "idea," only the manifestation of the idea. The right of copyright reserves to the maker of the work the right to copy, distribute, prepare derivative works (i.e. modify), and publicly display the work. A copyright exists upon creation of a work, although federal registration grants certain procedural advantages to anyone trying to sue someone for infringement. Copyrights -- like patents -- are creatures of federal law.

There is a limited exception, known as the "fair use" doctrine, to the prohibition on copying copyrighted works without permission. For example, teachers generally can make limited copies of recently published literary materials for one-time use during class. Even they, however, cannot incorporate published materials into instructor supplements routinely sold to the students; that would probably not be a "fair use." This becomes an issue for State contracts where contractor-developed materials, e.g. training materials, will be furnished in limited numbers to the State. Whether the State then can just reproduce additional copies when it needs them is not entirely clear in the law -- because the "fair use" doctrine is very limited -- and should be addressed in the contract.

Trademarks are usually of less concern to governments. A trademark or service mark grants the owner the exclusive right to use the mark to identify goods or services. Protections for trademarks and service marks exist under both state and federal laws.

Trade Secrets and Nondisclosure/Confidentiality Agreements

Trade secrets are categories of information that are afforded protection under state law. While the legal requirements for patents are quite complex, most companies use trade secret protections

as an additional way to protect ideas. The advantage to the trade secrets is their scope: protections are granted to a broader category of information than might be available under patents (available only for "new and useful" inventions) or copyright law (protections granted only to "works"). In Colorado, a trade secret is defined as "the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses or telephone numbers, or other information relating to any business or profession which is secret and of value." (Section 7-74-102, CRS) These categories of information are much broader than would be protected under either patents or copyrights.

The downside of trade secrets is that once the secret is lost through lawful disclosure, there are no additional protections. That is why companies typically use nondisclosure clauses in contracts to restrict dissemination of information they consider to be trade secrets. A State agency's failure to comply with the nondisclosure terms could subject it to substantial liability, and potentially attorney fees.

Contracts must clearly identify the trade secrets (or confidential and proprietary information) when contractors want nondisclosure provisions. A clear marking requirement should be included so contractors have the responsibility for marking any information they consider subject to the nondisclosure provision. Further, contractors should be advised that the Colorado Open Records Act may limit the ability of the State agency to reach binding agreements on categories of material that may not be disclosed. Clause B5B in Appendix A has these essential elements.

Intellectual Property Rights in Software

Because of the technical limitations of patent law, most companies protect their software using a combination of copyright and trade secret/nondisclosure concepts. Typically, the software is not "sold" to the State agency, only "licensed." And to the extent the contract requires delivery of source code of previously developed software, often the contracts will have nondisclosure provisions that restrict disclosure of that source code and other associated documentation.

Who owns the copyright or patent in an independent contractor situation?

In patent law, there is a "shop right" granted to the employer, permitting the employer to use a patented invention royalty-free where it was conceived or "reduced to practice" using the employer's time or resources. In copyrights, there is a "work for hire" doctrine that grants ownership rights in the copyright to the employer where creation of the work was specifically commissioned as part of the employment.

However, these doctrines generally apply only to employer/employee relationships. In an independent contractor situation, the State would not automatically get any rights to use or ownership in the intellectual property right, other than as necessary for use of the product delivered under the contract. Consequently, if the State intends to reserve the right to transfer, modify, or expand the uses of a software product beyond what was intended in the original

contract, such a right would have to be included in the contract. While there may be instances when the particular circumstances of the service performance may give the State a "work for hire" right, for example, it is not advisable to rely on it. Specify the terms of any ownership or license rights in the contract. This is particularly important if the State intends to modify or maintain the software after delivery.

Ownership and License Rights - the State Model Clauses

Appendix A of Chapter 6 of the *Manual* provides most of the tools to write an integrated set of clauses that defines the intellectual property rights. Consider the following:

1. Clause A8 in Appendix A is the starting point for specifying rights in data, documents, and computer software. That clause gives the State ownership rights, which include the rights to copy, publish, display, transfer, prepare derivative rights, and otherwise use the works. Often, the contractor will not have any problem with the clause if all the development is unique and funded by the State. In the case of previously developed software modified for State purposes, though, the contractor often will want to negotiate these ownership rights.

2. Do not forget to specify the document/data/software documentation deliverables. Clause B4 is a model provision for specifying these deliverables. The clause is designed to be used with an exhibit that has more detail concerning the nature, content, and formats for the data and documents. The clause has a <u>simplified</u> definition of software documentation and its adequacy. This clause is designed to be a starting point for contract drafters who, in conjunction with their information technology professionals, can better define the specific documentation requirements on any given project. Some complex software projects may require detailed definition of source code requirements, for example, that are better defined using national or industry standards for software documentation.

3. In the case of software, in particular, vendors will often want to retain ownership rights and license "use" rights to the State. Often, vendors will have license provisions that they want to use, which is acceptable so long as the agency and its information management professionals understand the terms and use restrictions. At the very least, the license provisions in the contract should clearly identify:

   a. the term of the license, usually perpetual;
   b. the cost of the license;
   c. that other entities on behalf of the State can modify and use the licensed software; and
   d. all of the rights that the State needs to retain, usually including the right make archival copies and to modify at least the portion customized for State use.

4. A simplified version of a license provision to accomplish these objectives is:

   The State is granted an irrevocable, nontransferable, nonexclusive, paid-up, perpetual license to display publicly, perform, copy, reproduce, prepare derivative

works, and distribute any works, drawings, documents, data, or software delivered under this contract. For purposes of this license, the "State" includes any other person or entity performing services for the State to the extent required for use, modification, or maintenance of the works, drawings, documents, data, or software delivered under this contract.

5. In a complex software development contract, involving previously developed software and a customized software module, sometimes the owned software and licensed software are defined separately. The definitions of "owned software" and "licensed software" then become a key part of the contract.

6. In general, it is acceptable to permit a vendor to retain "ownership rights" in its previously developed software, so long as the State retains adequate license rights at a reasonable price to permit subsequent use and maintenance of the software.

Always use caution in negotiating the documentation and ownership/license clauses. It is easily to unwittingly create a de facto sole source situation because the State has either ordered insufficient documentation or retained insufficient rights to permit its own employees or other contractors to maintain the software.

Federally Funded Contracts

Federal grants often require specific allocation of rights in intellectual property conceived or developed with federal funding. Clauses C9 and C10 are the Federal Patent Rights and Rights in Data and Copyrights clauses developed from the *Common Rule*, also known as the *Uniform Requirements for Grants and Cooperative Agreements to State and Local Governments*. (OMB Circular 102) Agencies are encouraged, however, to ask the federal agencies administering the particular grant programs to identify the clauses that should be used in the State's subrecipient agreements whenever "works" or "inventions" are likely byproducts of the contract performance.

Limitation of Liability/Warranty Disclaimer Issues

Especially with respect to software development agreements, vendors are concerned about potential consequential damages (e.g. lost productivity damages from software bugs) that can potentially far exceed the contract amount. Consequently, many software vendors propose limitation of liability and warranty disclaimer language. Consider these issues:

1. Do not disclaim or exclude the "warranty of title and against infringement" in any contracts. This implied Uniform Commercial Code warranty in "transactions in goods" provides some protection against adverse claims by third parties alleging that the vendor has infringed their intellectual property rights.

2. Other implied warranty disclaimers are fairly common. An example is at clause B11. This disclaimer will limit "warranties" to those expressed in the contract. The State gives up a chance to later claim that the product breached the implied warranty of merchantability or fitness for a particular purpose. See pp. 10-61 and 10-62 for more information about these implied warranties. If an agency is being careful about drafting the contract and statement of work, it should not have to rely on implied warranties anyway.

3. The limitation of liability policies on pages 6-27 and 6-28 apply to software licensing agreements also. Be aware, however, that agreeing to limit liability to the contract amount may cut off vendor liability well short of potential State liability/defense costs if a third party sues the State for intellectual property infringement. Consider using an "Intellectual Property Indemnification" clause such as that at B15 in cases where: 1) limitation of liability provisions are included that limit the vendor's liability, 2) the State could incur significant costs defending an intellectual property action, and 3) discontinuing use of the infringing software or invention is not a viable alternative because of the critical nature of the product or software.

Final Caveat

Integrating rights in data/software and limitation of liability clauses can be difficult, especially when vendor forms are incorporated in the contract. Typically, important terms and conditions are spread throughout the documents, and often terms are used in different ways. Unless the contract amount is relatively insignificant, the nature of the requirement routine, or the consequences for breach otherwise not substantial, we recommend that you seek either the help of experienced purchasing professionals or legal advice from your assigned assistant attorney general. Even more important, agency information management professionals need to be involved to insure that document deliverables are being ordered that permit State use and maintenance of software, and that licensing use restrictions are acceptable.

Amendments, Changes, And Modifications

Generally

Appendix B is the model State amendment form and instructions. This discussion will explain the limitations and uses of amendments, and instructions for completing the amendment form.

Amendments are routed for approval just like the original contract. There are some modifications that can be executed without Attorney General review, but which still require approval by the State Controller (unless delegated) and the Department of Personnel (unless waived). Those modifications are described in the State Controller's policy memorandum in the Policy Letters Annex, and the model provisions are included in Appendix A of this Chapter, Clauses B18-B23. Also, some changes to capital construction contracts can be executed without Attorney General

review where consistent with State Buildings Program policies approved by the State Controller. Otherwise, amendments must be done using substantially the form in Appendix B.

Modifications and amendments must be "prospective" only. That is, the changes made to the original contract are made effective at the time of modification, not dating back to the effective date of the original contract. In rare situations where the circumstances require such a result, however, retroactive amendments may be permitted, as in the case of something erroneously omitted from the original contract, or where there has been a mutual mistake by the contracting parties.

A contract must contain mutual obligations to be valid. So too must contract modifications. Where, for example, something is to be done by a particular date in consideration for the payment of a sum of money, to adjust these original obligations there must be some give and take. For instance, the State cannot agree to pay more money unless additional services are agreed to.

Whenever a contract or lease is to be modified or amended, be sure to submit a copy of the original document and prior amendments when review and approval is sought. The original shall be referred to in the modification by its date, encumbrance number, and contract routing number, and need only be attached to <u>one</u> <u>copy</u> of the amendments submitted for approval.

APPENDIX A: MODEL CONTRACT CLAUSES

Introduction

These model provisions are commonly used in State contracts, and where indicated, are prescribed by the Procurement Code or other laws or regulations. In most instances, the clauses may have to be adapted to the particular procurement situation. Brief commentary follows the clauses where the uses of the clause, or possible modifications to the clause, explanatory.

Optional provisions/phrases in the clauses, or those requiring tailored adaptation, are indicated

A. PROVISIONS GENERALLY USED IN ALL CONTRACTS

1. Caption/Whereas Clauses - Form 6-AC-02A (R5/91)

Agency or Department Name
Department or Agency Number
Contract Routing Number

CONTRACT

THIS CONTRACT, Made this ___ day of _____ 1997, by and between the State of Colorado for the use and benefit of the Department of _____ hereinafter referred to as the State and _____ hereinafter referred to as the contractor.

WHEREAS, authority exists in the Law and Funds have been budgeted, appropriated and otherwise made available and a sufficient uncommitted balance thereof remains available for encumbering and subsequent payment of this contract under Encumbrance Number _____ in Fund Number _____, Appropriation Account _____ and Organization _____.

WHEREAS, required approval, clearance and coordination has been accomplished from and with appropriate agencies;

WHEREAS, the contractor's [bid] [offer] was selected in accordance with State law as a result of [IFB] [RFP]

WHEREAS, . . .

This "header" and the WHEREAS provisions are required by Fiscal Rule 3-1, which requires use of the Special Provisions. Include the availability and identity of funds, source of legal authority, particular type of contract, procurement method and authority, necessary approvals obtained, etc.

2. Scope of Work

The contractor shall deliver the supplies described in Exhibit A. [supplies]

The contractor shall perform the services described in Exhibit A. [services]

The contractor shall perform the services in accordance with the RFP, Section 8, attached as Exhibit A, and the contractor's proposal, chapter 4, attached as Exhibit B.

If you have competed the contract using an IFB or RFP, attach the relevant portions of the IFB or RFP to the contract as exhibits. If the contractor submitted a proposal that you intend to incorporate, attach the relevant portions of the proposal as an exhibit.

If you have not competed the requirement, you will have to negotiate a statement of work and attach it as an exhibit. See Chapter 2 for a guidance about writing statements of work.

3. Order of Precedence

In the event of conflicts or inconsistencies between this contract and its exhibits or attachments, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority:

1) Colorado Special Provisions, pages ____ to ____.

2) Contract, pages ____ to ____.

3) The RFP, Exhibit ____.

4) The contractor's proposal, Exhibit ____.

Where exhibits are attached that together define the scope of work, make sure you have a suitable clause that will govern conflicts or inconsistencies between exhibits and language in the contract. Don't rely on this clause to resolve all ambiguities; you have to read all the exhibits and negotiate to clarify any apparent conflicts between the State requirement and how the contractor proposes to do the work. The usual order of precedence is the Special Provisions, contract, RFP or IFB provisions describing the requirement, and the contractor's proposal.

4. Performance Period

The contract shall be effective upon approval by the State Controller, or designee, or on June 1, 1997, whichever is later. The contract performance contemplated herein shall commence as soon as practicable after the effective date of this contract and shall be undertaken and performed in the sequence and manner set forth in the attached [scope of work][specifications] and extend through June 31, 1998. [services]

The contractor shall deliver the supplies [by August 31, 1997][90 days after the effective date of the contract. [supplies]

[Optional] The parties agree that "time is of the essence," and failure of the contractor to complete [delivery of reports][completion of the _____ milestone][performance][delivery] by the date specified shall be grounds for termination for default, subject to adjustment of extension in the time of performance according to the terms of this contract.

[Optional] The term of this contract shall commence and the effective date hereof shall be _____, 19__, and the contract shall terminate _____, 19__, unless either the contractor or the State shall fail to timely execute the contract prior to the said effective date as determined by the date the contract is received for final approval by the State Controller. As prescribed by Section 24-30-202(1), CRS, the effective date shall be the date the contract is approved by the State Controller, and in the event this date is subsequent to the effective date stated in the contract, all provisions relating to time of performance shall be adjusted [and payment therefor shall be reduced proportionately] to account for the reduction of work and services. It is understood the State shall not be liable for payment of work or services nor for costs or expenses incurred by the contractor prior to the proper execution and approval of this contract.

The contract should have a provision that sets the period of performance, in the case of services, and the delivery date, in the case of supplies. The "time is of the essence" clause should be used where time is particularly important, and failure to meet specified deadlines is considered so significant that the contract may be terminated for default. (See the discussion of performance remedies in Chapter 10, Section 7). The second optional clause may be used to deal with automatic adjustment of contract duration for contracts where time is important and dependent on the date of approval by the State Controller or his designee.

5. Price/Cost

The contract price is $25,000. [fixed price]

The State shall pay the contractor at the rates set herein for labor and/or material, not to exceed a ceiling price of $25,000. The contractor will successfully complete the services in accordance with contract requirements within the ceiling price specified herein. [time and material/labor hours contracts]

The State shall reimburse the contractor's reasonable, allowable costs, as defined herein, not exceeding $25,000. [cost reimbursement]

Fiscal Rule 3-1 requires the contract to include a ceiling cost, the maximum amount of money that can be expended on a contract without an amendment.

The first option specifies a firm, fixed price or "lump sum" that is due to the contractor no matter how much it costs the contractor to perform. The second option uses a "time and material" contract, a cost-type contract that requires the State to pay at specified rates for labor and/or material and makes it clear that the contractor must complete performance within the ceiling amount specified.

The final option can be used in either grant or commercial contracts, where the contractor's costs are reimbursed. A commercial cost reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the State than any other type of contract, see Section 24-103-501, CRS. The tests for "allowability" are set out in the Procurement Code (for commercial contracts) and OMB Circulars (for grants to state and local governments and educational institutions). See the discussion about cost reimbursement contracts in Chapter 5.

6. Payment Terms

[Other than cost reimbursement] Unless otherwise provided, and where appropriate, the State shall establish billing procedures and pay the contractor the contract price or rate for services performed and accepted or supplies delivered and accepted pursuant to the terms of this contract, based on the submission of statements on forms and in a manner prescribed by the State. [Progress payments shall be made monthly based on invoices submitted to and in a form prescribed by the State detailing the amount of costs incurred, but 10% of the amount of costs incurred shall be withheld by the State until final acceptance of the services or supplies under the contract.] Payments pursuant to this contract shall be made as earned, in whole or in part, from available funds encumbered for the purchase of the described services. The liability of the State, at any time, for such payments shall be limited to the amount remaining of such encumbered funds. Incorrect payments to the contractor due to omission, error, fraud, or defalcation shall be recovered from the contractor by deduction from subsequent payment under this contract or other contracts between the State and the contractor, or by the State as a debt due to the State.

[Cost reimbursement] The State shall pay reasonable, allocable, allowable costs of performance. Unless otherwise provided, and where appropriate:

A. The State shall establish billing procedures and pay the contractor the reasonable, allocable, and allowable costs for work performed under this contract, based on the submission of monthly statements in the format prescribed by the State. To be considered for payment, billings for payment pursuant to this contract must be received within 60 days after the period for which payment is being requested and final billings on the contract must be received by the

State within 60 days after the end of the contract term.

B. Payments pursuant to this contract shall be made as earned, in whole or in part, from available funds encumbered for the purchase of the described services. The liability of the State, at any time, for such payments shall be limited to the amount remaining of such encumbered funds.

C. In the event this contract is terminated, final payment to the contractor may be withheld at the discretion of the State until completion of final audit.

D. Incorrect payments to the contractor due to omission, error, fraud, or defalcation shall be recovered from the contractor by deduction from subsequent payment under this contract or other contracts between the State and the contractor, or by the State as a debt due to the State. The contractor shall submit requests for reimbursement monthly, stating in the invoice a detailed description of the amounts of services performed, the dates of performance, and amounts and description of reimbursable expenses. [The State procurement rules governing allowability and allocability of cost shall govern.] [The Uniform Administrative Requirements for Grants and Cooperative agreements to State and Local Governments (the "Common Rule"), and the applicable OMB Circulars cited therein, shall govern the allowability and allocability of costs under this contract.] The State [and federal government] reserves the right to audit the contractor's books and records for a period of three years after contract expiration or termination in order to validate the allowability of costs paid under this contract, and any costs not allowable under the State procurement rules shall be reimbursed by the contractor, or offset against current obligations due by the State to the contractor, at the State's election.

Use the first payment clause alternative, modified as necessary to meet your agency requirements, for contracts with a fixed price or fixed rate of payment. The optional provision permits payment of progress payments, see page 6-14 for a discussion of the use of progress payments. Use the second payment clause for cost reimbursement type contracts where payment of allowable, allocable costs up to a specified ceiling cost is specified. Also consider using Clauses B2 and C5 in cost reimbursement contracts for pricing modification and preserving an audit right.

7. Legal Authority

The contractor warrants that it possesses the legal authority to enter into this contract and that it has taken all actions required by its procedures, by-laws, and/or applicable law to exercise that authority, and to lawfully authorize its undersigned signatory to execute this contract and to bind the contractor to its terms. The person(s) executing this contract on behalf of the contractor warrant(s) that such person(s) have full authorization to execute this contract.

Essentially, this clause assures the State that the person the State is dealing with has the authority to bind the contracting party. If the person signing the contract does not have authority, or at least reason to believe he/she has the authority to act on behalf of the contracting party, then very simply, the State cannot hold the contracting party to the terms of

the contract. If the State has been harmed by these circumstances, they may want to sue and, if the signatory does not have authority, these provisions allow the State to hold the person signing the contract personally liable for breach of his or her assurances to the contrary even if the contracting party is not.

8. Rights in Data, Documents, and Computer Software (State Ownership)

Any software, research, reports, studies, data, photographs, negatives or other documents, drawings or materials prepared by contractor in the performance of its obligations under this contract shall be the exclusive property of the State and all such materials shall be delivered to the State by the contractor upon completion, termination, or cancellation of this contract. Contractor may, at its own expense, keep copies of all its writings for its personal files. Contractor shall not use, willingly allow, or cause to have such materials used for any purpose other than the performance of contractor's obligations under this contract without the prior written consent of the State; provided, however, that contractor shall be allowed to use non-confidential materials for writing samples in pursuit of the work. The ownership rights described herein shall include, but not be limited to, the right to copy, publish, display, transfer, prepare derivative works, or otherwise use the works.

Not only may there be instances where the State does not wish the work products of the contractor to be made available to any other entity, public or private, but also the contractor is not entitled to any additional profit or benefit where payment for the said products was by public funds, unless the State agency has given its prior approval of the use of the materials.

This clause gives the "ownership" rights in all works, including software, developed or created under the contract. This allocation of rights would be equitable where all development was funded at State expense. If some development is funded at the expense of the contractor, or commercially available software is part of the deliverable, then a modification of the clause is necessary to identify the license rights that exist to the software where the State does not have an ownership interest.

Make sure you not only have "rights," but have also specified the delivery of reports, documents, data, and software somewhere in the contract. Clause B4 is an example of how to specify delivery and format for software documentation.

9. Inspection and Acceptance (Services)

The State reserves the right to inspect services provided under this contract at all reasonable times and places during the term of the contract. "Services" as used in this clause includes services performed or tangible material produced or delivered in the performance of services. If any of the services do not conform with contract requirements, the State may require the contractor to perform the services again in conformity with contract requirements, with no additional payment. When defects in the quality or quantity of service cannot be corrected by reperformance, the State may (1) require the contractor to take necessary action to ensure that the future performance conforms to contract requirements and (2) equitably reduce the payment due the contractor to reflect the reduced value of the services performed. These remedies in no way limit the remedies

available to the State in the termination provisions of this contract, or remedies otherwise available at law.

10. Remedies

In addition to any other remedies provided for in this contract, and without limiting its remedies otherwise available at law, the State may exercise the following remedial actions if the contractor substantially fails to satisfy or perform the duties and obligation in this contract. Substantial failure to satisfy the duties and obligations shall be defined to mean significant insufficient, incorrect or improper performance, activities, or inaction by contractor. These remedial actions are as follows:

A. Suspend contractor's performance pending necessary corrective action as specified by the State without contractor's entitlement to adjustment in price/cost or schedule; and/or

B. Withhold payment to contractor until the necessary services or corrections in performance are satisfactorily completed; and/or

C. Request the removal from work on the contract of employees or agents of contractor whom the State justifies as being incompetent, careless, insubordinate, unsuitable, or otherwise unacceptable, or whose continued employment on the contract the State deems to be contrary to the public interest or not in the best interest of the State; and/or

D. Deny payment for those services or obligations which have not been performed and which due to circumstances caused by contractor cannot be performed, or if performed would be of no value to the State. Denial of the amount of payment must be reasonably related to the value of work or performance lost to the State.

E. Terminate the contract for default.

The above remedies are cumulative and the State, in its sole discretion, may exercise any or all of them individually or simultaneously.

This clause is commonly used in service contracts. Although contract law provides for numerous remedies for contract breach, occasionally it may be beneficial to specifically mention some in the contract. Note that the clause begins with "In addition to any other remedies provided for in this contract, and without limiting its remedies otherwise available at law. . ." This specifically does not limit remedies under the contract to those listed. See Chapter 10, Section 7 for a discussion of performance remedies.

11. Termination for Convenience (Short Form)

The State may terminate this contract at any time the State determines that the purposes of the distribution of State moneys under the contract would no longer be served by completion of the project. The State shall effect such termination by giving written notice of termination to the contractor and specifying the effective date thereof, at least twenty (20) days before the effective date of such termination. In that event, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports or other material prepared by the contractor under this contract shall, at the option of the State, become its property, and the

contractor shall be entitled to receive just and equitable compensation for any satisfactory services and supplies delivered.

If the contract is terminated by the State as provided herein, the contractor will be paid an amount which bears the same ratio to the total compensation as the services satisfactorily performed bear to the total services of the contractor covered by this contract, less payments of compensation previously made, provided, however, that if less than sixty percent (60%) of the services covered by this contract have been performed upon the effective date of such termination, the contractor shall be reimbursed (in addition to the above payment) for that portion of the actual out-of-pocket expenses (not otherwise reimbursed under this contract) incurred by the contractor during the contract period which are directly attributable to the uncompleted portion of the services covered by this contract. In no event shall reimbursement under this clause exceed the contract amount. If this contract is terminated for cause, or due to the fault of the contractor, the Termination for Cause or Default provision shall apply.

This short form version of the termination for convenience clause is used in contracts with political subdivisions and other contracts not subject to the Procurement Code, and in service contracts having fixed level-of-effort where the State is receiving value as the services are being performed. Janitorial services contracts, for example, would be examples of contracts where this short-form clause may be appropriate, because payment for services in proportion to the performance period completed would fairly reimburse the contractor and still insure that the State receives fair value for its payments. For contracts with commercial entities not meeting these criteria -- e.g. software development/integration contracts involving significant start-up costs -- the Procurement Rules "long form" clause, the next clause in this Appendix, is more appropriate.

Occasionally, contractors will ask to make the termination for convenience clause "mutual," permitting either party to terminate the contract at will by giving specified advance, written notice. In such cases, exercise extreme care, and consider getting legal advice or the assistance of a more experienced purchasing/contracting professional. It is particularly important to consider: the effect of contractor termination on advance or progress payments, and the obligation of the contractor to return them; whether the right of the contractor to compensation after it terminates is clearly stated and requires the State to pay only reasonable compensation for acceptable, completed deliverables having value to the State; whether the milestones and associated progress payments are distinguished from the compensation due the contractor for acceptable, completed services and deliverables after termination, since progress payments are often not sufficiently based on the value of services received by the State; and whether there is procurement authority to acquire replacement or continued services within the needed time. In general, while the termination for convenience clauses in this Appendix are adequate to give the State the right to terminate for convenience, they are not generally adequate to define the contractor's right to terminate at will and receive compensation.

12. Termination for Convenience (Long Form)

Termination

The procurement officer may, when the interests of the purchasing agency so require, terminate this contract in whole or in part, for the convenience of the agency. The procurement officer shall

give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective. This in no way implies that the purchasing agency has breached the contract by exercise of the Termination for Convenience Clause.

Contractor's Obligations

The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The procurement officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the purchasing agency. The contractor must still complete and deliver to the purchasing agency the work not terminated by the Notice of Termination and may incur obligations as are necessary to do so.

Compensation

A. The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data bearing on such claim. If the contractor fails to file a termination claim within 90 days from the effective date of termination, the procurement officer may pay the contractor, if at all, an amount set in accordance with subparagraph C of this Section.

B. The procurement officer and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost or pricing data and that the settlement does not exceed the total contract price plus settlement costs, reduced by payments previously made by the purchasing agency, the proceeds of any sales of supplies and manufactured materials made under agreement, and the contract price of the work not terminated.

C. Absent complete agreement, under subparagraph B of this Section, the procurement officer shall pay the contractor the following amounts, provided the payments agreed to under subparagraph B shall not duplicate payments under this subparagraph:

    1) Contract prices for supplies or services accepted under the contract;

    2) Costs incurred in preparing to perform the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid to or to be paid for accepted supplies or services; provided, however, that if it appears that the contractor would have been sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss.

    3) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to the contractor's obligations paragraph of this clause. These costs must not include costs paid in accordance with subparagraph B of this Section.

4) The reasonable settlement costs of the contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the terminated portion of this contract.

5) The total sum to be paid the contractor under this subparagraph C shall not exceed the total contract price plus settlement costs, reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph B, and the contract price of work not terminated.

D. Cost claimed or agreed to under this section shall be in accordance with applicable sections of the Colorado State Procurement Code.

This long form version of the termination for convenience clause is prescribed in the Procurement Rules. The clause "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01. See the comments under Termination for Convenience (Short Form) with respect to the proper use of each clause, as well as cautions in making the clauses "mutual" and the contract terminable at will by the contractor.

13. Termination for Default/Cause (Short Form)

If, through any cause, the contractor shall fail to fulfill, in a timely and proper manner, its obligations under this contract, or if the contractor shall violate any of the covenants, agreements, or stipulations of this contract, the State shall thereupon have the right to terminate this contract for cause by giving written notice to the contractor of its intent to terminate and at least ten (10) days opportunity to cure the default or show cause why termination is otherwise not appropriate. In the event of termination, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports or other material prepared by the contractor under this contract shall, at the option of the State, become its property, and the contractor shall be entitled to receive just and equitable compensation for any services and supplies delivered and accepted. The contractor shall be obligated to return any payment advanced under the provisions of this contract.

Notwithstanding the above, the contractor shall not be relieved of liability to the State for any damages sustained by the State by virtue of any breach of the contract by the contractor, and the State may withhold any payment to the contractor for the purposes of mitigating its damages until such time as the exact amount of damages due to the State from the contractor is determined.

If after such termination it is determined, for any reason, that the contractor was not in default, or that the contractor's action/inaction was excusable, such termination shall be treated as a termination for convenience, and the rights and obligations of the parties shall be the same as if the contract had been terminated for convenience, as described herein.

This short form termination for default clause is customarily used in contracts with political subdivisions and nonprofit entities.

14. Termination for Default/Cause (Long Form)

Default

If the contractor refuses or fails to timely perform any of the provisions of this contract, with such diligence as will ensure its completion within the time specified in this contract, the procurement officer may notify the contractor in writing of the non-performance, and if not promptly corrected within the time specified, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services elsewhere.

Contractor's Duties

Notwithstanding termination of the contract and subject to any directions from the procurement officer, the contractor shall take timely, reasonable and necessary action to protect and preserve property in the possession of the contractor in which the purchasing agency has an interest.

Compensation

Payment for completed supplies delivered and accepted by the purchasing agency shall be at the contract price. The purchasing agency may withhold amounts due to the contractor as the procurement officer deems to be necessary to protect the purchasing agency against loss because of outstanding liens or claims of former lien holders and to reimburse the purchasing agency for the excess costs incurred in procuring similar goods and services.

Excuse for Nonperformance or Delayed Performance

The contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms if such failure arises out of acts of God; acts of the public enemy; acts of the State and any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. Upon request of the contractor, the procurement officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the purchasing agency.

Erroneous Termination for Default

If after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under the provisions of this clause, or that the delay was excusable, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the termination for convenience clause.

This long form version of the termination for default clause is set forth in the Procurement Rules. The clause "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01.

15. Insurance

A. The [contractor][vendor] shall obtain, and maintain at all times during the term of this agreement, insurance in the following kinds and amounts:

1) Standard Worker's Compensation and Employer Liability as required by State statute, including occupational disease, covering all employees on or off the work site, acting within the course and scope of their employment.

2) General, Personal Injury, and Automobile Liability (including bodily injury, personal injury, and property damage) minimum coverage:

a) Combined single limit of $600,000 if written on an occurrence basis.

b) Any aggregate limit will not be less than $1,000,000.

c) Combined single limit of $600,000 for policies written on a claims-made basis. The policy shall include an endorsement, certificate, or other evidence that coverage extends two years beyond the performance period of the contract.

d) If <u>any</u> aggregate limits are reduced below $600,000 because of claims made or paid during the required policy period, the contractor shall immediately obtain additional insurance to restore the full aggregate limit and furnish a certificate or other document showing compliance with this provision.

B. The State of Colorado shall be named as additional insured on all liability policies.

C. The insurance shall include provisions preventing cancellation without 60 days prior notice to the State by certified mail.

D. The [vendor][contractor] shall provide certificates showing adequate insurance coverage to the State within 7 working days of award or contract execution, unless otherwise provided.

E. If the contractor is a "public entity" within the meaning of the Colorado Governmental Immunity Act, CRS 24-10-101, <u>et seq.</u>, as amended ("Act"), the contractor shall at all times during the term of this contract maintain such liability insurance, by commercial policy or self-insurance, as is necessary to meet its liabilities under the Act. Upon request by the State, the contractor shall show proof of such insurance.

This insurance clause is prescribed for use by the division of purchasing in all competitive procurements. It is also an advisable clause in any service contract where the contractor is performing services on State property, or other contracting situations where the State may suffer direct damages from performance or be at risk of suit by a third party on an "agency" theory. See the discussion in this chapter for definitions of the different types of insurance, as well as the distinction between an "occurrence based" and "claims made" policy.

16. Independent Contractor Relationship

THE CONTRACTOR SHALL PERFORM ITS DUTIES HEREUNDER AS AN INDEPENDENT CONTRACTOR AND NOT AS AN EMPLOYEE. NEITHER THE CONTRACTOR NOR ANY AGENT OR EMPLOYEE OF THE CONTRACTOR SHALL BE OR SHALL BE DEEMED TO BE AN AGENT OR EMPLOYEE OF THE STATE. CONTRACTOR SHALL PAY WHEN DUE ALL REQUIRED EMPLOYMENT TAXES AND INCOME TAX AND LOCAL HEAD TAX ON ANY MONEYS PAID PURSUANT TO THIS CONTRACT. CONTRACTOR ACKNOWLEDGES THAT THE CONTRACTOR AND ITS EMPLOYEES ARE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS THE CONTRACTOR OR A THIRD PARTY PROVIDES SUCH COVERAGE AND THAT THE STATE DOES NOT PAY FOR OR OTHERWISE PROVIDE SUCH COVERAGE. CONTRACTOR SHALL HAVE NO AUTHORIZATION, EXPRESS OR IMPLIED, TO BIND THE STATE TO ANY AGREEMENTS, LIABILITY, OR UNDERSTANDING EXCEPT AS EXPRESSLY SET FORTH HEREIN. CONTRACTOR SHALL PROVIDE AND KEEP IN FORCE WORKER'S COMPENSATION (AND SHOW PROOF OF SUCH INSURANCE) AND UNEMPLOYMENT COMPENSATION INSURANCE IN THE AMOUNTS REQUIRED BY LAW, AND SHALL BE SOLELY RESPONSIBLE FOR THE ACTS OF THE CONTRACTOR, ITS EMPLOYEES AND AGENTS.

This paragraph and the typeface is required by the Personnel Rules to be used in personal services contracts.

The purpose of the provision is to declare the intent of the parties to establish an independent contractor relationship. Failure to maintain an independent contractor relationship can result in the State being held responsible for income tax withholding and FICA taxes, workers compensation, and other liability of "employers."

17. Representatives and Notice

A. Representatives. For the purpose of this contract, the individuals identified below are hereby designated representatives of the respective parties. Either party may from time to time designate in writing new or substitute representatives:

For the State:

_____

Name Title

For the Contractor:

_____

Name Title

It is advisable that the responsible employees of the parties be clearly identified, since it is often necessary for parties to a contract to have a continuous course of dealing as the contract is performed.

This provision is not a delegation of signatory authority for the purposes of contracting initially or entering into modifications or amendments. If you want to specify the specific authority of the representative, do so using a provision substantially like the one that follows. Note that you cannot ever give the representative the authority to amend the contract and commit more funds--you must use an approved modification.

B. Authority. With respect to the representative of the State, such individual shall have the authority to _____, inspect and reject services, approve invoices for payment, and act otherwise for the State, except with respect to the execution of formal amendments to or termination of this agreement pursuant to paragraphs ___ and ___.

C. Notices. All notices required to be given by the parties hereunder shall be hand delivered or given by certified or registered mail to the individuals at the addresses set forth below. Either party may from time to time designate in writing substitute addresses or persons to whom such notices shall be sent.

For the State:

Name : _____
Department and Division: _____
Address: _____
_____
_____

For the contractor:

This provision will help avoid practical problems caused by misdirected mail. Several representatives may be listed if necessary. Certified or registered mail are preferred, but regular U.S. Mail is a reasonable alternative. The option of personal delivery of a notice could also be provided for.

18. Assignment and Successors

The contractor agrees not to assign rights or delegate duties under this contract [or subcontract any part of the performance required under the contract] without the express, written consent of the State [which shall not be unreasonably withheld]. Except as herein otherwise provided, this agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns. This provision shall not be construed to prohibit assignments of the right to payment to the extent permitted by section 4-9-318, CRS, provided that written notice of assignment adequate to identify the rights assigned is received by the controller for the agency, department, or institution executing this contract. Such assignment shall not be deemed valid until receipt by such controller -- as distinguished from the State Controller -- and the contractor assumes the risk that such written notice of assignment is received by the controller for the agency, department, or institution involved.

Especially in contracts for personal services, but for most State contracts in general, if the State has selected a certain vendor or contractor, it has done so through a process according to the laws governing State contracting in order to allow for fairness to all potential contractors. If the vendor assigns a contract with the State to another party, then the public confidence in the competitive process may be compromised. Section 4-9-318, CRS, permits contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract.

Despite the prohibition on nonconsensual assignment, if a contractor goes into bankruptcy, its accounts and contract may be assigned. If a company reorganizes or merges with another under a different name, it will have successors. The last sentence of this clause assures that these other entities will be bound by the law to complete the contract if the State desires, even though they are not technically parties to the contract.

19. Changes

A written order

By a written order, at any time, and without notice to any surety, the procurement officer may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

1) [Drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the purchasing agency in accordance therewith] [description of services to be performed];

2) Method of shipment or packing [time of performance of services]; or

3) Place of delivery or performance of services.

Adjustments of Price or Time or Performance

If any such change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

Failure of the parties to agree to an adjustment

Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the purchasing agency promptly and duly makes such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of the time for completion.

Time Period for Claim

Within 30 days after receipt of a written change order under the Change Order paragraph of this clause, unless such period is extended by the procurement officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment.

Claim Barred After Final Payment

No claim by the contractor for an adjustment hereunder shall be allowed if asserted after final payment under this contract.

Without a "changes" clause, the right of the State to direct changes in statement/scope of work or specifications is dependent on the willingness of the contractor to agree to amend the contract. "Changes" clauses give the State a limited right to direct changes to the contract that are "within the scope of the contract." Of course, the contractor would be entitled to an equitable adjustment in price/cost and/or schedule if such a change is ordered. Because the State would be committing to a payment of money by exercising this right, use of the changes clause generally would require review by the Attorney General and approval by the Controller.

Elsewhere in this Appendix is an expanded version of the changes clause that permits a bilateral "change order letter" without the necessity of Attorney General review.

This changes clause, an important right to reserve for the State, could be exercised unilaterally (after approval by the State Controller), although a bilateral change is most common using an amendment or other approved modification format. If you are anticipating use of the clause unilaterally, consult counsel.

20. Price Adjustments

A. Price Adjustment Method. Any adjustment in contract price pursuant to the application of a clause in this contract shall be made in one or more of the following ways:

1) By agreement on a fixed-price adjustment;

2) By unit prices specified in the contract;

3) In such other manner as the parties may mutually agree; or

4) In the absence of agreement between the parties, by a unilateral determination by the procurement officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee.

B. Submission of Cost or Pricing Data**.** The contractor shall provide cost or pricing data for any price adjustment subject to the provisions of the Cost or Pricing Data Section of the Colorado State Procurement Rules.

If there are any clauses in the contract which give the contractor an adjustment in price/schedule for certain events, the contract should also set out how the adjustment will be done. This clause is set forth in the Procurement Rules for general use, but it "may be varied

for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01.

21. Force Majeure

Neither the contractor nor the State shall be liable to the other for any delay in, or failure of performance of, any covenant or promise contained in this contract, nor shall any delay or failure constitute default or give rise to any liability for damages if, and only to the extent that, such delay or failure is caused by "force majeure". As used in this contract "force majeure" means acts of God; acts of the public enemy; acts of the State and any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather.

"Force majeure" means those events for which neither party will be held accountable. The long-form termination for default clause has an excusable delay provision that also excuses delays caused by the list of "force majeure" events in the clause. Generally, if the long-form termination for default clause is used, this "force majeure clause need not also be added to the contract. The list of events constituting "force majeure" can be negotiated and modified by the parties.

22. Third Party Beneficiaries

It is expressly understood and agreed that the enforcement of the terms and conditions of this contract and all rights of action relating to such enforcement, shall be strictly reserved to the State and the named contractor. Nothing contained in this agreement shall give or allow any claim or right of action whatsoever by any other third person. It is the express intention of the State and the contractor that any such person or entity, other than the State or the contractor, receiving services or benefits under this agreement shall be deemed an incidental beneficiary only.

23. Governmental Immunity

Notwithstanding any other provision of this [contract] to the contrary, 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, protection, or other provisions of the Colorado Governmental Immunity Act, Section 24-10-101, *et.seq.*, CRS, as now or hereafter amended. The parties understand and agree that liability for claims for injuries to persons or property arising out of negligence of the State of Colorado, its departments, institutions, agencies, boards, officials and employees is controlled and limited by the provisions of Section 24-10-101, *et. seq.*, CRS, as now or hereafter amended and the risk management statutes, Section 24-30-1501, *et. seq.*, CRS, as now or hereafter amended.

24. Severability

To the extent that this contract may be executed and performance of the obligations of the parties may be accomplished within the intent of the contract, the terms of this contract are severable,

and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof.

Common law allows for an argument that if any one provision of a contract is deemed invalid, illegal, or inoperative for some other reason, all the provisions in the contract are then suspect and the contract can be rescinded or voided entirely. This clause prevents that argument and allows the State to still hold a contractor liable for parts of the contract that have not been deemed invalid.

25. Waiver

The waiver of any breach of a term, provision, or requirement of this contract shall not be construed or deemed as waiver of any subsequent breach of such term, provision, or requirement, or of any other term, provision, or requirement.

26. Entire Understanding

This contract is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a writing executed and approved pursuant to the State Fiscal Rules.

Parties' memories of what was agreed to may get foggy in time and that's why written contracts are valuable. This clause prevents parties from later claiming that there were other provisions agreed to that were not put into the contract. This clause has the effect of saying that, "If it is not written down, it is not valid and the court won't recognize it." Secondly, it makes it clear that changes to the contract must be properly approved and processed under the fiscal rules.

If, at any point after a contract is signed, the parties agree to something different from or in addition to what is contained in the contract, these changes cannot be informally accepted, but must be set forth in writing and embodied in an amendment or approved modification.

27. Survival of Certain Contract Terms

Notwithstanding anything herein to the contrary, the parties understand and agree that all terms and conditions of this contract and the exhibits and attachments hereto which may require continued performance, compliance, or effect beyond the termination date of the contract shall survive such termination date and shall be enforceable by the State as provided herein in the event of such failure to perform or comply by the contractor.

Examples of these types of long-lived contract terms include: records retention, maintenance and replacement provisions, land use covenants, inspections and certification, indemnification, audit rights, rights in data and software, warranties, etc.

28. Modification and Amendment

This contract is subject to such modifications as may be required by changes in Federal or State law, or their implementing regulations. Any such required modification shall automatically be incorporated into and be part of this contract on the effective date of such change as if fully set forth herein. Except as provided above, no modification of this contract shall be effective unless agreed to in writing by both parties in an amendment to this contract that is properly executed and approved in accordance with applicable law.

B. MODEL CLAUSES TO BE USED WHEN APPROPRIATE

1. Advance Funds or Payment (Where Approved by the State Controller)

The State shall pay the contractor $_____ within 30 days of State Controller (or designee) approval of this contract. If funds are not used for the purposes herein described by the dates established in this contract, or if the contract is terminated, with or without cause, all such funds shall be immediately returned to the State.

Fiscal Rule 3-1 requires all advance payments to be approved by the State Controller.

2. Cost or Pricing Data

Contractor shall submit cost or pricing data with change or modification proposals where the aggregate increase/decrease in costs plus associated profit exceeds $50,000. "Cost Data" is factual information concerning the cost of labor, material, overhead, and other cost elements which are expected to be incurred or which have been actually incurred by the contractor in performing the contract, such as vendor quotations, non-recurring costs, and unit cost trends, and which can reasonably be expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. "Price Data" is factual information concerning prices for supplies, services, or construction substantially identical to those being procured, including offered or proposed selling prices, historical selling prices, and current selling prices of such items, which can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. The contractor will promptly certify that, to the best of their knowledge and belief, the cost or pricing data submitted was accurate, complete, and current as of a mutually determined, specified date on or before the date of conclusion of negotiations. Such certification shall contain a provision that the price to the State, including profit or fee, will be adjusted to exclude any significant sums by which such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between the parties.

T*he Procurement Rules require submission of cost or pricing data when modifications exceed $500, although the scope and format of the data are not defined. This clause requires detailed, comprehensive cost or pricing data—and certification of that data—when modifications exceed a specified threshold, one that is high enough to justify the more extensive data required by the clause. See Chapter 5 for a discussion of contract pricing and cost reimbursement contracts in general.*

3. Reporting

Unless otherwise provided, in service contracts having a performance term longer than three (3) months, the contractor shall submit, on a quarterly basis, a written program report specifying progress made for each activity identified in the contractor's duties and obligations, regarding the performance of the contract. Such written analysis shall be in accordance with the procedures

developed and prescribed by the State. The preparation of reports in a timely manner shall be the responsibility of the contractor and failure to comply may result in delay of payment of funds and/or termination of the contract. Required reports shall be submitted to the State not later than the end of each calendar quarter, or at such time as otherwise specified.

4. Data and Document Deliverables

The contractor shall deliver, by the dates specified in Exhibit __, the data or documents described therein.

Unless otherwise specified, software documentation shall be delivered that meets the following standards:

A. The documentation shall be in paper, human readable format, which clearly identifies the programming language and version used, and when different programming languages are incorporated, identifies the interfaces between code programmed in different programming languages.

B. The documentation shall contain source code in a paper, human readable format, which describes the program logic, relationship between any internal functions, and identifies the disk files which contain the various parts of the code.

C. Detailed "commenting" of source code may be used to partially satisfy the documentation requirements, although documentation shall also include a flow chart which identifies the program flow between files and functions. Comments may be used to document internal flow control in functions.

D. Files containing the source code shall be delivered, or may be left on the host machine so long as the files and their location are identified, and their significance to the program described, in the documentation.

E. Documentation shall describe error messages and the location in the source code, by page, line number, or other suitable identifier, where the error message is generated.

It is the intent of the parties that documentation be written so persons reasonably proficient in the use of the program language involved can efficiently use the documentation to understand the program structure, iterative and other control techniques, and decipher error messages should they occur. Within the rights granted elsewhere in this contract, the contractor warrants that the delivered software will be sufficiently descriptive to enable maintenance and modification of the software to permit change to addresses and telephone numbers in computer generated documentation, addition of fields to the database, revisions of report formats, including breakpoints and summary computations, _____.

Contract clauses can give rights in data, documents, and software, but if you haven't ordered the documents, data, or software in the contract, you may have "lots of rights to nothing." One alternative is to reference an Exhibit defining the requirements for data or document delivery. Alternatively, you can specify the content requirements in the contract itself, as has been done in this model software documentation clause. One caveat: before using this

provision, consult with a software programming expert to see if there are better ways, such as use of national standards, with which to specify the requirements for software documentation.

5. Confidentiality of Records

A. [The contractor is hereby designated an agent of the State for the purposes of the confidentiality requirements of Section 8-72-107, CRS.] In the event the contractor shall obtain access to any records or files of the State in connection with agreement, or in connection with the performance of its obligations under this agreement, the contractor shall keep such records and information confidential and shall comply with [Section 8-72-107, CRS, and all other] laws and regulations concerning the confidentiality of such records to the same extent as such laws and regulations apply to the State. [The contractor shall notify its employees that they are subject to the confidentiality requirements as set forth above, and shall provide each employee with a written explanation of the confidentiality requirements before the employee is permitted access to confidential data.]

Under Section 8-72-107, CRS, (1973), the Division of Employment is permitted to give access to its employment records to other governmental agencies and agents of the division "designated as such in writing." This provision imposes on such parties the same confidentiality requirements to which employees of the division are subject. <u>Only the Division of Employment may designate agents for access to confidential employment records</u>.

If the contractor will have access to confidential data other than employment-related information controlled by the State Department of Labor and Employment, use a variation on the above paragraph which removes the statutory citations and references to DOLE, and substitute a requirement that such data will be held confidential unless it is already in the public domain or its release is approved in writing by the State. <u>Eliminate the first sentence regarding agency unless</u> the statute you are referring to expressly permits the granting of agency status to others.

Where it is anticipated that more than a few of the contractor's personnel will be dealing with confidential data, it is usually a good idea to require the contractor to provide each such employee with an explanation of the confidentiality requirements, using a clause similar to the optional sentence at the end of the clause.

B. Except as required by law, the State will not disclose to third persons, other than contractors or consultants of the State whose performance of services require disclosure, any information marked as “confidential” or “proprietary” or otherwise marked as agreed by the parties. Except as otherwise agreed, “confidential” or “proprietary” information of the contractor which may be marked is information relating to its research, development, trade secrets, business affairs, internal operations and management procedures and like information of its customers, clients, or affiliates, but does not include information lawfully obtained from third parties, information in the public domain, exhibits, attachments, or appendices to the contract, or information required to be delivered to the State pursuant to the terms of this contract. With respect to any such disclosure to other contractors or consultants of the State, the State

agrees to inform them concerning the restrictions on disclosure and include suitable nondisclosure provisions in their agreements. Nothing herein is intended or shall operate as a waiver of any applicable law governing disclosure of records, including the Colorado Open Records Act (Section 24-72-101. CRS). The State agrees to provide the contractor with prompt written notice of requests for disclosure under such laws of contract information within the scope of this clause.

6. Applicable Law

The contractor shall at all times during the execution of this contract strictly adhere to, and comply with, all applicable Federal and State laws, and their implementing regulations, as they currently exist and may hereafter be amended, which are incorporated herein by this reference as terms and conditions of this contract.

7. Licenses, Permits, and Responsibilities

Contractor certifies that, at the time of entering into this contract, it has currently in effect all necessary licenses, certifications, approvals, insurance, permits, etc. required to properly perform the services and/or deliver the supplies covered by this contract. Contractor warrants that it will maintain all necessary licenses, certifications, approvals, insurance, permits, etc. required to properly perform this contract, without reimbursement by the State or other adjustment in contract price. Additionally, all employees of contractor performing services under this contract shall hold the required licenses or certification, if any, to perform their responsibilities. Contractor further certifies that, if it is a foreign corporation or other entity, it currently has obtained and shall maintain any applicable certificate of authority to do business in the State of Colorado and has designated a registered agent in Colorado to accept service of process. Any revocation, withdrawal or non-renewable of necessary licenses, certifications, approvals, insurance, permits, etc. required for contractor to properly perform this contract, shall be grounds for termination of this contract by the State for default.

8. Availability of Funds – Lease/Purchase and Installment Purchases

A. The parties hereto understand and agree this contract is contingent upon continuing availability of funds as provided in Special Provision Two (2) hereinafter, and that the State is prohibited by law from making fiscal commitments beyond the term of its current fiscal period. The State may terminate this contract as provided in the following paragraphs.

B. The State has reason to believe that sufficient funds will be available for the full term of the contract. Where, for reasons beyond State's control, its funding entity does not allocate funds for any fiscal period beyond the one in which this contract is entered into, or beyond a succeeding fiscal period, where State has exhausted efforts to obtain funds legally available for future fiscal periods, and where such failure to obtain funds does not result from any act or failure to act on the part of State, State will not be obligated to make the payments remaining beyond State's then current fiscal period, nor shall State be liable for any penalty therefore. In that event, State shall notify contractor of such non-allocation of funds by sending written notice thereof to the contractor thirty (30) days prior to the effective date of termination.

C. To supplement the provisions of Special Provision paragraph 2 of this contract regarding fund availability, and to make certain the understanding of the parties because the contract will

extend beyond the current fiscal year, State and contractor understand and intend that the obligation of the State to pay the annual charges hereunder constitutes a current expense of the State payable exclusively from State's funds and shall not in any way be construed to be a general obligation indebtedness, or other multiple fiscal year financial obligation whatsoever, of the State of Colorado or any agency or department thereof, within the meaning of any provision of sections 1, 2, 3, 4 or 5 of article XI, Section 20 of article X, of the Colorado Constitution, or any other constitutional or statutory limitation or requirement applicable to the State concerning the creation of indebtedness. Neither the State, nor the contractor on its behalf, has pledged the full faith and credit of the State, or any agency or department thereof, to the payment of the charges hereunder, and this contract shall not directly or contingently obligate the State, or any agency or department thereof, to apply money from, or levy or pledge any form of taxation to, the payment of the annual charges.

9. State-furnished Property

A. The State shall deliver to the contractor, for use in connection with and under the terms of this contract, the State-furnished property described in this contract together with any related data and information that the contractor may request and is reasonably required for the intended use of the property (hereinafter referred to as "State-furnished property").

B. If State-furnished property is received by the contractor in a condition not suitable for the intended use, the contractor shall, upon receipt of it, notify the State, detailing the facts, and, as directed by the State and at State expense, either repair, modify, return, or otherwise dispose of the property. After completing the directed action and upon written request of the contractor, the State shall make an equitable adjustment as provided in paragraph (f) of this clause.

C. If damage occurs to State property, the risk of which has been assumed by the State under this contract, the State shall replace the items or the contractor shall make such repairs as the State directs. However, if the contractor cannot effect such repairs within the time required, the contractor shall dispose of the property as directed by State. When any property for which the State is responsible is replaced or repaired, the State shall make an equitable adjustment in accordance with paragraph (f) of this clause.

D. The State and all its designees shall have access at all reasonable times to the premises in which any State property is located for the purpose of inspecting the State property. The contractor shall maintain an inventory and accountability system acceptable to the State, and mark or tag the property in accordance with State procedures.

E. Risk of loss. Unless otherwise provided in this contract, the contractor assumes the risk of, and shall be responsible for, any loss or destruction of, or damage to, State property upon its delivery to the contractor. However, the contractor is not responsible for reasonable wear and tear to State property or for State property properly consumed in performing this contract.

F. Equitable adjustment. When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes clause. When appropriate, the State may initiate an equitable adjustment in favor of the State. The right to an equitable adjustment shall be the contractor's exclusive remedy. The State shall not be liable to suit for breach of contract for:

1) Any delay in delivery of State-furnished property;

2) Delivery of State-furnished property in a condition not suitable for its intended use;

3) A decrease in or substitution of State-furnished property; or

4) Failure to repair or replace State property for which the State is responsible.

G. Upon completing this contract, or at such earlier dates as may be fixed by the State, the contractor shall submit, in a form acceptable to the State, inventory schedules covering all items of State property (including any resulting scrap) not consumed in performing this contract or delivered to the State. The contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the State property as may be directed or authorized by the State. The net proceeds of any such disposal shall be credited to the contract price or shall be paid to the State as the State directs.

For a discussion of contract management considerations when using State-furnished property, see Chapter 10, Section 3.4.

10. Warranties

Contractor warrants that all supplies furnished under this contract shall be free from defects in materials or workmanship, are installed properly and in accordance with manufacturers recommendations or other industry standards, [will function in a failure-free manner for a period of one year from the date of delivery/installation]. Contractor shall, at its option, repair or replace any supplies that fail to satisfy this warranty during the warranty period. Additionally, contractor agrees to assign to the State all written manufacturer's warranties relating to the supplies and to deliver such written warranties to the customer.

11. Disclaimer of Warranties

THE PARTIES HEREBY EXCLUDE ALL EXPRESS AND IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND THE IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE OF THIS CONTRACT.

This clause would not normally be inserted in a State contract by the agency. However, contractors may insist on exclusion of implied warranties, although you may be able to get a price concession if you agree to the disclaimer. These implied warranties are defined in sections 4-2-314 and 315, CRS.

12. Limitation of Liability

The express remedies provided herein are the State's sole remedies for breach of any and all warranties and for the contractor's liability arising from the supplies, disaster recovery services, or other services provided hereunder, and any other performance by the contractor under or pursuant to this Agreement. In no event shall the contractor's or its suppliers' contractual liability to the State for damages of any nature exceed the total charges payable under this contract, as it may be amended from time to time. The contractor will not have any responsibility for any product or service provided by persons other than the contractor. This limitation of liability provision, and any other limitation or exclusion of damages in this contract, do not limit or exclude the contractor's liability for intellectual property rights infringement or for death or bodily

injury or damage to tangible property arising out of contract performance and caused by the contractor, its employees, agents, or subcontractors.

This is a typical limitation of liability clause often requested by contractors. DO NOT ROUTINELY USE THESE PROVISIONS IN STATE CONTRACTS. In fact, we recommend that you get the advice of counsel when negotiating these clauses. Notice the final exclusion from the clause. It is State policy that exclusion of damages (e.g. consequential damages) and limitations of liability clauses not limit or exclude the contractor's liability for death or bodily injury or damage to tangible property arising out of contract performance by the contractor, its agents, or subcontractors. See, for example, the State Purchasing Director/State Controller's policy on modification to the purchase order form in the Policy Letters Annex to this manual.

13. Stop Work Orders

Order to Stop Work

The procurement officer may, by written order to the contractor, at any time, and without notice to any surety, require the contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period after the order is delivered to the contractor. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, the contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurring of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, as legally extended, the procurement officer shall either:

1) Cancel the stop work order; or

2) Terminate the work covered by such order; or

3) Terminate the contract.

Cancellation or Expiration of the Order

If a stop work order issued under this clause is properly canceled, the contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if:

1) The stop work order results in increased time required for, or in the contractor's cost properly allocable to, the performance of any part of this contract; and

2) The contractor asserts claim for such an adjustment within 30 days after the end of the period of work stoppage.

Termination of Stopped Work

If the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise and such adjustment shall be in accordance with the Price Adjustment Clause of this contract.

14. Liquidated Damages

When the contractor is given notice of delay or nonperformance and fails to cure in the time specified, in addition to any other damages that are applicable, the contractor shall be liable for $_____ [amount to be filled in for each contract] per calendar day from date set for cure until either the purchasing agency reasonably obtains similar supplies or services if the contractor is terminated for default, or until the contractor provides the supplies or services if the contractor is not terminated for default. To the extent that the contractor's delay or nonperformance is excused under the [Excuse for Nonperformance] [Delayed Performance] [Force Majeure] paragraph of the Termination for Default Clause of this contract, liquidated damages shall not be due the purchasing agency. [The parties agree that the damages from breach of this contract are difficult to prove or estimate, and the amount of liquidated damages specified herein represents a reasonable estimation of damages that will be suffered by the State from late performance, including costs of additional inspection and oversight, lost opportunity for additional efficiencies that would have attended on-time completion of performance, . . .] Assessment of liquidated damages shall not be exclusive of or in any way limit remedies available to the State at law or equity for contractor breach.

A liquidated damages provision is a contract clause that gives one party the right to withhold payment at an agreed rate per calendar day if the specified performance is late. This right does not exist unless it is in the contract. Use of these clauses is common in construction contracts. They are not commonly used in supply and most service contracts.

Damages for breach [i.e. late performance] by either party can be liquidated in the contract, but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty (emphasis added). See Section 4-2-718, CRS.

Place a memorandum in the contract file explaining the rationale for the liquidated damages amount, e.g. the rental costs of substitute facilities or equipment, the labor costs of continued oversight or inspection when services contracts are delayed, lost opportunity for improved efficiencies because of late or unsatisfactory performance, or other specific elements of costs that might have been avoided had performance been completed on-time.

15. Intellectual Property Indemnification

A. Contractor shall defend, at its sole expense, any claim(s) or suit(s) brought against the State alleging that the use by the State of any product(s), or any part thereof, supplied by contractor under this agreement constitutes infringement of any patent, copyright, trademark, or other proprietary rights, provided that the State gives contractor written notice within twenty (20) days of receipt by the State of such notice of such claim or suit, provides assistance and cooperation to contractor in connection with such action, and contractor has sole authority to defend or settle the claim. Contractor shall consult the State regarding such defense and the State may, at its discretion and expense, participate in any defense. Should the State not choose to participate, contractor shall keep the State advised of any settlement or defense.

B. Contractor shall have liability for all such claims or suits, except as expressly provided herein, and shall indemnify the State for all liability incurred by the State as a result of such infringement. Contractor shall pay all reasonable out-of-pocket costs and expenses, and damages finally awarded by a court of competent jurisdiction, awarded or agreed to by contractor regarding such claims or suits.

C. If the product(s), or any part thereof, become the subject of any claim, suit or proceeding for infringement of any patent, trademark or copyright, or in the event of any adjudication that the product(s), or any part thereof, infringes any patent, trademark or copyright, or if the sub-license or use of the product(s), or any part thereof, is enjoined, contractor, after consultation with the State, shall do one of the following at contractor's expense: (i) produce for the State the right under such patent, trademark or copyright to use or sub-license, as appropriate, the product or such part thereof: or (ii) replace the product(s), or part thereof, with other suitable products or parts conforming to the original license and State specifications; or (iii) suitably modify the products, or part thereof. Except as otherwise expressly provided herein, contractor shall not be liable for any costs or expenses incurred without its prior written authorization.

D. Contractor shall have no obligation to defend against or to pay any costs, damages or attorney's fees with respect to any claim based upon: (i) the use of an altered release if contractor had not consented to the alteration, or (ii) the combination, operation or use of the product(s) with programs or data which were not furnished by contractor, if such infringement would have been avoided if the programs or data furnished by persons or entities other than contractor had not been combined, operated or used with the product(s), or (iii) the use of product(s) on or in connection with equipment or software not permitted under this contract if such infringement would have been avoided by not using the product(s) on or in connection with such other equipment or software.

16. Litigation Reporting

Unless otherwise provided, the contractor shall promptly notify the State in the event that the contractor learns of any actual litigation in which it is a party defendant. The contractor, within ten (10) days after being served with a summons, complaint, or other pleading in a case which involves services provided under this contract and which has been filed in any Federal or State court or administrative agency, shall deliver copies of such document to the representative designated in this contract, or in absence of such designation, to the chief executive officer of the department, agency, or institution executing this contract on behalf of the State.

The Executive Director of the contracting agency, as well as the Attorney General's Office, needs to know if the Agency is being sued, or even if the party with which the State is contracting is being sued.

17. Venue

The parties agree that venue for any action related to performance of this contract shall be in the City and County of Denver, Colorado.

Paragraph 7 of the Special Provisions makes Colorado law the governing law under the contract. This clause requires any court actions to be filed in the City and County of Denver, especially important when you are dealing with corporations whose principal place of business is outside the State of Colorado.

18. Changes (Other than Grants/Subgrants)

By a written order, at any time, and without notice to any surety, the procurement officer may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

1) [Drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the purchasing agency in accordance therewith] [description of services to be performed];

2) Method of shipment or packing [time of performance of services]; or

3) Place of delivery or performance of services.

Adjustments of Price or Time or Performance

If any such change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

Failure of the parties to agree to an adjustment

Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the purchasing agency promptly and duly makes such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of the time for completion.

Time Period for Claim

Within 30 days after receipt of a written change order under the Change Order paragraph of this clause, unless such period is extended by the procurement officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment.

Claim Barred After Final Payment

No claim by the contractor for an adjustment hereunder shall be allowed if asserted after final payment under this contract.

Bilateral Change Order Letters

Bilateral changes within the general scope of the contract may be executed using the simplified change order letter process described in this paragraph and the model letter attached as exhibit _____ for any of the following reasons:

1) Where the agreed changes result in no adjustment to the [price] [ceiling cost], delivery schedule, or other terms and conditions of the contract. The change letter will contain a mutual release of claims for adjustment of price, cost, time for performance, or other terms and conditions, whether based on costs of changed work or direct or indirect impacts on unchanged work, as a result of the change; or

2) Where the changes to the contract are priced based on the unit prices to be paid for the goods or services in [Exhibit ___] [Attachment ___] of the contract; or

3) Where the changes to the contract are priced based on established catalog prices generally extended to the public, or on prices or rates set by law or regulation;

Written bilateral change order letter

The written bilateral change order letter will be substantially in the form at Exhibit ____, must bear the signature of the authorized agency official, the contractor, and--except where the parties agree on the face of the change order that no price/cost, schedule, or other contract adjustments are due the contractor--the State Controller or his designee. The change order letter shall refer to the basic contract and include a detailed description of the changes to the contract, the price or cost ceiling adjustment, the effective date, and (where applicable) the time within which the changed work must be done. Other bilateral modifications to this contract not within the scope of this paragraph must be executed by formal amendment to the contract, approved in accordance with State law.

Without a "changes" clause, the right of the State to direct changes in statement/scope of work or specifications is dependent on the willingness of the contractor to agree to amend the contract. These "changes" clauses give the State a limited right to direct changes to the contract that are "within the scope of the contract." Of course, the contractor would be entitled to a price adjustment or extension in performance time if such a change is ordered. Because the State would be committing to a payment of money by exercising this right, use of a unilateral change would require review by the Attorney General and approval by the Controller.

1. These sample provisions give the State the right to direct changes, and also set up an informal "bilateral" (meaning both parties agree and sign the letter) change procedure that does not have to be treated as a formal contract amendment. So long as the bilateral change satisfies the requirements in the Controller's policy (included in the Policy Letters Annex), these letters do not have to be reviewed by the Attorney General. One key restriction, one that may limit the use of this modification procedure in many commercial contracts, is a requirement that the changes be pre-priced. By Controller policy, bilateral change order letters (not requiring Attorney General review) options are permitted only if the changed

prices are pre-priced in the contract, based on established catalog prices generally extended to the public, or otherwise set by law or regulation.

2. Include the model change order letter on the next page as an exhibit to the contract.

Sample Bilateral Change Order Letter

Exhibit _____

Date: _____

State Fiscal Year 1997-98

Bilateral Change Order Letter No. _____

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the undersigned agree that the supplies/services affected by this change letter are modified as follows:

Services/Supplies

Exhibit A, Schedule of Equipment for Maintenance, is amended by adding two (2) 486 Central Processing Units, serial numbers _____ and _____.

Price/Cost

The maximum amount payable by the State for _____[service] [supply]_____ in Paragraph _____ is (increased/decreased) by ($ amount of change) to a new total of ($ _____) based on the unit pricing schedule at Exhibit____. The first sentence in Paragraph____ is hereby modified accordingly;

OR

The parties agree that the changes made herein are "no cost" changes and shall not be the basis for claims for adjustment to [price] [cost ceiling], delivery schedule, or other terms or conditions of the contract. The parties waive and release each other from any claims or demands for adjustment to the contract, including but not limited to price, cost, and schedule, whether based on costs of changed work or direct or indirect impacts on unchanged work. Controller approval of this "no cost" change is not required. ____ contractor initials. ____ Agency initials.

This change to the contract is intended to be effective as of _____, but, except with respect to "no cost" changes identified above, in no event shall it be deemed valid until it shall have been approved by the State Controller or such assistant as he may designate.

Please sign, date, and return all copies of this letter on or before _____ 19____.

Contractor Name:	State of Colorado: Bill Owens, Governor
By: _____ Name _____ Title _____	By: _____ For the Executive Director Colorado Department of _____
APPROVALS:	FOR THE STATE CONTROLLER Arthur L. Barnhart
By: _____ For _____ Division	By: _____ State Controller or Designee

19. Changes (Grants/Subgrants)

The State may prospectively increase or decrease the amount payable under this contract through a "Change Order Letter," approved by the State Controller or his designee, in the form attached hereto as Exhibit __, subject to the following conditions:

A. The Change Order Letter ("Letter") shall include the following:

1) Identification of contract by contract number and affected paragraph number(s);

2) Types of services or programs increased or decreased and the new level of each service or program;

3) Amount of the increase or decrease in the level of funding for each service or program and the total;

4) Intended effective date of the funding change;

5) A provision stating that the change shall not be valid until approved by the State Controller or such assistant as he may designate;

B. Upon proper execution and approval, such letter shall become an amendment to this contract and, except for the general terms and conditions and Special Provisions of the contract, the letter shall supersede the contract in the event of a conflict between the two. It is understood and agreed that the letter may be used only for increased or decreased funding, and corresponding adjustments to service levels and any budget line items.

C. If the contractor agrees to and accepts the change, the contractor shall execute and return the letter to the State by the date indicated in the letter. In the event the contractor does not accept the change, or fails to timely return the executed letter, the State may, upon notice to contractor, terminate this contract effective at any time after twenty (20) days following the return deadline specified in the letter. Such notice shall specify the effective date of termination. In the event of termination, the parties shall not be relieved of their obligations up to the effective date of termination.

D. Increases or decreases in the level of contractual funding made through the letter process during the term of this contract may be made under the following circumstances:

1) If necessary to fully utilize Colorado State appropriations and/or non-appropriated federal grant awards.

2) Adjustments to reflect current year expenditures.

3) Supplemental appropriations or non-appropriated federal funding changes resulting in an increase or decrease in the amounts originally budgeted and available for the purposes of this program.

4) Closure of programs and/or termination of related contracts.

5) Delay or difficulty in implementing new programs or services.

6) Other special circumstances as deemed appropriate by the State.

1. By State Controller policy (included in the Policy Letter Annex to this manual), use of this changes mechanism--which does not contemplate pre-priced rates for the changes--is only permitted for grant contracts with nonprofit organizations and political subdivisions.

2. Attach the model change order letter to the original contract as an exhibit when routing the original contract for approval.

Sample Change Order Letter In Grant/Subgrant Contracts

Exhibit _____

Date: _____

State Fiscal Year 1997-98

Change Order Letter No. _____

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ Division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the undersigned agree that the maximum amount payable by the State for non-Medicaid eligible services in Paragraph 24 is (increased/decreased) by ($ amount of change) to a new total of ($_____). The first sentence in Paragraph 24 is hereby modified accordingly.

The services affected by this (increased/decreased) are modified as follows:

The Budget is revised accordingly, as set forth in the Revised Budget, Attachment E (1,2,3), attached and incorporated herein by reference.

This amendment to the contract is intended to be effective as of _____, but in no event shall it be deemed valid until it shall have been approved by the State Controller or such assistant as he may designate.

Please sign, date, and return all copies of this letter on or before _____ 19____.

Contractor Name:	State of Colorado: Bill Owens, Governor
By: _____ Name _____ Title _____	By: _____ For the Executive Director Colorado Department of _____
APPROVALS:	FOR THE STATE CONTROLLER Arthur L. Barnhart
By: _____ For _____ Division	By: _____ State Controller or Designee

20. Options (Performance Extension)

The State may require continued performance for a period of [one year] of any services within the limits and at the rates specified in the contract. The State may exercise the option by written notice to the contractor deposited in the mail before the end of the performance period of the contract using a form substantially equivalent to Exhibit ___. [The State shall give the contractor ____ days preliminary written notice of its intent to execute the option. Preliminary notice does not commit the State to an extension.] If the State exercises this option, the extended contract shall be considered to include this option provision. The total duration of this contract, including the exercise of any options under this clause, shall not exceed five (5) years. Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

Multiyear procurements may be contracted for in several ways. A contract for one year with the option to "renew" or "extend" has the effect of renewing or extending contract performance beyond the original contract performance period, but it requires an affirmative act by the State to exercise the option and bind the contractor to performance in future years or option periods. If the State fails to follow the contract procedure for exercising the option, the State loses the right to require performance beyond the original contract term.

By contrast, a multiyear contract can be written that obligates the State to pay for contract performance, subject only to availability of funds, over consecutive fiscal years. So long as the legislature appropriates the money, the State is obligated to pay the contractor for continued performance. Theoretically, this kind of a multiyear contract does not require an option provision. However, by agreeing to multiyear contracts, which typically do not include termination for convenience provisions, the State forfeits an important right: the right to make a discretionary decision about whether to permit the contractor to continue performance for an additional period of time. The choice between an "extendible" or "renewable" contract, versus a multiyear contract subject only to appropriation of funds, must be carefully considered. For example, what is the State getting in return for waiving its rights to discontinue performance regardless of funding availability? If you choose a multiyear contract, because the State is getting something of value in return, or there is no other commercially feasible way to structure the contract, normally an annual option exercise letter would not be necessary.

These model provisions are written as "options," preserving the right of the State to decide whether to continue performance by a contractor. Further, these options can be written to permit, not only more performance time, but also more services or supplies. So long as these options are written to comply with the Controller's policy on change orders and modifications (included in the Policy Letters Annex to this manual), these letters do not have to be reviewed by the Attorney General, although they still require approval by the Controller or his designee.

1. By Controller policy, options are permitted only if the option prices for additional services or supplies, or contract extensions, are pre-priced in the contract, based on established catalog prices generally extended to the public, or otherwise set by law or regulation.

2. Attach the following model option letter as an exhibit to the contract.

<u>Sample Option Exercise Letter</u>

Sample Option Exercise Letter

Exhibit _____

Date: _____

TO: [Contractor]
[Address]

SUBJ: Option Exercise Letter

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the State hereby exercises the option for

[an additional one year's performance period at the (cost) (price) specified in paragraph ___.]

The maximum amount payable by the State in Paragraph ___ is (increased/decreased) by ($ amount of change) to a new total of ($_____). The first sentence in Paragraph ___ is hereby modified accordingly.

State of Colorado:
Bill Owens, Governor

For the Executive Director
Colorado Department of _____

_____
Title

APPROVALS:

By: _____
For _____ Division

FOR THE STATE CONTROLLER
Arthur Barnhart

By: _____
State Controller or Designee

21. Options (Additional Services/Supplies)

The State may increase the quantity of supplies [services] called for in [paragraph __] [the schedule] [Exhibit ___] at the unit price specified therein. The State may exercise the option by written notice to the contractor deposited in the mail [within ____ days of execution of the contract] [not later than 90 days prior to the expiration of the contract, including any of its extension terms,] using a form substantially equivalent to Exhibit ___. [Delivery] [performance] of the added [items] [services] shall continue at the same rate and under the same terms as the like items called for under the contract. Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

1. By Controller policy, options are permitted only if the option prices for additional services or supplies, or contract extensions, are pre-priced in the contract, based on established catalog prices, or otherwise set by law or regulation.

2. Attach the following model option letter as an exhibit to the contract.

Sample Option Exercise Letter

Exhibit _____

Date: _____

TO: [Contractor]
[Address]

SUBJ: Option Exercise Letter

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the State hereby exercises the option for

[maintenance services for three additional 486 CPUs at the prices specified in Exhibit ___.]; or

The maximum amount payable by the State in Paragraph ___ is (increased/decreased) by ($ amount of change) to a new total of ($_____). The first sentence in Paragraph ___ is hereby modified accordingly.

State of Colorado:
Bill Owens, Governor

For the Executive Director
Colorado Department of _____

_____
Title

APPROVALS:

By: _____
For _____ Division

FOR THE STATE CONTROLLER
Arthur L. Barnhart

By: _____
State Controller or Designee

22. Indefinite Quantity Contract

This is an indefinite quantity contract for the [services] [supplies] specified herein. Any estimates of quantities of supplies or services in the solicitation or otherwise made known to the contractor are estimates only and not purchased by this contract. The State will order, and the contractor agrees to perform, services [for maintenance of ____ personal computers during the contract period] [for the minimum quantity specified in the solicitation]. The per unit price for maintenance services is [$_____ per machine per visit] [specified in Exhibit ____] plus the cost of materials, not exceeding $_____ unless otherwise approved in advance by the State. The State has the right, through the representative designated in paragraph ____ of this contract, to order service for additional machines at [the same rate] [rate specified in Exhibit ___], up to a maximum quantity of ____ service calls, in accordance with the ordering provisions of this contract during its period of performance. [The contractor is not obligated to honor maintenance services orders in increments of less than ____ machines per order, greater than _____ machines per order, or a combination of orders within _____ days that exceeds _____ machines.] All orders are subject to the terms of this contract.

Funds are available and encumbered in the amount of _____. The contractor shall not accept any orders which create a financial obligation of the State exceeding the amount of available funds specified herein. [Additionally, the contractor shall notify the representative when State commitments, paid and unpaid, are within 10% of the amount of funds available.] The State is not liable beyond the amount of funds specified as available in this paragraph.

The State may from time to time, in a form substantially equivalent to that in Exhibit _____, and bearing the approval of the State Controller or his designee, make more funds available on this contract. The funds availability letter shall not be deemed valid until it shall have been approved by the State Controller or such assistant as he may designate.

Indefinite Quantity and Requirements contracts are two types of a broad category of contracts known as "indefinite delivery" contracts. These kinds of contracts obligate the contractor to satisfy contract requirements that are not clear in terms of how much is needed.

A "requirements contract" defines the obligation in terms of all requirements for a service or supply that the State may have. In such an agreement, the consideration for the contractor's promise to satisfy all State requirements is the State's promise--not only to pay at specified rates--but also to place all of its orders to satisfy a requirement through this particular contractor. An example would be a State contract with XYZ Computer Maintenance, Inc. to order all department requirements for computer maintenance through XYZ at maintenance prices/rates set in the contract. The State would usually get better prices in this kind of contact. The "downside" is: the State would breach the contract if the department contracted with another vendor for these services during the life of the contract. Consult counsel for help in language to make a contract a requirements contract.

The other kind of indefinite delivery contract, and the kind that the model provisions are based on, is the "indefinite quantity" contract. This gives the department or agency flexibility to change the amount of services at a specified price or rate, without promising to satisfy all of its requirements through one vendor. In this kind of a contract, in order to make it binding on the contractor, a commercially reasonable (not nominal), minimum order is specified in

the contract. Usually the contract also has a ceiling amount that represents the maximum order. Often, the contract also contains ordering limits, such as a minimum order or maximum order that could be placed at any one time. In this kind of contract, the State has no obligation to order any quantities in excess of the minimum. In the computer maintenance example, the contract might order a minimum of 30 service calls in a fiscal year, with a maximum order available of 100 service calls, all at $50.00 per call. The contract also might provide that the contractor would not be required to honor more than 5 calls in any single day.

The purpose of the attached funding letter is to notify the contractor how much funding has been made available to satisfy orders within the minimum and maximum quantities specified in the contract. In the computer maintenance example, at the time of execution $1,500 would be encumbered initially to cover the minimum quantity. Periodically during performance, more money would be encumbered to cover estimated orders.

1. Attach the following model funding letter to the exhibit portion of the contract.

Indefinite Quantity Contract Funding Letter

Exhibit _____

Date: _____

TO: [Contractor]

SUBJ: Indefinite Quantity Funding Letter No. _____

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the undersigned commits the following funds to the contract:

The amount of funds available and specified in paragraph ____ is (increased/decreased) by ($ amount of change) to a new total funds available of ($_____) to satisfy orders under the contract. Paragraph ____ is hereby modified accordingly.

This funding letter does not constitute an order for services under this contract.

This funding letter is effective upon approval by the State Controller or such assistant as he may designate.

State of Colorado:
Bill Owens, Governor

By: _____
For the Executive Director
Department of _____

APPROVALS:

By: _____
For _____ Division

FOR THE STATE CONTROLLER
Arthur L. Barnhart

By: _____
State Controller or Designee

23. Task Order Contract

Tasks will be defined, negotiated, and ordered from time to time by agreement of the parties based on the rates in Appendix ___, such task orders hereinafter referred to as "orders". Amendments to terms and conditions, the ceiling amounts specified herein for task orders, or other provisions of the contract other than as specified in this paragraph shall be by formal amendment processed and executed in compliance with the Fiscal Rules and signed by the State Controller or his designee. Orders processed in accordance with this paragraph to add work shall occur as follows:

A. If the State has need of services, and the contractor agrees to provide those services, the State will provide a definition of the requirement to the contractor. The contractor will propose a [price] [cost ceiling] for the task using the rates agreed to and attached as Appendix ___ [attachment ___ to the contractor's proposal]. The proposal shall include the estimated number of hours, material costs, and amount of other elements of cost fixed by the parties in the rates attached as Appendix ____, as well as the proposed time for performance, in a form acceptable to the State.

B. Upon negotiation and agreement by the parties about the scope of the task, the [price] [cost ceiling], and the time for performance, the task order letter attached as Appendix ____ shall be prepared and signed by the parties.

C. Performance of the work, and payment for that work, shall be governed by the standards, procedures, and terms set forth in this contract. Upon negotiation and acceptance of the task order, the contractor warrants that performance will be successfully completed within the time and [price] [cost ceiling] identified in the task order. The State's financial commitment memorialized by the task order letter shall not be effective until signed by the Controller or such assistant as he may designate.

D. The cumulative "not to exceed" amount for all additive tasks under this paragraph shall be $50,000. The State's financial obligation is limited by this amount, and the contractor shall accept no orders which result in a cumulative contract value which exceeds the "not to exceed" value. Amendments to the "not to exceed" amount, and any other modification or amendment to the terms and conditions of this contract other than as specified in this paragraph, must be in writing, executed in accordance with the State Fiscal Rules, and be approved by the Controller or his designee.

Task order contracts let parties agree to the basic terms and conditions of the contract, including the pricing methodology and rates to be used in pricing later tasks. Then, as the specific tasks are identified, the parties negotiate the basic task scope and price. These kinds of contracts are useful when the specific work has not been defined, but a requirement is certain, and the parties are trying to avoid time-consuming contract negotiation every time a task is identified.

The Controller's policy (in the Policy Letter Annex to this manual) allows use of these contracts and execution of specific task orders (without Attorney General review) under certain circumstances. Most notably, the basic pricing rates must be identified in the original contract. Even if your contract cannot satisfy that requirement, though, these contracts can be useful tools in managing complex contracts with changing requirements. If the Controller's policies cannot be satisfied though, tasks would have to be issued using normal amendment procedures.

1. By Controller policy, task order provisions that do not require Attorney General review are permitted only if the rates for negotiating the tasks are pre-priced in the contract, based on established catalog prices generally extended to the public, or otherwise set by law or regulation. Otherwise, tasks must be negotiated and processed as contract amendments.

2. Move the following model task order letter to the exhibit portion of the contract.

TASK ORDER CONTRACTS INTENDED FOR USE BY MULTIPLE AGENCIES AND INSTITUTIONS ARE NOT ALLOWED UNLESS THEY ARE OFFICIAL PRICE AGREEMENTS PROCURED BY THE DIVISION OF PURCHASING. However, these task order provisions are designed to achieve the desired result for individual agency requirements through a master contract approved in accordance with law governing State contracts, which contains a task order or work order format as an exhibit. The contract must state the maximum financial obligation for each year.

Sample Task Order Letter

Exhibit _____

Date: _____

State Fiscal Year 1997-98

Task Order Letter No. _____

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the undersigned agree that the supplies/services affected by this change letter are modified as follows:

Task Order Description

The contractor shall perform the _____ task in accordance with [the following specifications/statement of work] [the contractor's task order proposal dated _____, as amended by amended task order proposal dated _____, both of which are hereby incorporated by reference].

Price/Cost

The [price] [maximum amount payable by the State] for [service] [supply] _____ described above is ($ _____) for a new contract total of ($ _____).

Performance Period.

The contractor will complete the performance in this task order by _____ [date].

This task order is executed pursuant to paragraph ____ of the original contract. The parties agree that all work shall be performed according to the standards, procedures, and terms set forth in the original contract. In the event of any conflict or inconsistency between this amendment and the original contract, such conflict or inconsistency shall be resolved by reference to these documents in the following order: Special Provisions, original contract, attachments/exhibits to the original contract, this task order letter, attachments/exhibits to this task order letter.

This task order is effective as of _____. In no event shall it be deemed valid until it shall have been approved by the State Controller or such assistant as he may designate.

Please sign, date, and return all copies of this letter on or before _____ 19____.

Contractor Name:

By: _____
Name _____
Title _____

APPROVALS:

By: _____
For _____ Division

State of Colorado:
Bill Owens, Governor

By: _____
For the Executive Director
Colorado Department of _____

FOR THE STATE CONTROLLER
Arthur L. Barnhart

By: _____
State Controller or Designee

C. PROVISIONS APPLICABLE TO GRANT-TYPE CONTRACTS

The following clauses are generally applicable to and used in grant-type contracts. However, be aware that although the "Common Rule ("The Common Rule--Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments") specifies requirements generally applicable to grant contracts, m federal programs also levy their own requirements and formats. Clause A6 has optional clauses that incorporate the cost accounting standards that govern federal grants.

1. Federal Funding

This contract is subject to and contingent upon the continuing availability of Federal funds for the purposes hereof. [The parties hereto expressly recognize that the contractor is to be paid, reimbursed, or otherwise compensated with funds provided to the State [by the United States Department of Labor under the Comprehensive Employment and Training Act of 1973, as amended]for the purpose of contracting for the services provided for herein, and therefore, the contractor expressly understands and agrees that all its rights, demands, and claims to compensation arising under this contract are contingent upon receipt of such funds by the State. In the event that such funds or any part thereof are not received by the State, the State may immediately terminate this contract without liability, including liability for termination costs.]

This clause prevents the State from being held accountable for the amount of a contract if the funding is not allocated for some reason. Without this clause, it is unclear whether the State is obligated to pay from other funds where the federal funds are not made available.

This provision limits the liability of the State where particular moneys, such as special grant funds, CETA funds, or developmental grants have been obtained for the purposes of the contract. The State wishes to have no liability beyond the moneys obtained. This would prohibit the contractor from making a claim on general State revenues where an external funding source withholds money or discontinues funding the project. This provision supplements paragraph 2 of the State Special Provisions required by Fiscal Rule.

The language of the paragraph is purposefully general, and can be modified to refer to the particular grant, the funding sources, or to otherwise identify the matter more specifically.

2. Matching Fund Requirements

The contractor shall provide "matching funds," as that term is defined in the [Common Rule][Exhibit A][other provisions of this contract], in the amount of $_____.

3. Legal Authority - Matching Funds

The governing body (City Council; Board of County Commissioners; Corporation Board of Directors; etc.) shall execute and provide to the State a resolution, or other document as appropriate, which: obligates the full amount of the Local Share of the funds required by this contract; and authorizes a specific individual to execute the contract and bind the contractor/grantee to its terms.

This clause supplements the Legal Authority clause. Where the contractor/grantee is required

by the contract to provide matching funds, <u>and especially where the State Agency is contracting for the work instead of merely reimbursing the contractor for the State/Federal share after the contractor has spent its match share in performing the work</u>, State agencies use this provision because the governing body of the contractor has sole authority to obligate/appropriate funds)

4. Maintenance of Records

The contractor shall maintain a complete file of all records, documents, communications, and other written materials which pertain to the operation of programs or the delivery of services under this contract, and shall maintain such records for a period of three (3) years after the date of termination of this contract or final payment hereunder, whichever is later, or for such further period as may be necessary to resolve any matters which may be pending. All such records, documents, communications and other materials shall be the property of the State, and shall be maintained by the contractor in a central location and the contractor shall be custodian on behalf of the State.

Where the contractor is conducting a program which involves substantial service delivery—especially those benefiting third parties--records may have to be kept. Also, where the State retains an audit right, as in cost reimbursement contracting, records must be maintained. Frequently, it is only through examination of the contractor's records that the State is able to determine if the contractor has, in fact, performed its contract obligations. When such a situation is presented in a particular instance, the contractor should be required to keep records.

5. Audit, Inspection of Records, and Monitoring

The contractor shall permit the State, Federal Government, or any other duly authorized agent of a governmental agency to audit, inspect, examine, excerpt, copy and/or transcribe contractor's records during the term of this contract and for a period of three (3) years following termination of this contract or final payment hereunder, whichever is later, to assure compliance with the terms hereof, or to evaluate the contractor's performance hereunder. The contractor shall also permit these same described entities to monitor all activities conducted by the contractor pursuant to the terms of this contract. As the monitoring agency may in its sole discretion deem necessary or appropriate, such monitoring may consist of internal evaluation procedures, examination of program data, special analyses, on-site check, or any other reasonable procedure.

This provision supplements the record-keeping requirement. It is short and general, and can be expanded if circumstances dictate. Your program may have alternative clauses. Note the State's right to monitor the contractor.

6. Federal Examination of Records Clause

Contractor, and its subcontractors and subgrantees, will give the State, the awarding Federal agency, and the Comptroller General of the United States, through any authorized

representatives, access to and the right to examine all records, books, papers, or documents related to the award and contract; and will establish a proper accounting system in accordance with generally accepted accounting standards.

7. Federal Audit Provisions

The Office of Management and Budgets (OMB) Circular No. A-133 Audits of States, Local Governments, and Non-Profit Organizations defines audit requirements under the Single Audit Act of 1996 (Public Law 104-156). All state and local governments and non-profit organizations expending $300,000 or more from all sources (direct or from pass-through entities) are required to comply with the provisions or Circular No. A-133. The Circular also requires pass-through entities to monitor the activities of subrecipients and ensure that subrecipients meet the audit requirements. To identify its pass-through responsibilities, the State of Colorado requires all subrecipients to notify the State when expected or actual expenditures of federal assistance from all sources equal or exceed $300,000.

Confirm that the Cognizant Federal agency has not established a different audit threshold for the program involved. Clause A6 has optional clauses that incorporate the applicable cost accounting standards that govern expenditure of funds under federal grants.

8. Conflict of Interest

The contractor (and subcontractors or subgrantees permitted under the terms of this contract) shall maintain a written code of standards governing the performance of its employees engaged in the award and administration of contracts. No employee, officer or agent of the contractor, subcontractor, or subgrantee shall participate in the selection, or in the award or administration of a contract or subcontract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

1) The employee, officer or agent;
2) Any member of the employee's immediate family;
3) The employee's partner; or
4) An organization which employs, or is about to employ, any of the above,

has a financial or other interest in the firm selected for award. The contractor's, subcontractor's, or subgrantee's officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements.

9. Patent Rights - Federal Funds

If any invention, improvement, or discovery of the contractor/grantee or any of its subcontractors or subgrantees is conceived or first actually reduced to practice in the course of or under this contract work, and if such is patentable, the contractor/grantee shall notify the State immediately and provide a detailed written report. The rights and responsibilities of the contractor/grantee, third party contractors, and the State with respect to such invention, improvement, or discovery will be determined in accordance with applicable federal laws and regulations in existence on the date of execution of this contract which define contractor title, right to elect title, federal

government "march in" rights, and the scope of the federal government's right to a nonexclusive, irrevocable, paid-up license to use the subject invention for its own. The contractor/grantee shall include the requirements of this paragraph in its third party contracts for the performance of the work under this contract.

This clause will not grant the State much of a right in any invention reduced to practice during performance of a federally funded contract. Unless the invention is covered by the limited circumstances of a "shop right," the State would likely have little interest in the invention unless an assignment, license, or other allocation of ownership exists pursuant to contract. This clause is intended to invoke federal rules governing title to inventions, and the federal government's rights in those inventions. In a case in which development is expected to be funded with State funds, contact legal counsel for assistance in drafting necessary contract provisions.

10. Rights In Data and Copyright - Federal Reserved Rights

Except for its own internal use, the contractor/grantee shall not publish or reproduce any data/information, in whole or part, that is recorded in any form or medium whatsoever and that is delivered or specified to be delivered under this contract, nor may it authorize or permit others to do so, without the written consent of the federal government, through the State, until such time as the federal government may have released such data/information to the public.

As authorized by 49 CFR 18.34, the federal government, through the State, reserves a royalty free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize the State and others to use: a) any work developed under this contract or a resulting third party contract irrespective of whether or it is copyrighted; and b) any rights of copyright to which a contractor/grantee, sub-recipient, or third party contractor purchases ownership with federal assistance.

11. Grant Assurances

If this contract involves the expenditure of federal funds, the contractor shall at all times during the execution of this contract strictly adhere to and comply with all applicable federal laws and regulations, as they currently exist and may hereafter be amended, which are incorporated herein by this reference as terms and conditions of this contract. The contractor shall also require compliance with these statutes and regulations in subgrant agreements permitted under this contract. The federal laws and regulations include:

- The "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (Common Rule), at 49 Code of Federal Regulations, Part 18.

- Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Chapter 60) (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees).

- The Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3) (All contracts and subgrants for construction or repair).

- The Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5) (Construction contracts in excess of $2,000 awarded by grantees and subgrantees when required by Federal grant program legislation. This act requires that all

laborers and mechanics employed by contractors or sub-contractors that work on construction projects financed by federal assistance must be paid wages not less than those established for the locality of the project by the Secretary of Labor).

- Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2,000, and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers).

- Standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857(h), Section 508 of the Clean Water Act (33 U.S.C. 1368). Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15) (contracts, subcontracts, and subgrants of amounts in excess of $100,000).

- Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

- Office of Management and Budget Circulars A-87, A-21 or A-122, and A-102 or A-110, whichever is applicable.

- The Hatch Act (5 USC 1501-1508) and Public Law 95-454, Section 4728. These statutes state that federal funds cannot be used for partisan political purposes of any kind by any person or organization involved in the administration of federally-assisted programs.

- USC 6101 et seq., 42 USC 2000d, 29 USC 794, and implementing regulation, 45 C.F.R. Part 80 et. seq.. These acts require that no person shall, on the grounds of race, color, national origin, age, or handicap, be excluded from participation in or be subjected to discrimination in any program or activity funded, in whole or part, by federal funds;

- The Americans with Disabilities Act (Public Law 101-336; 42 USC 12101, 12102, 12111-12117, 12131-12134, 12141-12150, 12161-12165, 12181-12189, 12201-12213, 47 USC 225 and 47 USC 611.

- The Uniform Relocation Assistance and Real Property Acquisition Policies Act, as amended (Public Law 91-646, as amended and Public Law 100-17, 101 Stat. 246-256). (If the contractor is acquiring real property and displacing households or businesses in the performance of this contract.)

- The Drug-Free Workplace Act (Public Law 100-690 Title V, subtitle D, 41 USC 701 et seq.).

- The Age Discrimination Act of 1975, 42 U.S.C. Sections 6101 et. seq. and its implementing regulation, 45 C.F.R. Part 91;

- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended, and implementing regulation 45 C.F.R. Part 84.

These grant assurance provisions were taken from the Department of Transportation model provisions. You should check your sister federal agency for required assurances.

12. Federal Certifications

Suspension and Debarment

Certification Regarding Debarment, Suspension, Ineligibility
And
Voluntary Exclusion-Lower Tier Covered Transaction

Instructions for Certifications

1. By signing and submitting its proposal and signing this contract, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

4. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted or with whom this contract is made for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting its proposal and signing this contract that should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal and signing this contract that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transaction.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may purse available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility an Voluntary Exclusion-Lower Tier Covered Transactions

1. The prospective lower tier participant certifies, by submission of this proposal and execution of this contract, that neither it nor its principals is presently declared ineligible, or voluntarily excluded from participation in this transaction by an Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to its proposal.

Certification Regarding Drug-Free Workplace Requirements

Instructions for Certifications

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant and executes the contract. If it is later

determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees that are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

Drug-Free Workplace Certifications

Alternate I. (Grantees Other Than Individuals)

A. The grantee/contractor certifies that it will or will continue to provide a drug-free workplace by:

1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition:

2. Establishing an ongoing drug-free awareness program to inform employees about-

   a) The dangers of drug abuse in the workplace;
   b) The grantee's policy of maintaining a drug-free workplace;
   c) Any available drug counseling, rehabilitation, and employee assistance programs; and

d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

3. Making it a requirement that each employee to be engaged in the performance of the grant/contract be given a copy of the statement required by paragraph 1;

4. Notifying the employee in the statement required by paragraph 1 that, as a condition of employment under the grant/contract, the employee will:

   a) Abide by the terms of the statement; and
   b) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

5. Notifying the agency in writing, within ten calendar days after receiving notice under paragraph 4(b) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant/contract activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant/contract;

6. Taking one of the following actions, within 30 calendar days of receiving notice under paragraph 4(b), with respect to any employee who is so convicted:

   (a) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or
   (b) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

7. Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs 1,2,3,4,5, and 6.

B. The grantee/contractor may insert in the space provided below the site(s) for the performance of work done in connection with this grant/contract:

_____

_____

_____

_____

Alternate II. (Grantees Who Are Individuals)

1. The grantee/contractor certifies that, as a condition of the grant/contract, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant/contractor;

2. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant/contract activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant/contract.

Certification Regarding Lobbying

(Certification for Contracts, Grants, Loans, and Cooperative Agreements)

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an office or employee of any agency, a Member of Congress, an office or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with this commitment providing for the United States to ensure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Tobacco Free Certification

Public Law 103-227, the Pro-Children Act of 1994, requires that smoking not be permitted in any portion of any indoor facility owned or leased or contracted for by any entity and used routinely or regularly for the provision of health, day care, education, or library services to children under the age of 18, if the services are funded by Federal programs either directly or through State or local governments, by Federal grant, contract, loan, or loan guarantee. The law does not apply to children's services provided by private residences, facilities funded solely by Medicare or Medicaid funds, and portions of facilities used for inpatient drug or alcohol treatment. By submitting and signing the application and this contract, the contractor certifies that it will comply with the requirements of the Act. The contractor further agrees that it will require the language of this certification to be included in any subawards which contain provisions for children's services and that all subgrantees shall certify and perform accordingly.

All of these certifications may not be required for particular grant programs, although normally the first three certifications (suspension and debarment, drug free work place, and anti-lobbying) are required. The program administrator should check with the cognizant federal agency, or its implementing regulations, concerning the content of required certifications. Some federal agencies have particular certification forms and instructions for their completion. Some federal agencies have particular certification forms and instructions for their completion. If the certifications are executed as a part of the grant application or proposal submission, they need not also be included in the contract.

D. Special Provisions

These Special Provisions are required by Fiscal Rule 3-1 to be used in every State contract, including grants.

SPECIAL PROVISIONS

CONTROLLER'S APPROVAL

1. This contract shall not be deemed valid until it shall have been approved by the Controller of the State of Colorado or such assistant as he may designate. This provision is applicable to any contract involving the payment of money by the State.

FUND AVAILABILITY

2. Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

BOND REQUIREMENT

3. If this contract involves the payment of more than fifty thousand dollars for the construction, erection, repair, maintenance, or improvement of any building, road, bridge, viaduct, tunnel, excavation or other public work for this State, the Contractor shall, before entering upon the performance of any such work included in this contract, duly execute and deliver to the State official who will sign the contract, a good and sufficient bond or other acceptable surety to be approved by said official in a penal sum not less than one-half of the total amount payable by the terms of this contract. Such bond shall be duly executed by a qualified corporate surety conditioned upon the faithful performance of the contract and in addition, shall provide that if the Contractor or his subcontractors fail to duly pay for any labor, materials, team hire, sustenance, provisions, provendor or other supplies used or consumed by such Contractor or his subcontractor in performance of the work contracted to be done or fails to pay any person who supplies rental machinery, tools, or equipment in the prosecution of the work the surety will pay the same in an amount not exceeding the sum specified in the bond, together with interest at the rate of eight per cent per annum. Unless such bond is executed, delivered and filed, no claim in favor of the Contractor arising under such contract shall be audited, allowed or paid. A certified or cashier's check or a bank money order payable to the Treasurer of the State of Colorado may be accepted in lieu of a bond. This provision is in compliance with CRS 38-26-106.

INDEMNIFICATION

4. To the extent authorized by law, the Contractor shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees incurred as a result of any act or omission by the Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract.

DISCRIMINATION AND AFFIRMATIVE ACTION

5. The Contractor agrees to comply with the letter and spirit of the Colorado Antidiscrimination Act of 1957, as amended, and other applicable law respecting discrimination and unfair employment practices (CRS 24-34-402), and as required by Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975. *Pursuant thereto, the following provisions shall be contained in all State contracts or subcontracts.*

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap, or age. The Contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to the above mentioned characteristics. Such action shall include, but not be limited to the following: employment upgrading, demotion or transfer, recruitment or recruitment advertising; lay-offs or terminations; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth provisions of this non-discrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, State that all qualified applicants will receive consideration for employment without regard to race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap, or age.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, notice to be provided by the contracting officer, advising the labor union or workers' representative of the Contractor's commitment under the Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975, and rules, regulations, and relevant Orders of the Governor.

(d) The Contractor and labor unions will furnish all information and reports required by Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, and by the rules, regulations and Orders of the Governor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the office of the Governor or his designee for purposes of investigation to ascertain compliance with such rules regulations and orders.

(e) A labor organization will not exclude any individual otherwise qualified from full membership rights in such labor organization, or expel any such individual from membership in such labor organization or discriminate against any of its members in the full enjoyment work opportunity because of race, creed, color, sex, national origin, or ancestry.

(f) A labor organization, or the employees or members thereof will not aid, abet, incite, compel or coerce the doing of any act defined in this contract to be discriminatory or obstruct or prevent any person from complying with the provision of this contract or any order issued thereunder; or attempt, either directly or indirectly, to commit any act defined in this contract to be discriminatory.

(g) In the event of the Contractor's non-compliance with the non-discrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the Contractor may be declared ineligible for further State contracts in accordance with procedures, authorized in Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975 and the rules, regulations, or orders promulgated in accordance therewith, and such other sanctions as may be imposed and remedies as may be invoked as provided in Executive Orders, Equal Opportunity and Affirmative Action of April 16, 1975, or by rules, regulations, or orders promulgated in accordance therewith, or as otherwise provided by law.

(h) The Contractor will include the provisions of paragraphs (a) through (h) in every subcontract and subcontractor purchase order unless exempted by rules, regulations, or orders issued pursuant to Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any sub-contracting or purchase order as the contracting agency may direct, as a means of enforcing such provisions, including sanctions for non-compliance; provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation, with the subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the State of Colorado to enter into such litigation to protect the interest of the State of Colorado.

COLORADO LABOR PREFERENCE

6a. Provisions of CRS 8-17-101 & 102 for preference of Colorado labor are applicable to this contract if public works within the State are undertaken hereunder and are financed in whole or in part be State funds.

b. When a construction contract for a public project is to be awarded to a bidder, a resident bidder shall be allowed a preference against a non-resident bidder from a State or foreign country equal to the preference given or required by the State or foreign country in which the non-resident bidder is a resident. If it is determined by the officer responsible for awarding the bid that compliance with this subsection .06 may cause denial of federal funds which would otherwise be available or would otherwise be inconsistent with requirements of Federal law, this subsection shall be suspended, but only to the extent necessary to prevent denial of the moneys or to eliminate the inconsistency with Federal requirements (CRS 8-19-101 and 102).

GENERAL

7. The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this contract. Any provision of this contract whether or not incorporated herein by reference which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall 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 will not invalidate the remainder of this contract to the extent that the contract is capable of execution.

8. At all times during the performance of this contract, the Contractor shall strictly adhere to all applicable federal and State laws, rules, and regulations that have been or may hereafter be established.

9. Pursuant to CRS 24-30-202.4 (as amended), the State Controller may withhold debts owed to State agencies under the vendor offset intercept system for: (a) unpaid child support debt or child support arrearages; (b) unpaid balance of tax, accrued interest, or other charges specified in Article 21, Title 39, CRS; (c) unpaid loans due to the Student Loan Division of the Department of Higher Education; (d) owed amounts required to be paid to the Unemployment Compensation Fund; and (e) other unpaid debts owing to the State or any agency thereof, the amount of which is found to be owing as a result of final agency determination or reduced to judgment as certified by the controller.

10. The signatories aver that they are familiar with CRS 18-8301, et. seq., (Bribery and Corrupt Influences) and CRS 18-8-401, et. seq., (Abuse of Public Office), and that no violation of such provisions is present.

11. The signatories aver that to their knowledge, no State employee has any personal or beneficial interest whatsoever in the service or property described herein:

IN WITNESS WHEREOF, the parties hereto have executed this Contract on the day first above written.

Contractor:

(Full Legal Name)_____

_____

_____

Position (Title)_____

_____

Social Security Number or Federal Identification Number

If Corporation:)
Attest (Seal)

By_____

Corporate Secretary, or Equivalent, Town/City/County Clerk

STATE OF COLORADO

Bill Owens, GOVERNOR

EXECUTIVE DIRECTOR

DEPARTMENT OF _____

APPROVALS:

ATTORNEY GENERAL

By_____

STATE CONTROLLER

By_____

Form 6-AC-02C
Revised 6/97

Page ____ which is the last of ____ pages

APPENDIX B: CONTRACT AMENDMENT FORMAT

Introduction

Attached is an appropriate form to use for contract amendments other than real property contracts, or other specialized forms where the "Special Provisions" are not used in the original contract (leases, purchase orders, *etc.*). The term "Special Provisions" means a dedicated section of the contract entitled "Special Provisions" and containing all required contract provisions in Chapter 3 of the Fiscal Rules (Forms 6-AC-02B and 6-AC-02C, or equivalent). Amendments to real property or other specialized forms of agreements should follow the same principles, but each circumstance is so unique as to preclude use of form generalization. Real property lease amendment forms are located in the State Buildings Program Annex.

This form is written so as to eliminate the need to include the entire Special Provisions every time. Further, this form is not a "fill in the blank" form. It is intended to set forth the required provisions for the vast majority of cases. Feel free to put the basic terms into your word processor and create a custom format for each application. This form is not legally required, but much of what it contains is required by law. It has been written for your word processing convenience, and to eliminate the need to include the Special Provisions a second or third time. Bear in mind, however, that material deviation from these basics in any amendment may create legal sufficiency problems. The traditional form of amendment using the Special Provisions remains acceptable. A sample is attached following the simplified format.

The "boiler-plate" amendment provisions are adapted from the State Controller's approved contract forms 6-AC-02A, 6-AC-02B, and 6-AC-02C, the standard "contract," page 1, and the two pages of "Special Provisions."

Note that in the interest of clarity and simplification, the term "WHEREAS" has been omitted in favor of a single heading for the entire section entitled "FACTUAL RECITALS." The purpose of background statements of fact remains a vital part of the contract amendment so this change of form should not cause you to change anything of substance in this portion of the amendment. Be detailed about what caused the need for an amendment and how each side benefits.

Finally, it is important to remember that this form is for use in contracts involving payment of money. While much of it is useful in contracts the Controller is not required to approve, much of the form is not required for non-payment contracts.

If you are using the contract amendment to resolve a dispute or claim submitted by the contractor, see the instructions in Chapter 10, Section 6, Disputes.

Instructions

A. After numbering the amendment at the top, and properly completing the blanks in the opening paragraph and the first Factual Recital of the amendment, tailoring the form to your particular situation begins with the fourth Factual Recital.

B. The fourth and fifth recital paragraphs should contain the reasons amendments or modifications to the original contract are necessary, and what you are trying to accomplish (e.g., the federal government gave the State more money to increase service levels in the program, and it is the parties' intention to increase the amount payable in exchange for additional services). These reasons must be in sufficient detail to ensure there is mutual consideration for each party, otherwise the amendment cannot be approved. Use as many paragraphs as you need to accurately explain the need for the amendment, and why each side benefits from the changes. A final recital may contain the information that each party is agreeable to the proposed modifications or changes.

C. The language inserted under paragraph 3 of the amendment should relate specifically to particular provisions of the original contract by provision number, etc. Remember, an amendment generally may not be retroactive. Also, do not "delete" portions of the original contract" that were completely in effect and valid up to the date of the amendment. Merely supplement, or add, subparagraphs with appropriate language to show the modification or change is intended to be prospective, as of the effective date of the amendment.

D. Amendments must be executed by the same authorized signatories who signed the original contract. This need not be the same individual signatory if he or she is unavailable, but merely one who has proper delegation or authority for each party. Signature authority is discussed in detail elsewhere in this Chapter.

E. <u>One</u> copy of the original contract and any previous amendments must accompany the contract amendment documents through the contract process. The original contract copy will be returned to the agency with the signed and certified counterparts. <u>Please do not route three complete sets of amendment plus original contracts</u>. At least three original amendments must be routed for execution, just as for original contracts. But only one copy of the original contract is required for review; mailing the others merely adds unnecessary weight and expense to the cost of contract processing.

State Controller's memorandum, Contract Modifications, Changes, Amendments, and Approval Routing, January 8, 1997

In June 1996, the State Controller first published a policy concerning permissible modification procedures that could be included in State contracts. Modifications, e.g. options, change orders, and task orders processed in accordance with that policy are not treated as "amendments" and do not require review by the Attorney General. The full text of that policy is in the Policy Letters Annex to this manual. The model clauses in Appendix A comply with that policy.

Amendment Forms

This Appendix contains the model State amendment form. If you intend to use an amendment to settle a claim or dispute with the contractor, read Chapter 10, Section 6, which contains sample release language.

Agency or Department Name
Department or Agency Number
Contract Routing Number

C O N T R A C T A M E N D M E N T #

THIS AMENDMENT, made this _____ day of _____ 19 ___, by and between the State of Colorado for the use and benefit of the Department of _____ ___ hereinafter referred to as the State, and _____, hereinafter referred to as the contractor,

FACTUAL RECITALS

Authority exists in the Law and Funds have been budgeted, appropriated, and otherwise made available and a sufficient unencumbered balance thereof remains available for payment in Fund Number _____, Appropriation Code _____, Contract Encumbrance Number_____ ; and

Required approval, clearance, and coordination has been accomplished from and with appropriate agencies; and

The parties entered into a contract dated _____ , for _____, more fully described below.

[Brief statement of facts/reasons for the amendment.]

[Brief statement of intention in amending the contract.]

NOW THEREFORE, it is hereby agreed that

1. Consideration for this amendment to the original contract, CE number _____ , Contract Routing Number _____, dated _____ consists of the payments which shall be made pursuant to this amendment and the promises and agreements herein set forth.

2. It is expressly agreed by the parties that this amendment is supplemental to the original Contract Routing Number _____, dated _____ [as amended _____ , Contract Routing Number _____ , collectively] referred to as the "original contract," which is, by this reference, incorporated, and made a part hereof, and attached as exhibit A, and all terms, conditions, and provisions thereof, unless specifically modified herein, are to apply to this amendment as though they were expressly rewritten, incorporated, and included herein.

3. It is agreed the original contract is and shall be modified, altered, and changed in the following respects only:

a.

b.

c.

4. The effective date of this amendment is _____, 199_.

Page 1 of 2

5. Except for the "Special Provisions," in the event of any conflict, inconsistency, variance, or contradiction between the provisions of this amendment and any of the provisions of the original contract, the provisions of this amendment shall in all respects supersede, govern, and control. The "Special Provisions" shall

provisions of this amendment shall in all respects supersede, govern, and control. The "Special Provisions" shall always be controlling over other provisions in the contract or amendments. The representations in the Special Provisions concerning the absence of bribery or corrupt influences and personal interest of State employees are presently reaffirmed.

6. 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.

7. THIS AMENDMENT SHALL NOT BE DEEMED VALID UNTIL IT SHALL HAVE BEEN APPROVED BY THE CONTROLLER OF THE STATE OF COLORADO OR SUCH ASSISTANT AS HE MAY DESIGNATE.

IN WITNESS WHEREOF, the parties hereto have executed this amendment on the day first above written.

Contractor:

_____
(Full Legal Name)

_____
(Signature of Individual)

_____
(Name of Individual)

_____
Position (Title)

_____
Social Security Number
or Federal Employer Identification Number

Attestation

By: _____
Corporate Secretary,
or Equivalent,
Town/City/County Clerk

(Seal)

State of Colorado
Bill Owens, GOVERNOR

By: _____
Executive Director

DEPARTMENT OF _____

APPROVALS

ATTORNEY GENERAL

By: _____

CONTROLLER

By: _____

Page 2 of 2

APPENDIX C: INTERAGENCY AGREEMENT FORMAT

Fiscal Rule 3-1 requires Interagency Agreements to be approved by the State Controller or a delegate, and include as a minimum the following provisions:

1. ***Identification of the parties;***
2. ***Appropriation authority, including fund, State agency, appropriation code, and encumbrance number;***
3. ***Scope of work;***
4. ***Statement of consideration;***
5. ***Payment and other performance; and***
6. ***Definition of breach and remedies.***

INTERAGENCY AGREEMENT

Agency or Department Name
Department or Agency Number
Contract Routing Number

THIS contract, Made this _____ day of _____ 199 __, by and between the State of Colorado for the use and benefit of the Department of _____ hereinafter referred to as [ ], and _____ hereinafter referred to as [ ], _____

WHEREAS, authority exists in the Law and Funds have been budgeted, appropriated and otherwise made available and a sufficient uncommitted balance thereof remains available for encumbering and subsequent payment of this contract under Encumbrance Number _____ in Fund Number _____, Appropriation Account _____ and Organization Number _____.

WHEREAS, required approval, clearance and coordination has been accomplished from and with appropriate agencies; and

NOW THEREFORE, it is hereby agreed that

1. Statement of Work and Responsibilities

2. Payment Amount and Billing Procedure

In consideration of the obligation of [the Department] to perform in accordance with paragraph one, [the Department] will transfer $_____ upon satisfactory completion of performance.

3. Term. The term of this interagency agreement is from _____ through _____.

4. Availability of Funds. Payment pursuant to this agreement, if in any part federally funded, is subject to and contingent upon the continuing availability of federal funds for the purposes hereof. If any of said federal funds become unavailable, as determined by the department, either party may immediately terminate or seek to amend this agreement.

5. Record Keeping Requirements. [Department or Institution] shall maintain a complete file of all records, documents, communications and other material which pertain to this agreement for a period of three (3) years from the date of final payment under this agreement, unless [the department] requests that the records be retained for a longer period.

6. [The department] shall permit [State agency] and federal agency monitoring and auditing of records and activities which are or have been undertaken pursuant to this agreement.

7. Except as otherwise provided, the duties and obligations of ( ) shall not be assigned, delegated or subcontracted except with the express prior written consent of [the department]. All subcontractors will be subject to the requirements of this agreement.

8. Except as otherwise stated this agreement shall inure to the benefit of and be binding only upon the parties hereto and their respective successors and assigns. No third party beneficiary rights or benefits of any kind are expressly or impliedly provided herein.

9. For the purpose of this agreement, the persons named below are designated the representatives of the parties. All notice required to be given by the parties shall be given by registered or certified mail to the representative named below. The parties may designate in writing a new or substitute representative:

[Department]: [Department]

_____ _____

10. Any failure of either party to performance in accordance with the terms of this agreement shall constitute a breach of the agreement. Any dispute concerning the performance of this agreement which cannot be resolved at the divisional level shall be referred to superior departmental management staff designated by each department. Failing resolution at that level, disputes shall be presented to the executive directors of each department for resolution. Failing resolution by the executive directors, the dispute shall be submitted in writing by both parties to the State Controller, whose decision on the dispute shall be final.

11. Any of the parties shall have the right to terminate this agreement by giving the other party _____ days notice. If notice is given, the agreement will terminate at the end of _____ days, and the liabilities of the parties hereunder for further performance of the terms of the agreements shall thereupon cease, but the parties shall not be released from duty to perform up-to-the-date of termination.

12. Controller's Approval. This interagency agreement shall not be deemed valid until it shall has been approved by the State Controller or such assistant as he may designate.

DEPARTMENT OF _____ DEPARTMENT OF _____

_____ _____

Authorized Signature Authorized Signature

APPROVAL

STATE CONTROLLER

_____

APPENDIX D: AGENCY CONTRACT FORMS

THIS SECTION IS RESERVED FOR AGENCY SUPPLEMENTARY MATERIAL, SUCH AS CONTRACT FORMS USED BY THE AGENCY.

Chapter 7 : DEPARTMENTAL ACCOUNTING PROCEDURES

Responsibilities under the Controller's Statute

The Controller's statute (Section 24-30-202, CRS) requires that a contract (called a "commitment voucher" under the statute) be filed with the State Controller's office prior to the disbursement made in payment of a liability incurred on behalf of the State. The State Controller or his designee must examine the contract to determine that:

- the proposed expenditure is authorized by the appropriation to which it is charged
- the prices or rates are "fair and reasonable" or otherwise in accordance with law
- the contract is signed by persons authorized to do so
- the expenditure does not exceed the amount of the appropriation

In cases where the State Controller has delegated approval authority to State agencies and institutions, the delegate will be responsible for insuring that these statutory duties are satisfied when contracts are approved.

State law prohibits administrative ratification of contracts where a person incurred or ordered any obligation against the State in excess of or for any expenditure not authorized by appropriation <u>and approved commitment voucher</u>. Section 24-30-202(3), CRS. Contracts that are routed to the State Controller or his designee for signature after the starting date must have a justification letter attached that explains why the contract is "late." Page 6-1 of Chapter 6 explains more fully the prohibition on "retroactive" contracts, the "late" contract policy, and the significance of the "made" dates and "effective" dates relative to the issue of unlawful ratification.

Much of this *Manual* has explained requirements that the State Controller sets for State contracts pursuant to the authority granted under the Controller's statute, e.g. the Fiscal Rule 3-1 requirements for *Special Provisions*, required routing and approvals, review for legal sufficiency by the office of the Attorney General, and the basic criteria for use of purchase orders and State contracts. The objective of all of this guidance is to insure that the agreement that reaches the State Controller's office for approval complies with legal requirements, has a "fair and reasonable" price, and can be paid from available appropriations. The "encumbrance" is one of the last steps designed to insure that funds are available to pay the commitment represented by the contract.

Encumbrance

Sound governmental accounting practices require that portions of budgets be reserved for future commitments made by the government agency in anticipation of paying for these commitments

when goods and/or services are received. In order to reserve the amounts for these commitments, the government agency records an encumbrance on its accounting system. This "encumbrance" prevents a certain amount of the budget from being spent. When the goods and/or services have been received and the government agency is ready to pay for them, the encumbrance is liquidated which allows that portion of the budget to be spent.

State statutes and the Fiscal Rules require that State agencies do not overspend or over-commit their budgets. The State Controller therefore requires all State contracts and modifications to State contracts to be encumbered prior to the approval of the contract by the State Controller or a designee. If an agency uses COFRS as its primary accounting system, they are to provide a screen print of an authorized encumbering document that they have entered in to the system with the contract. The acceptable encumbrance documents are a PO transaction and a SC transaction.

If an agency or institution does not use COFRS as their primary accounting system, they must furnish documentation that shows proof of the encumbrance in their accounting system.

Advance Payments

Fiscal Rule 3-1 requires that advance payments be approved by the State Controller where they not consistent with written policies established by the State Controller. Advanced payments may only be made where such payments are not inconsistent with policies established by the State Controller.

Suggested Internal Routing for Contracts

Despite the fact that the State Controller examines and approves all State contracts, agencies and institutions have specific responsibilities in the contracting process.

- The State Controller to a large extent relies on their assessment that the supplies and services are required, and that the prices/costs are "fair and reasonable."

- The Executive Director/President of agencies and institutions is given personal authority and responsibility under Section 24-30-202, CRS to authorize expenditures. These officers typically act through authorized delegates properly appointed in accordance with the delegation notice procedures established by the State Controller.

- By Executive Order (dated October 30, 1991), the executive director of each department has the responsibility to assure that contracts conform to all applicable law.

Because the contracting process implicates internal agency responsibilities, a procedure for the internal routing of contracts is important prior to submission for final approval by the State Controller. Consider the following internal routing prior to submission for external approval:

1. Division/Program Director (for compliance with statutes/other program requirements)

2. Agency Purchasing (for approval where purchasing authority is delegated)

3. Agency Accounting (for completion of encumbrance/PO)

4. Executive Director/President or authorized delegate

CLIN & CLI2 Tables

In 1996, the State started using a computerized system, known as CLIN, to track the routing of contracts when central approval is sought. Use of CLIN is mandatory for agencies which use COFRS to route contracts for approval by any central approving offices. The contracts are routed through the routing technician in the State Controller's Office. Appendix A contains the CLIN Contract Log Procedures for State Agencies.

Contract Waiver Program

In 1996, the State Controller approved a waiver program, whereby agencies can request approval of "form contracts" submitted on prescribed waiver forms and approved by the State Controller. The State Controller's contract approval authority is typically delegated to the chief financial officer of the agency or institution, permitting execution of contracts using the approved contract format by the agency without the necessity of State Controller and Attorney General review and approval again. Typically, the waiver also seeks waiver of review by the Division of Purchasing (if required) and the Department of Personnel as well. Copies of the waiver forms and instructions are in the Policy Letters Annex.

Subrecipient Grants and Required Reporting

Financial officers of the state are required to correctly report and record the financial transactions and financial condition of the state. In order to accomplish this task financial officers must be able recognize and distinguish between the different types of obligations assumed by the state. The following information should be shared with agency financial officers to enhance their reporting capabilities.

The State Auditor's office has identified a problem with agencies correctly reporting subrecipient grants on the schedules K1 and K2 for the state financial statements. The following definitions and examples will enable agencies to identify these types of grant contracts, include the required language in these contracts, and correctly report the disbursements on schedules K1 and K2.

Definitions :

Vendor - An entity hired by a state agency to provide goods and/or services to that state agency. Typically this is a buyer/seller relationship in which the seller has no responsibility to help an individual meet the requirements to receive an assistance award.

Example - The Department of Health Care Policy and Financing receives federal financing assistance to provide medical care to certain individuals. The department enters into service contracts with doctors and hospitals to provide this medical care. The doctor and hospital contracts are not subrecipient grants.

Subrecipient - Any person or government department, agency, or establishment that receives federal financial assistance to carry out a program through a state or local government, but does not include an individual that is a beneficiary of such a program. Subrecipients typically have a responsibility to help individuals meet the requirements to receive an assistance award and are held responsible by the contract for complying with the specific audit requirements of the original award and for the general requirements for receiving federal financial assistance. If any such language is included in the contract there is a possibility that a subrecipient relationship exits between the parties to the contract.

Examples - A city of county government receives federal financial assistance which it disburses to a state department or agency, which in turn disburses to landlords to pay the rent for qualified individuals as an assistance award. The State department is the subrecipient.

A state department of education receives federal assistance, which it disburses by a formula to local school districts within the state. The school districts are the Subrecipients.

The county commissioners receive federal funds for food programs for elderly individuals. These funds are disbursed to not-for-profit organizations support their food programs. The not-for-profit organizations are the Subrecipients.

The Department of Human Services receives federal funds, which are disbursed to county governments. The county governments are the Subrecipients.

Another indication that a contract is a subrecipient grant contract is if the primary recipient of federal funds is responsible for all of the following when federal assistance of $25,000 or more is passed through in a single subgrant to one or more Subrecipients.

1. Determines whether Subrecipients have met the applicable federal audit requirements.

2. Determines whether the subrecipient has controls in place to ensure that the federal financial assistance is expended in accordance with applicable laws and regulations.

3. Ensures that appropriate corrective action is taken within six months of a subrecipient's audit report that identifies reported instances of noncompliance with applicable laws and regulations.

4. Considers whether subrecipient audits may necessitate adjustments of the primary recipient's records.

5. Requires each subrecipient to permit independent auditors to have access to their records and financial statements as necessary to comply with federal audit requirements.

State Financial Reporting Requirements for Subrecipient Grants

Program managers should be aware that their accounting offices will be advised to review the contract for particular language and requirements when they are attempting to determine whether or not a contract is a subrecipient grant contract and if it should be reported on schedules K1 or K2. The following table specifies the accounting and reporting treatment for subrecipient/vendor transactions. See Open/Close Instructions Chapter 3 Section 6.14-15 for Exhibit K1/K2 reporting requirements.

	DISBURSOR	RECIPIENT
Vendor Relationship Contract		
	Code payments using object code indicating type of good or service purchased. Report expenditure on Exhibit K1/K2. Disbursor is responsible for ensuring that expenditure is an allowable cost.	Code receipts using revenue source code indicating type of good or service sold. Do not report on the Exhibit K1/K2.
Subrecipient Relationship Contract		
With Another State Agency	Code disbursement using object code 5771-Grants to Other State Agencies. Report on the Exhibit K1/K2. In general, disbursor is responsible for determining if recipient is a qualified recipient and for monitoring if recipients expenditures are allowable costs.	Code receipt using revenue source code 7501-7523-Fed Grant/Cont-Subrecip-(Dept.). Do not report on Exhibit K1/K2. Recipient is responsible for helping disbursor comply with grant requirements.
With a Non-state Entity	Code disbursement using object code 51XX-Intergovernmental Grants or 5781-Grants to Non-Gov/Organizations. Report on the Exhibit K1/K2. In general, disbursor is responsible for determining if recipient is a qualified recipient and for monitoring if recipients expenditures are allowable costs.	Code receipt using revenue source code 7500-Fed Grant/Cont-Subrecipient-Other. Report on the Exhibit K1/K2. Recipient is responsible for helping disbursor comply with grant requirements.

Agency Accounting Procedures Supplement (Insert)

THIS SECTION IS RESERVED FOR AGENCY SUPPLEMENTARY MATERIAL OR POLICIES RELATED TO THIS CHAPTER.

WE RECOMMEND THAT YOUR AGENCY'S ACCOUNTING PROCEDURES, POLICIES, AND CHECKLISTS BE INCLUDED IN THE MANUAL.

Appendix A: Contract Log Procedure for State Agencies

Contract Log Procedures for State Agencies

The purpose of this procedure is to describe the actions to be taken by state agencies prior to routing contracts, amendments, change orders, and supplements that require approval by a central approver. This procedure also describes some suggested actions to be taken by the agencies after they receive these agreements back from the central approvers.

The term "agreements" used in this procedure refers to contracts, amendments, change orders, and supplements to contracts.

All agreements that require approval by any central approver must be entered onto the CLIN table in COFRS and forwarded to the State Controller's Office Routing Technician for processing and forwarding to the central approvers.

The CLIN table may be used for delegated contracts as well as those sent that must be forwarded to a central approver.

The CLIN table may also be used for other types of documents that are required to be sent to a central approver. However, in that situation the documents will not follow the same path as agreements and they should be sent directly to the central approver involved in the review and approval.

Responsibilities of the Agency Routing Technician:

1. Determine the correct routing sequence that the agreement must follow.

2. Log on to COFRS and access the CLIN table.

3. Change the Action field to an "A" for add and complete all of the fields on the table per the COFRS User Reference Manual instructions (attached). Then press "enter", the table will automatically assign the next routing number to your record.

4. Screen print the CLIN table and the matching record on the CLI2 table.

5. Route the agreement for all internal agency approvers and required signatures, except for any delegate authorized to sign for the State Controller. If your agency has the required delegation that allows your agency to do the procurement without the assistance of State Purchasing, please ensure that there is a line on the CLIN table for the agency purchasing agent. If your agency does not have this level of delegation you must attach a copy of the Verification Letter (sample attached) prepared by State Purchasing for this particular procurement.

6. Forward the agreement packet, which includes the required number of signed agreements, a screen print of the CLIN and CLI2 tables, the encumbrance document, a State Purchasing Verification Letter if necessary, and any other pertinent correspondence to the Division of Accounts and Control "Attention:: Contract Routing Technician".

When agreements are returned from a central approver the ownership field will be changed back to an "A". This will allow agencies to add any additional approvals or other information , such as distribution date, that are required or desired. If someone within your agency has been delegated to sign contracts for the State Controller, the agreement packet should be forwarded to them at this time and a line on the CLIN table should be available and labeled for their approval date.

Contract Logging Inquiry Table (CLIN)
Agency Defined

PURPOSE

The Contract Logging Inquiry Table (CLIN) provides agencies with a screen to track the flow/routing of proposed contracts or other documents through their agencies. It gives basic information on the document, showing the document's current location, who has already approved it, who still needs to approve it, and how long the approval process is taking.

This table's primary application is to monitor the approval of contracts. In conjunction with the Contract Logging Inquiry Table - 2 (CLI2), which shows approval by central control agencies, it establishes a Statewide routing/tracking system for documents requiring central approval, such as procurement documentation for personnel services or purchased services.

FUNCTION

Many header fields (#4 - #10, #12 - #19) may be modified through the Contract Logging Inquiry Table - 2 (CLI2) when the Owner field is 'C' (Central).

TIMING

A record must be added to this table before a contract is routed to a central control agency for approvals.

KEY FIELDS

Agency
Fiscal Year
Routing Number

PROCEDURE

All MTI actions except the (D)elete action may be performed on this table. To indicate that a routing document has been voided or discontinued, change the Type field to 'V' (Voided Record). **NOTE:** The (C)hange action cannot be performed if the Owner field is 'C' (Central).

TABLES UPDATED

Contract Logging Inquiry Table - 2 (CLI2)

Contract Logging Inquiry Table (CLIN)

```
ACTION: .  SCREEN: CLIN  USERID: ........
                    *** CONTRACT LOGGING INQUIRY TABLE ***
   (1)      (2)          (3)          (4)       (5)            (6)
FY: .. AGCY: ... ROUT #: ..... CNTR/PO: . TYPE: .   TOTAL AMT: ..............
          (7)                    (8)                (9)          (10)
START DATE: ........  END DATE: ........  OWNER: . ENC TOTAL: ..............
   (11)                                     (12)          (13)
DESC: ..............................  SEL METHD: .  RFP/BID#: ............
   (14)      (15)          (16)          (17)              (18)
CC/CM: . PROJ#: ......  BILL#: ........  PAGE: ...  AG BILL CODE: .........
          (19)          (20)                                      (21)
VENDOR CODE: ..............................................  ENTRY DAT: ......
          (22)      (22)  (22)    (22)      (23)          (24)
ROUTING--HR: . PUR/BLD: . AG: . DOAC: .  USER: ........  REF#: ............
          (25)                              (26)          (27)
PRGM CONTACT: ............................  PH: ........  FAX: ............
          (28)                              (29)          (30)
ACCT CONTACT: ............................  PH: ........  FAX: ............

SQ            -DATE (MONTH/DAY)-   SENT    ERROR
# ORGN/UNIT   RECV   REVW   SENT   TO  ACT CODE          COMMENTS
(31)(32)      (33)   (34)   (35)   (36) (37)(38)   (39)
..........    ..  ..  ..  ..  ..  ..  ....  .  .....  ..............................
..........    ..  ..  ..  ..  ..  ..  ....  .  .....  ..............................
..........    ..  ..  ..  ..  ..  ..  ....  .  .....  ..............................
..........    ..  ..  ..  ..  ..  ..  ....  .  .....  ..............................
..........    ..  ..  ..  ..  ..  ..  ....  .  .....  ..............................
```

Field	Length	Definition
1. FY (Fiscal Year)	2	Key field - required. Enter the last two digits of the fiscal year of the proposed contract or purchase order in 'YY' format. The year must be valid on the Fiscal Year Table (FSYR).
2. AGCY (Agency)	3	Key field - required. Enter the code of the agency originating the document to be tracked. The code must be valid in the Agency Table (AGCY).
3. ROUT # (Routing Number)	5	Key field - system-maintained. An automatically generated sequence number is displayed.
4. CNTR/PO (Contract/Purchase Order)	1	Required. Enter 'P' if the procurement will be acquired through a purchase order transaction, 'C' if it will be acquired through a service contract, or 'O' for other types of documents requiring routing/central approval.
5. TYPE	2	Required. Enter the code from the Contract Type Table (CTYP) that best describes the purchase.

6.	TOTAL AMT (Total Amount)	14	Optional. Enter the total value of the procurement, including any amount spent in a prior fiscal year and amounts to be spent in future fiscal years.
7.	START DATE	2 2 2	Optional. Enter the term starting date of the contract or purchase order in 'MMDDYY' format. The date must be valid in the Calendar Date Table (CLDT).
8.	END DATE	2 2 2	Optional. Enter the term ending date of the contract or purchase order in 'MMDDYY' format. The date must be valid in the Calendar Date Table (CLDT).
9.	OWNER	1	System-maintained; defaults to 'A' on an (A)dd action. 'C' (Central) is displayed if a central control agency has ownership of the document. 'A' (Agency) is displayed if an operating agency has ownership of the document.
10.	ENC TOTAL (Encumbrance Total)	14	Required. Enter the value of the purchase order or contract for the fiscal year shown in the Fiscal Year field (#1). If unknown, enter zero (0). A negative total is permitted.
11.	DESC (Description)	34	Optional. Enter any comments about this contract or document.
12.	SEL METHD (Selection Method)	1	Required. Enter a valid code from the Selection Method Table (SELM) indicating the method used to select the vendor.
13.	RFP/BID# (Request for Proposal/Bid Number)	14	Required if the Selection Method field (#12) is 'B' or 'F'; otherwise optional. Enter the number of the request for proposal or bid used to procure this contract.
14.	CC/CM (Capital Construction/ Controlled Maintenance	1	Required. Enter 'Y' (Yes) if this contract is for capital construction or controlled maintenance or 'N' (No) otherwise.
15.	PROJ# (DOAC Project Number)	6	Required if the CC/CM field (#14) is 'Y'; otherwise leave blank. Enter the six-digit project number assigned to this construction or maintenance contract by DOAC.
16.	BILL# (Bill Number)	2 2 4	Required if the CC/CM field (#14) is 'Y'; otherwise leave blank. Enter the legislative bill authorizing the capital construction or controlled maintenance. • In the first two characters, enter 'HB' (House Bill) or 'SB' (Senate Bill).

- In the next two characters, enter the **fiscal year** ('YY') in which the bill was introduced. The year must be valid on the Fiscal Year Table (FSYR).

- In the last four characters, enter the **bill number** assigned to the bill.

17. PG (Page)	3	Required if the CC/CM field (#14) is 'Y'; otherwise leave blank. Enter the page number in the legislative bill that authorizes the capital construction or controlled maintenance.
18. AG BILL CODE (Attorney General Billing Code)	2 2 5	Required if the Contract/PO field (#4) is 'C'. If approval by the Attorney General's office is required for this contract, enter the Attorney General's billing code for this contract. The code must be valid on the Attorney General Billing Code Table (AGBC). If approval is not required, enter either 'WAIVED' or 'WAIVER' in this field.
19. VENDOR CODE	11	Required. Enter the vendor code of the proposed vendor. The code must be valid on the Vendor Table (VEND). Miscellaneous vendor codes are not allowed.
20. Vendor Name	29	System-maintained. The name of the proposed vendor is displayed.
21. ENTRY DATE	2 2 2	System-maintained. The date when this record was added to the table is displayed.
22. ROUTING	1	Optional. Enter the numerical order of contract review by central control agencies (Human Resources, Purchasing/State Buildings, Attorney General's Office, Division of Accounts and Control). For example, the first agency to review the contract should be labeled '1'. Leave the corresponding sequence field blank if a central control agency is not required to review the contract. Valid values are '1' to '4'; duplicate entries are not allowed.
23. USER (Agency Defined)	9	Optional. Enter this field per agency-specific instructions.
24. REF# (Reference Number)	2 3 5	Optional. If this contract or purchase order is related to a prior contract or purchase order, enter the fiscal year, agency and routing number of the prior document.
25. PRGM CONTACT (Program Contact)	30	Optional. Enter the name of the program manager responsible for this contract or purchase order.

26.	PH (Phone Number)	3 3 4	Optional. Enter the telephone number of the program manager.
27.	FAX	3 3 4	Optional. Enter the fax number of the program manager.
28.	ACCT CONTACT (Accounting Contact)	30	Optional. Enter the name of the accounting liaison to contact in case of questions about this contract or purchase order.
29.	PH (Phone Number)	3 3 4	Optional. Enter the telephone number of the accounting contact.
30.	FAX	3 3 4	Optional. Enter the fax number of the accounting contact.
31.	SQ # (Sequence Number)	1	Optional. Enter a number indicating the sequence in which the contract or purchase order is to be routed to organizations or units for review/approval. For example, enter '1' for the first organization or unit to review the contract. Valid values are '1' to '5'; duplicate entries are not allowed.
32.	ORGN/UNIT (Organization/Unit)	11	Optional. Enter the name of the organization or unit to receive this proposed contract for review.
33.	DATE RECV (Date Received)	2 2	Optional. Enter the date when the proposed contract was received by the organization/unit in 'MMDD' format.
34.	DATE REVW (Date Reviewed)	2 2	Optional if the Date Received field (#33) is entered; otherwise leave blank. Enter the date when the proposed contract was reviewed by the organization/unit in 'MMDD' format.
35.	DATE SENT	2 2	Optional if the Date Reviewed field (#34) is entered; otherwise leave blank. Enter the date when the proposed contract was sent to the next organization/unit in 'MMDD' format.
36.	SENT TO	4	Required if the Date Sent field (#35) is entered. Enter an abbreviation for the organization or unit to which the proposed contract was sent.
37.	ACT (Action)	1	Optional. Enter 'A' to approve the proposed contract, or 'D' to disapprove it, 'H' to hold, 'R' to require corrections, or 'N' for not applicable.
38.	ERROR CODE	5	Required if the Action field (#37) is 'D'; leave blank if it is 'A''; otherwise optional. Enter the code from the Contract Error Table (CERR) explaining the reason for disapproving the proposed contract.

39. COMMENTS	27	Optional. Enter any comments about the review process, such as reasons for delay in receiving, reviewing or transmitting the proposed contract.

Contract Logging Inquiry by Vendor Table (CLIV)
System-maintained

PURPOSE

The Contract Logging Inquiry by Vendor Table (CLIV) is an alternate view of the Contract Logging Inquiry Table (CLIN). Organized by vendor name, it allows agencies to review all contracts and other document routings for a vendor.

FUNCTION

Records are automatically maintained on this table through additions, changes and deletions on the Contract Logging Inquiry Table (CLIN).

KEY FIELDS

Vendor Name

Contract Logging Inquiry by Vendor Table (CLIV)

```
ACTION: . SCREEN: CLIV USERID: ........
    CONTRACT LOGGING INQUIRY BY VENDOR TABLE
    KEY IS VENDOR NAME, VENDOR CODE, FISCAL YEAR, AGENCY, ROUTING NUMBER
              (1)                                          (2)
VENDOR NAME: ..............................  VENDOR CODE: ...........
              CONT
FY AGY ROUT# /PO  PROJ#    USER                DESCRIPTION          ENTRY DAT
-- --- ----- --- ------ --------- ------------------------------- --------
(3)(4) (5)   (6)  (7)    (8)       (9)                              (10)
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
-- --- ----- -   ------ --------- ------------------------------- -- -- --
```

Field	Length	Definition
1. VENDOR NAME	30	Key field - system-maintained. The name of vendor is displayed.
2. VENDOR CODE	11	Key field - system-maintained. The vendor code is displayed.
3. FY (Fiscal Year)	2	Key field - system-maintained. The fiscal year of the contract is displayed..
4. AGY (Agency)	3	Key field - system-maintained. The code of the agency originating the contract is displayed..

5. ROUT# (Routing Number)	5	Key field - system-maintained. The contract/document routing number is displayed.
6. CONT/PO (Contract/Purchase Order)	1	System-maintained. A 'P' is displayed if the procurement will be acquired through a Purchase Order Transaction, 'C' if it will be acquired through a Service Contract Transaction or 'O' for other types of documents requiring routing/central approval.
7. PROJ# (Project Number)	6	System-maintained. The project number associated with the contract is displayed.
8. USER (Agency Defined)	9	System-maintained. The agency-defined information entered on the Contract Logging Inquiry Table (CLIN) is displayed.
9. DESCRIPTION	34	System-maintained. The contract/document description, inferred from the Contract Logging Inquiry Table (CLIN), is displayed.
10. ENTRY DAT (Entry Date)	2 2 2	System-maintained. The date when the contract/document was added to the Contract Logging Inquiry Table (CLIN) is displayed.

Contract Type Table (CTYP)
Centrally Defined

PURPOSE — This table specifies the contract type codes to enter on the Contract Logging Inquiry Table (CLIN).

FUNCTION — This table is referenced when the Contract Logging Inquiry Table (CLIN) is edited.

KEY FIELDS — Contract Type Code

PROCEDURE — Only the Division of Accounts and Control (DOAC) is authorized to add, change or delete information on this table. To request changes to this table, send a memo to DOAC specifying the changes.

Contract Type Table (CTYP)

```
ACTION: . SCREEN: CTYP USERID: ........
    CONTRACT TYPE TABLE
    KEY IS CONTRACT TYPE CODE

CONTRACT
TYPE CODE                          DESCRIPTION
--------- ------------------------------------------------------------
 (1)      (2)
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
 ..       ------------------------------------------------------------
```

Field	Length	Definition
1. CONTRACT TYPE CODE	2	Key field - required. If adding a contract type, enter a unique code. To change or delete an existing contract type, enter the affected code.
2. DESCRIPTION	60	Required. Enter a description of the contract type.

EPS Purchase Order Selection Method Table (SELM)
Centrally Defined

PURPOSE	This table defines EPS purchase order selection method codes in COFRS. The one-character type code categorizes purchase orders by the method of vendor selection (e.g., sole source, competitive bid or emergency purchase order).
FUNCTION	Selection method codes entered on EPS Purchase Order Transactions (OE, PC, PD, PG, SC) and EPS Requisition Transactions (RX) are validated against this table.
KEY FIELDS	Method
PROCEDURE	Only the Division of Purchasing may update this table.
TABLES UPDATED	None

EPS Purchase Order Selection Method Table (SELM)

```
ACTION: _  SCREEN: PURT USERID: ........
EPS PURCHASE ORDER SELECTION METHOD TABLE
KEY IS SELECTION METHOD

 METHOD                    DESCRIPTION
 ------ ------------------------------------------------------------
 (1)    (2)
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
 .      ..............................................................
```

Field	Length	Definition
1. METHOD	1	Key field - required. To add a selection method, enter a unique code. To change or delete an existing selection method, enter the affected code.
2. DESCRIPTION	60	Optional. Enter a description of this method of selecting the vendor.

STATE FISCAL RULES (AGENCY INSERT)

THIS SECTION IS RESERVED FOR THE STATE FISCAL RULES (IF DESIRED BY THE AGENCY).

Chapter 8 : EXTERNAL APPROVAL ROUTING

External Routing Requirements

Contracts are reviewed by up to four external offices, depending on the type of contract. The following is the normal routing sequence that specific types of contracts must follow:

SERVICES	EASEMENTS & REAL ESTATE
1. Department of Personnel 2. State Purchasing/Type II Agency 3. Attorney General 4. State Controller	1. State Buildings Program (Division of Purchasing) 2. Attorney General 3. State Controller
LEASES	**GRANTS, LOANS, CONTRACTS WITH OTHER GOVERNMENTS**
1. State Buildings Program 2. Attorney General 3. State Controller	1. Attorney General 2. State Controller
CAPITAL CONSTRUCTION	**INTERAGENCY AGREEMENTS**
(Non Delegated by State Buildings) 1. State Personnel (if A/E agreement) 2. State Buildings Program 3. Attorney General 4. State Controller **(Delegated by State Buildings)** 1. State Personnel (if A/E agreement) 2. Attorney General 3. State Controller	1. State Controller **GOODS - COMMODITIES** 1. State Purchasing/Type II Agency 2. Attorney General 3. State Controller
CHANGE ORDERS AND SUPPLEMENTS	**AMENDMENTS**
(Non Delegated by State Buildings) 1. State Buildings Program(if Capital Construction) 2. State Controller **(Delegated by State Buildings)** 1. State Controller	Same routing as the original contract

Central Approvers Routing Policies/Procedures

Department of Personnel Privatization Review

Policy:

All contracts, purchase orders, and other agreements utilized by State agencies to acquire personal services must be submitted to the State Personnel Director.

Exceptions:

1. Intergovernmental agreements: i.e. - contracts between State agencies; contracts between the State and political subdivisions (counties and municipalities); contracts between the State and other states; and contracts between the State and the federal government.

2. Acquiring services exempted from the State classified system by the constitution (i.e. services of judges, attorneys, professors, etc.).

3. Agreements for terms of six months or less for that **are not expected to recur** on a regular basis. However, the agency is required to self certify as to these facts. If the need for the services is recurring the contracts/purchase documents must be submitted for review.

4. The lease or purchase of real property.

5. The purchase of goods or commodities where the personal services piece is not ongoing or significant to the transaction.

6. If an agency has received a letter from the Department of Personnel granting a waiver of its duty to provide individual review of agreements.

Review / Approval Requirements:

The State Personnel Director shall review and approve all contracts, purchase orders, and other agreements utilized by State agencies to acquire personal services.

Review Time Goal:

5 days, but the usual practice is same day or one day turnaround.

Routing Requirements:

Note: The personal services certification form is the Department of Personnel's permanent document; this form is never returned to the agency.

- All encumbrance documents for personal services must have a completed personal services certification form attached. The certification form must be signed by an agency representative and dated with the current date.

- Contracts must be entered on the CLIN table before being routed to the Department of Personnel. If submitting an amended contract, a copy of the original contract should also be forwarded.

- For other documents: a copy of a purchase order, invoice, RX (requisition), request for proposal or a memo needs to be attached. Once the information is reviewed, the Department of Personnel's contract administrator will sign one of these documents and return it to the requesting agency.

Walk-through Requests:

A "walk-through" may be requested, however, a walk-through is dependent upon the availability of authorized staff. Please call the Executive Director's office to make an appointment with the appropriate program staff.

Most Common Questions:

1. Do amended contracts need to be submitted to the Department of Personnel? **Yes**

2. Do services awarded on State price agreements need to be reviewed by the Department of Personnel? **Yes**

3. What if the services can be performed within six months**? No review is needed, however the Department of Personnel will still need to review these services if they are recurring (i.e. The use of temporary employees).**

4. What about using the services provided by the Division of Central Services? **Please check with the Division of Central Services when you are in need of services it performs such as collections, graphic design, mail, microfilm and printing services. A letter should be attached to the certification form from Central Services if it is unable to perform the required tasks or cannot be competitive as to quality and price**.

Division of Purchasing Procurement Review

Policy:

All State contracts and amendments **MUST** be reviewed to verify proper vendor selection and documentation.

Statutory Requirement:

The contractor/vendor must be selected in accordance with one of the options available in the Colorado Procurement Code and Rules. The contract **MUST** conform to the solicitation document (specification; terms and conditions).

Exceptions:

Procurements exempt from the Procurement Code

1. Bridge and highway construction;
2. No public funds paid (e.g., revenue producing);
3. Professional services - architect, engineer, landscape architect, land surveyor;
4. Procurements by the Legislative and Judicial branches, and elected officials;
5. Vendor is specifically identified in a grant;
6. Items bought for resale;
7. Other party is governmental entity - other Colorado agency, political sub-division, other state, federal government, other countries; and
8. Procurements otherwise authorized by law.

Note: Public printing is exempt from the Procurement Code **BUT** is covered by another statute and oversight is given to the Division of Purchasing.

Review / Approval Requirements:

Non-delegated and Group I agencies must submit their contracts to State Purchasing. Group II agencies may do their own review.

Review Time Goal:

3 business days.

Routing Requirements:

Route contract through the technician assigned to the State Controller's Office. Contract must be entered on the CLIN table. It is highly desirable that the Privatization Program, Department of Personnel, has already signed off on (approved) the contract.

Walk-through Requests:

Call to coordinate emergency, walk-through, and other priority contracts.

Most Common Errors:

1. Vendor selection method is not identified or not correctly identified;
2. Justification substantiating non-competitive selection is inadequate or missing;
3. Procurement information on CLIN table is not correct;
4. Non-competitive selection has not been pre-approved;
5. Contract does not conform to solicitation document;
6. Amendment routed without original contract and prior amendments; and
7. Vendor selection does not comply with the Procurement Code.

Office of the Attorney General

Policy:

All State contracts/amendments must be routed through the Attorney General's Office for legal review.

Exceptions:

1. Interagency agreements

2. Contracts for which Attorney General review has been waived in accordance with the State Controller's waiver procedure.

3. Change orders and A/E supplements consistent with the State Controller's policy.

Review / Approval Requirements:

The contract review attorneys in the State Services and Transportation Unit located on the 5th floor of the State Services Building, 1525 Sherman Street, Denver 80203 review all contracts, except contracts of designated institutions of higher education. These higher education contracts are reviewed by special assistant attorney generals designated by the State Controller.

Review Time Goal:

3 business days

Routing Requirements:

1. Route through the routing technician assigned by the State Controller's Office.

2. Contracts must be entered on the CLIN table, with appropriate attorney billing code entered in the CLIN table.

3. Attorney General is the last routing stop prior to the State Controller's Office.

Pre-reviews of Contract:

Call and arrange pre-review directly with the contract review attorney. Pre-reviews will be done as workload permits. It is preferable that the agency highlight issues that specifically need to be reviewed.

"Walk-through" Requests:

Call and coordinate walk-through reviews with the secretary for the contract review attorney. On priority reviews, conspicuously mark the contract file and informally annotate the reason for the priority request.

Most Common Errors:

1. Contract "made date" after the contract effective date (see Chapter 6, page 6-1 for a discussion of "ratification").
2. Special Provisions either missing or modified without State Controller approval.
3. Indemnification provisions modified without State Controller and Attorney General approval.
4. Contracts routed without exhibits and attachments referenced in body of the contract.
5. Payment provisions ambiguous, inconsistent, or contract type unclear.
6. Use of vendor limitation of liability/exclusion of damages or other vendor boilerplate that limits liability for death, personal injury, and damage to tangible property, or otherwise is inconsistent with Special Provisions.
7. No apparent authority for the agent signing on behalf of the contractor.
8. Amendments routed without basic contract and previous amendments.
9. Routing errors--approvals not obtained from Personnel (personal services contracts with other than political subdivisions), Purchasing or delegate (where Procurement code is apparently applicable to nondiscretionary purchases), State Buildings (leases), Risk Management (where agencies are using CRS 24-30-1510(3)(e) indemnification in leases)
10. Use of advance payment provisions not approved by the State Controller.

State Controller's Office

Policy:

All contracts, amendments, change orders, and supplements which require the expenditure of funds must be approved by the State Controller.

- If the original contract required the approval and signature of the State Controller, all amendments, change orders, and supplements related to that contract must be submitted to the State Controller for approval and signature, regardless of whether or not a disbursement of funds is required by the amendment, change order, or supplement.

- If an agency does not have delegated Controller authority, then a minimum of four copies each of a contract, amendment, change order, or supplement must be submitted to the State Controller's Office for approval. For leases, a minimum of 5 copies must be submitted to the State Controller's Office, if the agency does not have delegated Controller authority.

- All capital construction contracts, amendments, change orders, and supplements must be approved by the Director of State Buildings or his designee.

- All leases must be approved by the Department of Personnel Executive Director, or delegate. State Buildings Programs has been delegated this responsibility.

- All contracts and amendments (except interagency agreements) must be reviewed by the Attorney General's office prior to approval by the State Controller unless a waiver has been granted through the CATF/CCIT waiver process.

- Any contract involving a payment of funds by the State shall contain a clause providing that the contract will not be deemed valid until it has been approved by the State Controller or a delegated representative of the State Controller.

- All amendments, change orders, and supplements submitted to the State Controller's office must have a copy of the original contract and all prior amendments, change orders, and supplements attached.

- All personal service contracts must be submitted with a certification from the initiating agency to the Department of Personnel that indicates the status of the vendor to be that of an independent contractor.

- All contracts (except interagency agreements) must contain the *Special Provisions* required by Fiscal Rule 3-1.

Exception:

The State Controller may delegate his signature authority to a State agency. The delegation must be in writing.

Review Time Goal:

6 business days.

Routing Requirements:

1. Route through the routing technician assigned in the State Controller's Office

2. Contracts must be entered on the CLIN table

"Walk-through" Requests:

Emergency Contracts

1. Review the contract or CLI2 table and verify that all required approvals and signatures, other than the State Controller's, have been applied to the contract prior to contacting the State Controller's office and requesting emergency processing and approval of the contract.

2. Verify that all required documents have been completed and are available to the State Controller's contract signatory.

Walk-through Contracts

1. Call the State Controller's office for an appointment time
2. Hand carry contract and other required documentation to the contract signatory at the appointed time
3. Receive executed contract from the State Controller's contract signatory.

Telephone Request Approval Contract

1. Verify that the contract is in the possession of the State Controller by checking the CLI2 table.
2. Call the State Controller's contract signatory to request emergency processing and to indicate the desired time for the execution of the contract after which an agency representative will pick the contract up.
3. Pick up the executed contract from the State Controller's office at the appointed time.

Overnight Mail Approval Contract

1. Verify that the contract is in the possession of the State Controller by checking the CLI2 table.
2. Call the State Controller's contract signatory to request emergency processing
3. Give the State Controller's contract signatory your agency's overnight mail service billing code.

Most Common Errors:

1. Special provisions either missing or modified without State Controller approval.
2. Indemnification provisions modified without State Controller and Attorney General approval.
3. Payment provisions ambiguous, inconsistent, or contract type unclear.
4. No apparent authority for the agent signing on behalf of the contractor.
5. Amendments routed without basic contract and previous amendments.
6. Routing error--approvals not obtained from Personnel (personal services contracts with other than political subdivisions), Purchasing Division or delegate (where Procurement code is apparently applicable to nondiscretionary purchases), State Buildings (leases), Risk Management (where agencies are using CRS 24-30-1510 indemnification in leases)
7. Use of advance payment provisions not approved by the State Controller.
8. Encumbrance document (i.e. SC or PO transaction) not "Ready for Approval 3" - various errors on the budget

Chapter 9 : CONTRACT CHECKLIST

One way to improve the quality of contracts in general is through use of a checklist. The following checklist was in the 1993 version of the Contract Procedures Manual, and updated in 1996 for training by the Central Approvers' Task Force (CATF).

This checklist can also be useful in developing an agenda for business strategy meetings in advance of solicitations or negotiations of sole source contracts. The checklist, along with the table of contents to this *Manual*, can be used during development of the solicitation or in the formulation of negotiation objectives when negotiating sole source contracts.

Most important, it is useful as an aid in checking the quality of the contract. Since agency contract managers may not be involved in all types of contracts referenced in this manual, they are encouraged to tailor the contract checklist to their own contracting program.

Pages 9-2 through 9-6 contain the Contract Checklist.

A separate section has been reserved following the Contract Checklist for an agency "insert."

CONTRACT CHECKLIST

I. PROVISIONS RELATIVE TO CONTRACTS GENERALLY

A. AUTHORITY

1. **Funds availability** verified by: _____ [date] _____
2. Contract concept approved by: _____ [date] _____
3. Use of special forms required by other agencies, e.g. SBP _____

B. RECITATIONS

1. Introductory paragraph _____
   a. State of Colorado for the use and benefit of Department of _____ _____
   b. Agency name, building, street & zip code _____
   c. Full legal name of contractor _____
   d. Contractor state of legal existence and status (e.g. Colorado sole proprietorship/corporation/limited or general partnership) and business address _____
   e. Parties defined in short form ("State," "Contractor," "Lessor," "Lessee") _____
2. Fund availability statement _____
3. Statutory authority cited _____
4. General purpose of contract _____
5. Procurement methodology statement (RFP/IFB # or statutory authority, as applicable) _____

C. PROVISIONS

1. Scope of work/performance measurable _____
2. Technical terms or acronyms defined _____
3. Effective date (later than "made" date) _____
4. Term of contract (beginning and ending date) _____
5. Maximum dollar limit _____
6. Method and rate of payment _____
7. **No advance payments without Controller approval** _____
8. Lease and installment purchases, over multiple fiscal years: use

9. expanded future funding contingency used in real property leases _____
10. Federal Fund provisions/other third-party fund contingencies _____

CONTRACT CHECKLIST

Page 2

11. Language referencing all exhibits and controlling priority
12. of contract and exhibits _____
13. Language incorporating RFP/IFB or other statement of work _____
14. Notice provisions with names and addresses of key contacts _____
15. Inspection/Acceptance provisions ____
16. Warranty Provisions clear and suitable, e.g. specific to transaction _____
17. Documentation/Data/software deliverables and due dates defined _____
18. State rights in data/software defined. _____
19. Complete understanding/integration provision _____
20. Termination provisions
    a. For convenience of State _____
    b. For cause _____
21. **No indemnification or hold harmless by the State** _____
22. **Colorado Special provisions (two pages)** _____
23. All pages numbered as part of total (Page 1 of ___, etc.) _____

D. SIGNATURE BLOCK (4 signed originals routed through the central approval process)

1. Printed contract forms used (Special Provisions) _____
2. Top line: full legal name of contractor _____
3. 2nd line: legal signature(s) _____
4. Title of individual signatory _____
5. Taxpayer identification number _____
6. Corporate seal/attestation _____
7. Department name, etc. _____
8. If signature authority delegated: "For The" ex. dir. _____

E. AMENDMENTS

1. Amendment recites additional consideration for the contract change _____
2. **Basic contract/previous amendments included in review file** _____

CONTRACT CHECKLIST

II. PROVISIONS RELEVANT TO CERTAIN TYPES OF CONTRACTS

A. PERSONAL SERVICES CONTRACT CLAUSES/ATTACHMENTS

1. **Authorized independent contractor provision (Personnel Director rules)** _____
2. No excessive day to day direction and control over contractor _____
3. Assignment/subcontracting prohibited without State approval _____
4. Independent Contractor Certification Form in file _____

B. REAL ESTATE - LEASES

1. ADA compliance _____
2. Work requirements relative to any tenant improvements _____
3. Formula and cap for any increased rent in later years _____
4. Expansion options (where applicable) _____
5. Renewal options (where applicable) _____
6. Asbestos responsibilities _____
7. Number of square feet rented, expressed as "rentable square feet" for improved real estate _____
8. Exact address of premises _____
9. Purpose for which leased premises will be used _____
10. Services to be provided by Lessor _____
11. Parking obligations, if any _____
12. Termination provisions, if applicable _____
13. Holdover provisions, if applicable _____
14. Collocation clause (permits termination if State agencies collocate) _____
15. Damage or destruction provisions (see Fiscal Rules for minimums)
16. **Approved State form used (where required)** _____
17. Drawings and specifications of any agreed-upon tenant improvements _____
18. Diagram or sketch of leased premises within overall building or compound _____
19. Any agreed-upon rules and regulations applicable to leased premises _____
20. An appraisal, if the contract is purchase, sale, or exchange of real estate exceeding $100K _____

CONTRACT CHECKLIST

C. PROFESSIONAL SERVICES (Architect, Landscape Architect, Engineer, and/or Land Surveyor)

1. All Items under A. above, Personal Services Contracts _____
2. Coordinate scope of work with payment/compensation provisions _____
3. **Execution/encumbrance within 6 months of appropriation (if applicable)** _____
4. **Signed Consultant Certification Attached** _____
5. Complete, full service fee negotiated for all phases, whether or not funded _____
6. Services not to be performed eliminated/stricken _____
7. Condition precedent to unfunded phases used _____

D. CONSTRUCTION

1. Base bid/alternate amounts on face of agreement/total = award
   a. Alternates acquired or deducted in numerical order _____
2. Stamped, signed specifications for the project _____
3. Stamped, signed drawings for the project _____
4. Labor and material bond, with power of attorney attached _____
5. Performance bond, with power of attorney attached _____
6. Worker's Compensation Certificate _____
7. Appendix B: Minority Goal Form _____
8. MBE/WBE Compliance Report _____
9. Builder's Risk Insurance/Liability Insurance _____

III. EXHIBITS

A. Properly labeled as described in contract _____
B. Properly paginated (Exhibit A, Page 1 of ____, etc.) _____
C. All documents fastened (stapled) together as <u>one</u> document _____
D. Unnecessary RFP and proposal elements omitted _____

CONTRACT CHECKLIST

IV. ATTACHMENTS RELATIVE TO CONTRACTS GENERALLY

A. GENERAL

1. Late justification letter _____
2. If an amendment or modification, include one copy of original contract and previous amendments _____
3. Proof of insurance _____
4. Routing slip properly completed, including proper routing sequence _____

B ENCUMBRANCE DOCUMENT

1. Encumbrance Amount same as amount in contract _____
2. Encumbrance Amount same as Encumbrance Balance _____
3. Description fully explain purpose of contract _____
4. If multiple year, is there a total amount? _____

Agency Supplemental Checklist (Insert)

THIS SECTION IS RESERVED FOR AGENCY SUPPLEMENTARY MATERIAL OR POLICIES RELATED TO THIS CHAPTER.

CONSIDER SUPPLEMENTING THIS CHAPTER WITH AGENCY-DEVELOPED CHECKLISTS THAT ARE TAILORED TO THE CONTRACTS ROUTINELY EXECUTED IN YOUR AGENCY.

CHAPTER 10 : CONTRACT MANAGEMENT GUIDE

Introduction To Contract Management

1.1 Objective/Scope/Purpose/Definitions 10-1
1.2 Responsibilities 10-2

Beginning Contract Administration

2.1 Pre-Contract 10-3
Defining the Need 10-3
Developing the Means and Methods to Meet the Need 10-4
Procurement 10-5

2.2 Understanding the Contract 10-5

2.3 Contract Type Considerations 10-7
Supply vs. Service Contracts 10-7
Supply Contracts 10-7
Service Contracts 10-8

2.4 Contract Payments 10-9
Firm, Fixed Price Payments 10-9
Cost Reimbursement Payments 10-9
Time and Material/Labor Hour Payments 10-10
Indefinite Delivery Payments 10-11
Cost and Price Ceilings 10-12

2.5 Establishing a Contract Administration File 10-12

2.6 Planning for Administration 10-14
Assessing the Risk 10-14
Participating in “Partnering” 10-14
Conducting a Post Award Conference 10-16

Day-To-Day Contract Administration

3.1 Fundamental Duties of Contract Administration 10-19

3.2 Work Planning and Scheduling 10-19

3.3 Inspection, Monitoring, and Accepting Performance 10-20
Objectives related to monitoring 10-20
Elements of a good monitoring program 10-21
When may monitoring take place? 10-21
Who performs the monitoring? 10-22
Measuring Contract Performance 10-22
Handling Unacceptable Performance 10-23
Acceptance 10-23

3.4 Administration of State Property 10-24
Types of State Property 10-24
Administration of State Property 10-24
Contractor Bankruptcy and State Property 10-25
3.5 Funding and Financial Administration 10-25
Funding 10-25
Financial Administration 10-26

Modifications To Contracts 10-27
4.1 Introduction 10-27
4.2 Basis of Modifications 10-27
4.3 Modification Examples 10-27
Changes Clause 10-27
Price Adjustments Clause 10-28
Modification and Amendments 10-28
4.4 Procurement Rules and Approvals Related to Modifications 10-28
Procurement Rules 10-28
Approvals 10-28
4.5 Other Modifications 10-29
State-Furnished Property Clause 10-29
Force Majeure 10-29
Stop Work Orders 10-29
Bilateral Change Orders/Letters 10-29
Options 10-30
Task Orders 10-30
4.6 Pricing Changes and Modifications 10-30
4.7 Contractor Name Changes and Novation Agreements 10-30
Name Changes 10-30
Novation Agreements 10-31

Subcontracts and Assignments 10-35
5.1 "Privity of Contract" -- The Implications 10-35
5.2 State Approval of Subcontractors 10-35
5.3 State Relationship with Subcontractors 10-36
5.4 Assignments Distinguished 10-37
Checklist of Contract Management Considerations 10-38

Dispute Resolution 10-39
6.1 Introduction 10-39
6.2 Responsibilities in Dispute Resolution 10-40
6.3 Negoiation 10-41
Planning 10-41
Process and "Tactical" Considerations 10-43
Memorialize the Agreement 10-44
6.4 Other Dispute Resolution Techniques 10-44
Mediation 10-44
Informal Mini-Trials 10-45
Other Forms of Third Party Neutral Involvement 10-45
Arbitration 10-45
6.5 Implementing the Settlement of Disputes 10-46
Settlement Amendments 10-46
Negotiation Memoranda 10-47
Considerations During Dispute Resolution 10-48
Investigations 10-48

Planning for Negotiation - Interests and Constraints on Settlement 10-48
Best Alternative to Negotiated Settlement (BATNA) 10-49
Legitimacy Arguments 10-49
Communications During Negotiation 10-49
Plan, Discuss and Agree Upon Commitments 10-50
Options 10-50
Some "Tactical" and Process Considerations 10-50
When Alternative Dispute Resolution (ADR) Does And Does Not Made Sense 10-51
Principles of Contract Interpretation 10-53
Sample Settlement Amendment 10-55

Performance Remedies and Termination 10-58
7.1 Performance Remedies 10-58
Remedies Where the Contract Is Silent 10-58
Contracts for Goods 10-58
Contracts for Services 10-59
Inspection Remedies, (e.g. Rejection and Payment Withholding) 10-60
Warranties 10-61
Liquidated Damages 10-62
Waiver of Delivery Dates and Other Requirements 10-63
7.2 Termination for Default 10-64
Notice 10-64
Basis for Termination 10-64
Compensation 10-65
Excusable Delay 10-65
Contractor Liability for Excess Costs 10-65
Erroneous Termination for Default 10-65
7.3 Termination for Convenience 10-65
Methods of Termination 10-66
Compensation of the Contractor 10-66
Termination in “Good Faith” 10-66
“Bad Faith” 10-67
7.4 Avoiding Contract Interruptions 10-67
Performance Remedies - A Manager’s Checklist 10-69
General 10-69
Supply Contracts Without Remedies 10-70
Service Contracts Without Contract Remedies 10-70
Suggested Procedure in Liquidated Damages 10-71
Waiver of Delivery Schedules 10-71
Checklist for Termination for Default Situation 10-72
Complete the Appropriate Letters, Contract Amendments, Memos 10-73

Contract Close-Out 10-74
8.1 Evaluating and Documenting the Results 10-74
Approaches to Evaluating Contractor Performance 10-74
Techniques for Conducting the Evaluation 10-74
8.2 Renewals and Options, Extensions, and Resolicitation 10-75
Renewals and Options 10-75
Extensions 10-75
A Note About Contract "Scope" 10-76
Resolicitation 10-76
8.3 Internal and External Feedback 10-76

CHAPTER 10 : CONTRACT MANAGEMENT GUIDE

Introduction To Contract Management

1.1 Objective/Scope/Purpose/Definitions 10-1
1.2 Responsibilities 10-2

Beginning Contract Administration

2.1 Pre-Contract 10-3
Defining the Need 10-3
Developing the Means and Methods to Meet the Need 10-4
Procurement 10-5

2.2 Understanding the Contract 10-5

2.3 Contract Type Considerations 10-7
Supply vs. Service Contracts 10-7
Supply Contracts 10-7
Service Contracts 10-8

2.4 Contract Payments 10-9
Firm, Fixed Price Payments 10-9
Cost Reimbursement Payments 10-9
Time and Material/Labor Hour Payments 10-10
Indefinite Delivery Payments 10-11
Cost and Price Ceilings 10-12

2.5 Establishing a Contract Administration File 10-12

2.6 Planning for Administration 10-14
Assessing the Risk 10-14
Participating in “Partnering” 10-14
Conducting a Post Award Conference 10-16

Day-To-Day Contract Administration

3.1 Fundamental Duties of Contract Administration 10-19

3.2 Work Planning and Scheduling 10-19

3.3 Inspection, Monitoring, and Accepting Performance 10-20
Objectives related to monitoring 10-20
Elements of a good monitoring program 10-21
When may monitoring take place? 10-21
Who performs the monitoring? 10-22
Measuring Contract Performance 10-22
Handling Unacceptable Performance 10-23
Acceptance 10-23

3.4 Administration of State Property 10-24
Types of State Property 10-24
Administration of State Property 10-24
Contractor Bankruptcy and State Property 10-25

3.5 Funding and Financial Administration 10-25
Funding 10-25
Financial Administration 10-26

Modifications To Contracts .....

4.1 Introduction 10-27

4.2 Basis of Modifications 10-27

4.3 Modification Examples 10-27
Changes Clause 10-27
Price Adjustments Clause 10-28
Modification and Amendments 10-28

4.4 Procurement Rules and Approvals Related to Modifications 10-28
Procurement Rules 10-28
Approvals 10-28

4.5 Other Modifications 10-29
State-Furnished Property Clause 10-29
Force Majeure 10-29
Stop Work Orders 10-29
Bilateral Change Orders/Letters 10-29
Options 10-30
Task Orders 10-30

4.6 Pricing Changes and Modifications 10-30

4.7 Contractor Name Changes and Novation Agreements 10-30
Name Changes 10-30
Novation Agreements 10-31

Subcontracts and Assignments .....

5.1 "Privity of Contract" -- The Implications 10-35
5.2 State Approval of Subcontractors 10-35
5.3 State Relationship with Subcontractors 10-36
5.4 Assignments Distinguished 10-37
Checklist of Contract Management Considerations 10-38

Dispute Resolution .....

6.1 Introduction 10-39

6.2 Responsibilities in Dispute Resolution 10-40

6.3 Negoiation 10-41
Planning 10-41
Process and "Tactical" Considerations 10-43
Memorialize the Agreement 10-44

6.4 Other Dispute Resolution Techniques 10-44
Mediation 10-44
Informal Mini-Trials 10-45
Other Forms of Third Party Neutral Involvement 10-45
Arbitration 10-45

6.5 Implementing the Settlement of Disputes 10-46
Settlement Amendments 10-46
Negotiation Memoranda 10-47
Considerations During Dispute Resolution 10-48
Investigations 10-48
Planning for Negotiation - Interests and Constraints on Settlement 10-48
Best Alternative to Negotiated Settlement (BATNA) 10-49
Legitimacy Arguments 10-49
Communications During Negotiation 10-49
Plan, Discuss and Agree Upon Commitments 10-50
Options 10-50
Some "Tactical" and Process Considerations 10-50
When Alternative Dispute Resolution (ADR) Does And Does Not Made Sense 10-51
Principles of Contract Interpretation 10-53
Sample Settlement Amendment 10-55

Performance Remedies and Termination .....

7.1 Performance Remedies 10-58
Remedies Where the Contract Is Silent 10-58
Contracts for Goods 10-58
Contracts for Services 10-59
Inspection Remedies, (e.g. Rejection and Payment Withholding). 10-60
Warranties 10-61
Liquidated Damages 10-62
Waiver of Delivery Dates and Other Requirements 10-63

7.2 Termination for Default 10-64
Notice 10-64
Basis for Termination 10-64
Compensation 10-65
Excusable Delay 10-65
Contractor Liability for Excess Costs 10-65
Erroneous Termination for Default 10-65

7.3 Termination for Convenience 10-65
Methods of Termination 10-66
Compensation of the Contractor 10-66
Termination in “Good Faith” 10-66
“Bad Faith” 10-67

7.4 Avoiding Contract Interruptions 10-67

Performance Remedies - A Manager's Checklist 10-69
General 10-69
Supply Contracts Without Remedies 10-70
Service Contracts Without Contract Remedies 10-70
Suggested Procedure in Liquidated Damages 10-71
Waiver of Delivery Schedules 10-71
Checklist for Termination for Default Situation 10-72
Complete the Appropriate Letters, Contract Amendments, Memos 10-73

Contract Close-Out .....

8.1 Evaluating and Documenting the Results 10-74
Approaches to Evaluating Contractor Performance 10-74
Techniques for Conducting the Evaluation 10-74

8.2 Renewals and Options, Extensions, and Resolicitation 10-75
Renewals and Options 10-75
Extensions 10-75
A Note About Contract "Scope" 10-76
Resolicitation 10-76

8.3 Internal and External Feedback 10-76

Chapter 10 : CONTRACT MANAGEMENT GUIDE

Section 1

Introduction To Contract Management

1.1 Objective/Scope/Purpose/Definitions

The objective of this *Contract Management Guide* (*Guide*) is to provide State contract managers with relevant information and practical guidance in managing contracts executed by the State of Colorado (State). It was prepared by knowledgeable individuals that are involved in the State contracting process on a daily basis and contains their guidance on beginning contract administration, day-to-day contract administration, modifications to State contracts, subcontracts, dispute resolution, performance remedies and terminations, and contract close-out. This *Guide* was developed as a "stand alone" document, but since contract management affects all aspects of the State contracting process, it was incorporated into the *State of Colorado Contract Procedures and Management Manual* (*Manual*) as Chapter 10, the final chapter of the *Manual*.

The scope of this *Guide* is limited to contracting as it refers to the engagement of a party, either a firm or an individual, not on the State's payroll, to perform services or functions that would otherwise be performed by an agency or institution. The key differences between a service that is contracted for and one that is not are: whose employees are actually performing the work, and the existence of a contractual agreement that specifies the promises each party has made to the other. In a "self-provided" or "in-house" service, the State's employees do the work, supervise the performance of that work, and are paid on the State's payroll. In a contracted service, the State negotiates a contract in which it purchases certain services from the contractor. The precise method by which the service is to be performed is, within the constraints imposed by the statements of work or specifications in the contract, left to the discretion of the contractor.

The purpose of a contract is to document the way in which business will be conducted between the agency or institution and the contractor. A contract should represent the requirements of the agency or institution in clearly worded, understandable, legally enforceable terms. A contract might also specify remedies available to either one of the parties in the event that the other breaches any portion of the contract. A good contract can facilitate performance, minimize problems of coordination, and minimize risks associated with contingencies which may arise during contract performance.

The definitions for the terms contract and contract management are noted below. These two definitions are used consistently throughout this *Guide*.

A contract is an enforceable agreement between two or more competent and authorized parties in which one of the parties, the offeror, promises something of value to the other in return for that party's acceptance of the offer and promise to perform or refrain from performing certain activities. The

definition of contracting, as it is used in this *Guide*, includes purchase orders (POs) for goods and services, but it does not include employment contracts with State employees.

Contract management is the process of administering an agreement and includes:

- Defining the need.
- Developing the means and methods to meet the need.
- Complying with all legal requirements.
- Assessing risks and allocating resources.
- Monitoring the agreement.
- Comparing measured performance to established standards.
- Communicating concerns and taking corrective action, as necessary, to ensure the successful completion of the agreement.
- The receipt by the State of the intended benefit from the transaction, and documenting and evaluating the results.

1.2 Responsibilities

The primary responsibilities of a contract manager are:

- Participating, as necessary, in developing the solicitation and writing the contract.
- Monitoring the contractor's progress and performance to insure that goods and services provided conform to the contract requirements.
- Managing any State property used in contract performance.
- Making payments consistent with the contract requirements.
- Exercising State remedies, as appropriate, where a contractor's performance is deficient.
- Resolving disputes in a timely manner.
- Maintaining appropriate records.

The number of participants in the State contracting process will vary in number from one to many depending on the size and complexity of the project. Identify staff, early in the procurement process, who will participate in the project. Identify a single Project Manager (PM) and various subordinates, if necessary, who will be responsible to the PM. Each participant's responsibilities should be clearly defined to ensure a successful contract. Identify any teams with shared responsibilities. Assign individual and team goals, tasks, outcomes, quality levels, acceptable performance standards, and completion deadlines. Responsibilities of the State that are normally assigned to individuals or teams include: participating in structuring the entire project from procurement through completion and warranties, attending meetings, completing assignments, and other tasks in support of the contract.

Section 2

Beginning Contract Administration

2.1 Pre-Contract

Defining the Need

The contractor is obligated to perform in accordance with the contract, whether it is in the form of a standard State contract, a purchase order or another document authorized by the State Controller. Where a contractor is selected from a competitive selection process, the scope of work in the contract must be substantially the same as the scope of work as described in the solicitation. Accordingly, it is critical to properly structure the description of the State's needs, in the solicitation, keeping in mind the goal of having a contract that is readily understood, provides the goods and services that meet the State's needs, is easy to manage, and has the capability of measuring the contractor's performance.

Where no solicitation document is used, the agency must negotiate, and reduce to writing, a "Statement of Work" (SoW) that meets these same standards. A thorough, well-defined SoW with clear, precise specifications is critical to the success of the entire contract.

The legal obligations of both the contractor and the agency or institution are contained in the contract. The contract's SoW should be an accurate, thorough, detailed, precise, measurable description of the essential and technical requirements for the goods and services to be provided, including the desired results and the standards to be used to determine whether the requirements have been met. The SoW should:

- Be written. Use plain simple English written in the same logical order as the activities.
- Focus on results. Results or performance should be the focus, not procedure or process. The more detail that is provided to the bidders, the more likely it is that the State will satisfy its needs once the contract has been executed.
- Be accurate. The contractor should not have to guess at what is to be expected in terms of performance. All aspects of performance should be included.
- Be thorough. Cover all issues and express all expectations. If it is not in writing the contractor does not have to provide it.
- Be detailed. Include necessary detail to accurately describe a desired outcome, include all of the necessary detail.
- Be precise. Specify that the outcome is in the detail that is needed.
- Be measurable. Write the performance requirements in such a way that it can easily be determined if and when the contractor has successfully completed performance.

When preparing a SoW be systematic and thorough. Define the desired outcome in detail. List the steps necessary to achieve the desired outcome. Do an analysis to identify the various task components. Determine performance measures. For each task be able to answer questions such

as: "What is the input?" "What work will be done?" "What output is expected?" "What are the measurable standards?' "When is the performance to be completed?"

Establish reporting and monitoring requirements. For example, a regular conference should be scheduled to review standards, evaluate progress, identify problem areas, and determine actions to be taken by parties to resolve problems.

Developing the Means and Methods to Meet the Need

The contract manager should review the contract documents and be thoroughly familiar with all aspects of the contract and the required performance. The contract manager should understand what is expected of both the contractor and the agency or institution. The contract manager should also know what, when, where, how and to what standards the contractor is to perform.

The contract manager must organize and, as appropriate, work with any teams assigned to participate in monitoring the contract. To achieve these outcomes, the contract manager should complete the following:

- Identify any teams with shared responsibilities.
- For each individual and team, identify clearly and thoroughly the assigned mission, goals, objectives, tasks, and sub-tasks.
- Designate the individual or team responsible for accomplishing each of the tasks.
- Determine the sequence of activities, dependencies, required or desired outcomes, and acceptable performance levels.
- Develop a timetable and start and end date for each performance component. Include milestones with accompanying time frames, and monitoring and reporting requirements.
- Monitor contractor activity on a specified frequency to identify problem areas.
- Meet with the contractor on a regular basis to review progress, discuss problems, and consider necessary changes.
- Provide access to State facilities, equipment, data, staff, materials, information.
- Contact other staff to assure access and provide equipment and data.
- Establish scope of authority, clear lines of communication and reporting, and identify specific individuals who will interact directly with the contractor.
- Establish control of correspondence, data and reports.
- Identify potential problems and solutions.
- Define terms or conditions of default.
- Establish a procedure, identify a responsible person and establish a time frame for handling non-compliance.
- Establish the procedure, identify a responsible person, and establish a timeline for making necessary contract decisions or modifications.

Since the SoW is essentially a work plan of the contractor's and State's performance, it may be appropriate to include activities that are not part of the direct delivery of goods or services but are

critical to the vendor's ability to provide the services. The following listing contains some of the items that may be included:

- Participation in the structuring of the entire project from procurement through need definition, vendor selection, completion of performance and warranty periods, attending meetings, making site visits, reviewing vendor reports, testing equipment, software, forms, procedures.
- Requiring and attending periodic meetings to review schedules, establish standards, evaluate progress, identify problem areas, and identify actions to be taken by parties to resolve problems.

Remember that the SoW should be as complete and thorough as possible. It must be able to answer the who, what, when, where, why and how of any aspect of the contract or contractor performance.

Procurement

State agencies and institutions must select contractors in accordance with the Colorado Procurement Code and Rules and related standards, including the State Personnel Rules and State Fiscal Rules. A well defined SoW with detailed, measurable specifications is critical to the success of the entire contract. The steps in the procurement process are identified in the procurement Section of the *Manual*.

2.2 Understanding the Contract

All contract managers should start with an understanding of the basic components of a contract. All documents relating to the contract should be obtained, thoroughly reviewed, and maintained in a contract file. These documents include the contract, exhibits, requests for proposal, and any other related correspondence from the State, the agency or institution, or the contractor. The contract manager should become familiar with the procurement process associated with this specific contract type. Questions should be asked to find out what kind of relationship exists between the contracting parties. Were there any controversies regarding the contracting process? Determine if the contract negotiations went smoothly or if there were significant issues raised or problems encountered. Review all memorandums concerning the key elements of the negotiation.

Does the contract contain:

- Where and how the work is to be performed: The answer to this question may have an impact on whether or not the contractor will be considered an independent contractor or an employee.
- Expected outcome measures: This should include the staging of deliverables, if appropriate. Any significant deliverable should be tied to the payment schedule.
- Complete addresses: The addresses where correspondence is to be sent, where payments are to be made, and other addresses, as appropriate.

- Complete costs: The total cost, including any indirect cost allocation, of the goods and services that are to be provided.
- Complete contract performance: Where, when, and how the goods and services are to be delivered.
- Complete acceptance/rejection standards and conditions: The State's right to inspect and accept or reject the goods and services and the conditions of acceptance or rejection.
- Complete contract dates: The contract's effective date, completion date, and any additional dates necessary to monitor contract performance.

Is there a concern regarding the contractor's ability to perform? Are the parties relying on any verbal promises made outside of the scope of the contract? Verbal promise problems can be most effectively dealt with during the contract drafting stage by including an "entire agreement" clause. This clause emphasizes written agreements and requires the parties to look to the contract itself for terms and conditions. It prevents either party from substituting terms not agreed upon and forces the parties to formalize all future contract amendments in writing.

Another important clause to look for in the contract is a proprietary information clause that is designed to put both contracting parties on notice to maintain confidentiality requirements (if claimed by contractor), and Colorado Open Records Act requirements. It is critical that the contractor be made subject to all confidentiality requirements that the State may be obligated to observe, given the specific subject matter of the contract. Verify that the contract makes the contractor individually liable for disclosing any confidential information.

Independent contractors usually own the copyright and patent rights to works and inventions, including data and software created under the contract, unless the contract states otherwise. This is typically an issue in software development, computer programming, and other related types of service contracts. It is important to note whether or not the contract specifies the "ownership" of these rights. If the State is paying for the development of documents or software, the contract should at least provide for the State to use, modify, and copy the documents, and use the software or other inventions. If the contractor is being allowed to retain copyrights and patent rights without reserving adequate rights for the State, the contract manager may want to discuss this rationale with the contract negotiators. Finally, the contract should not only define the "rights", the contract should also clearly specify what data, documents, or software is deliverable, and the format for delivery.

The contractor's progress reports should be readily available to the State, if discussed in the contract. The contract manager should become familiar with how to acquire these reports and when they are posted. The contract should also define what information is to be included in the reports. If the initial reports provided contain incomplete information or the information provided is in an unacceptable format, discuss the issue with the contractor as soon as the problem is noted and decide on a report format that is mutually acceptable to the parties. These reports may include such items as:

- The specific accomplishment(s) achieved during the reporting period.

- The specific task(s) completed pursuant to the provisions of the contract and the completion dates of the tasks.
- The specific completion date(s) for all task(s) remaining to be completed pursuant to the provisions of the contract.

It is important that the contract manager set up a tickler file for acquiring reports. Do not let the contractor fall behind in delivering reports. This may be the only indication that the contract is on schedule and that the deliverables will be completed on time. By reviewing these reports, the contract manager may be able to identify a potential problem in its early stages and discuss the issue with the contractor, and prevent a problem from occurring. It is important to have a post-award contract requirements review with the contractor to answer questions and discuss outstanding issues. Holding periodic meetings during the course of the contract to discuss current issues and the status of deliverables is important in achieving contract performance.

2.3 Contract Type Considerations

Supply vs. Service Contracts

In general, what the State is buying, known as the State's "requirements", can be characterized as either goods, where a specific item or system is delivered on a delivery date or services, where the predominant value to the State is labor. Of course, contracts can also be combinations of both goods and services, as is the case in construction and "studies contracts", where services are often a substantial component of the performance, with the delivery of a study, a report, or other deliverable due at a certain time, usually at the end of the contract. Consider these differences in the administration of these two types of contracts.

Supply Contracts

- How the "Contract" is Defined. Inspection, acceptance, rejection, interpretation, and remedies for default are governed by the Uniform Commercial Code (UCC), Title 4, Articles 1 and 2, Colorado Revised contracting parties have not agreed how to handle specific issues. This is why purchase orders (which contain little, if any, language about "remedies") are more commonly used in supply purchasing.

- Payment. Payment usually is due after delivery, inspection, and acceptance of the supply or deliverable.

- Delivery Date/Performance Period. Normally the time for performance is expressed as a delivery date.

- Inspection and Acceptance. Inspection is usually performed by examining the product and comparing it against testing standards, or by visually examining and comparing the item to

contract specifications or "industry standards." Acceptance is usually “final”, except for a limited right under the UCC to “revoke acceptance” after discovery of substantial latent defects.

- Acceptable Performance. Under the UCC, there is a "perfect tender" rule (with limited exceptions). In general, the contractor must deliver the promised supply by the time specified, or the buyer has the right to reject and not pay, unless the contract specifies different rights.

- Warranties. The UCC grants implied warranties of merchantability and fitness for a particular purpose. Section 7 discusses warranties.

Service Contracts

- How the "Contract" is Defined. The Uniform Commercial Code does not apply to service contracts, so contract language is generally relied upon to define rights and obligations, except the few issues that are resolved by "common law" rules that were developed by the courts. The trouble is that common law rules typically are not clear and generally do not protect the State’s interests. Legal counsel should be consulted to better understand these remedies if they are not defined in the contract.

- Payment. Payment usually occurs as services are performed. Payments are normally made monthly and are based on invoices submitted that detail the nature of the services performed and any additional costs or expenses incurred.

- Performance Period/Delivery Date. Service contracts usually use the term "period of performance" to define the time within which services must be performed.

- Inspection and Acceptance. Often a "service" is difficult to inspect and examine. Inspection and testing is usually performed by selecting representative samples of the service and examining them to determine if they are acceptable. There is more reliance on examining invoices and relying on the contractor's affirmation of the time spent in performing the services. This is especially true where payment is based on the number of labor hours.

- Acceptable Performance. In services, usually "substantial performance” (not perfect performance) obligates the State to pay, even though the State has a right to sue for damages caused by deficient performance. This is the reason it is important to define the State's rights (e.g. payment withholding) for deficient contractor performance in service contracts.

- Warranties. There are no implied warranties. All warranties must be specified in the contract.

2.4 Contract Payments

There are four common types of payments required by State contracts: Firm, fixed price, or "lump sum" payments; Cost reimbursement payments; Time and material or "labor hours" payments; and Indefinite delivery payments. It is also important to note that cost and price ceilings apply to all State contracts.

Firm, Fixed Price Payments

- The contractor is entitled to payment of the agreed price upon successful delivery and acceptance of the goods or service, regardless of how much the performance costs the contractor.

- This is the easiest contract type to administer. There is no need to conduct an audit or require the contractor to account for direct and indirect costs.

- Firm, fixed price contracts are of low risk to the State, because the amount to be paid is stated in the contract.

- The contract manager must know the price, conditions for payment (e.g. delivery and acceptance), and the standard of acceptability for the goods or service provided.

Cost Reimbursement Payments

- The cost reimbursement contract is the most complex to manage and highest cost risk to the State. Cost reimbursement contracts require the State to pay the contractor "reasonable, allowable" costs.

    - Allowable costs are those that are "allocable" to goods or services provided under the contract and are not prohibited by the standards governing allowable cost, (e.g. the cost of fines and penalties cannot be reimbursed, even if directly related to performance of the work).

    - "Allocable" means that the cost being claimed was for the purpose of contract performance. It is sometimes difficult to determine allocable costs when dealing with "indirect costs" (for example overhead) that benefit not only contract performance, but also other "cost objectives".

- Grant contracts are typically cost reimbursement payments, and the cost accounting rules are contained in the Federal Office of Management and Budget (OMB) circulars.

- Chapter 5 of the *Manual* contains a more complete discussion of these cost accounting rules. The OMB circulars govern cost accounting on grant contracts.

- The State rarely uses cost reimbursement payments in any contract other than grant contracts. State statutes, Article 24-103-501, CRS, require a written determination that the use of a cost reimbursement contract is likely to be less costly to the State. If this type of payment is used, the standards for cost accounting must be defined. State of Colorado Procurement Rule R-24-107-1-1-01 contains guidance on cost principles.

- Contract management is difficult when cost reimbursement payments are used because an audit is the primary tool used to monitor contract costs.

- Typically when cost reimbursement payments are made, contract performance is so difficult to project that the customary contract approaches for breach/termination for default do not work. The State's remedy is to require reperformance by the contractor and pay for this reperformance, when satisfactorily accomplished.

- Payment for costs can be denied where unallowable or where costs are unreasonably high for performance of the work. This is often a difficult burden of proof for the State. See State of Colorado Procurement Rule R-24-107-101-05(f) for additional information on this subject.

- Contracts should set a "not-to-exceed" ceiling for materials and supplies, and define the scope of reimbursable supplies and materials.

Time and Material/Labor Hour Payments

- Time and material/labor contracts are used where service level is the primary component of the work, or it is difficult to otherwise price the "deliverable."

- These contracts should include agreed upon per hour labor rates, that include direct and indirect costs and profit. The contract should also include a ceiling amount that the contractor cannot exceed. Ceilings should be monitored, and the contract should contain a provision making the contractor responsible for reporting when the contract costs have exceeded a percentage of the contract ceiling.

- These contracts should also set a "not-to-exceed" ceiling for goods and services, and define the scope of reimbursable supplies and materials.

- Administration of these contracts requires examination of invoices specifying labor hours and materials, some validation that goods were purchased or services were performed, and inspection of services performed to insure compliance with contract requirements.

Indefinite Delivery Payments

- The quantity of goods and services to be provided cannot be so the parties must agree on a rate of payment for the units of goods or services as they are delivered.

- These are "Open-ended" contracts often priced on a "per unit" basis where the specific quantity, (e.g. hours of computer programming services) is not known.

- "Estimated Quantities Contracts" set a minimum quantity order that the State is obligated to purchase. These contracts usually also set maximum quantities and limits on each individual order issued to the contractor.

- "Requirements Contracts" require the State to satisfy all its requirements for the goods or services under the contract.

  - If the State satisfies the obligation with another contractor, the State may be in breach.

  - The advantage to this type of contract is that it gives the State more favorable prices. The disadvantage is that it requires the State to satisfy its requirements through a single vendor.

  - An example of this type of contract is a mandatory state-wide price agreement with a single vendor.

- Administration responsibilities of “indefinite delivery” contracts require the contract manager to:

  - Know and order the minimum quantity specified in the contract;

  - Limit the quality ordered to the maximum quantity allowed or other ordering limitations;

  - Ensure that the provision of "requirements contracts" are upheld that the requirements are not satisfied outside of the contract, such as by buying from another vendor; and

  - Inspect goods and services as usual and validate receipt of the goods or services listed as delivered on the invoice.

- The State Controller's policy on "Contract Modifications, Changes, Amendments, and Approval Routing", in the Policy Letters Annex of the *Manual*, contains a detailed discussion of these contracts and sample clauses.

Cost and Price Ceilings

Cost and price ceilings apply to all State Contracts.

- The State Fiscal Rules require that all State contracts have a price “ceiling” or “not to exceed” amount.

- Firm, fixed price contracts obligate the contractor to complete performance for the specified price.

- Usually, a cost reimbursement contract is a "best efforts" contractual obligation with no promise by the contractor that it can complete the work within the estimated cost, or the "not to exceed" cost.

- In between these two extremes are labor hours contracts having "not to exceed" amounts. Contract managers must know whether the "not to exceed" is merely an encumbrance or accounting control mechanism, or a promise by the contractor to complete the work within the amount specified in the contract as the ceiling.

- This distinction is important when rejecting performance or giving the contractor other technical direction in order to know whether the contractor may have a claim for additional costs if the contract reaches the ceiling amount.

2.5 Establishing a Contract Administration File

Keeping a complete contract administration file is critical. This file will provide a basis for settling claims and disputes should they arise in administrative or court actions. Through the life of the contract, the contract administration file may contain such things as:

- A copy of the current contract and all modifications thereto;
- A copy of prior contracts with this specific vendor if they offer valuable historical data;
- A copy of all specifications, drawings, or manuals incorporated into the contract by reference;
- The request for proposal (RFP), the contractor’s RFP response, the contract award document and supplemental agreements;
- A list of contractor submittal requirements;
- A list of government furnished property or services;
- A list of all information or documents furnished to the contractor;
- A copy of the pre-award survey, if conducted;
- Any applicable labor clearances such as Minority Business Enterprises/Women Business Enterprises certifications;
- A schedule of compliance reviews; internal correspondence if appropriate;
- A copy of all general correspondence related to the contract;

- The originals of all contractor data or report submittals;
- A copy of all routine reports required by the contract such as sales reports, pricing schedules, approval requests, and inspection reports;
- A copy of all notices to proceed, to stop work, to correct deficiencies, or change orders;
- A copy of all letters of approval pertaining to such matters as materials, the contractor's quality control program, prospective employees, and work schedules;
- The records/minutes of all meetings, both internal and external;
- A copy of all contractor invoices; information relative to discount provisions for prompt payment; letters pertaining to contract deductions or fee adjustments;
- A copy of all backup documentation for contractor payment or progress payment; and copies of audits if conducted.

Keep confidential or proprietary material clearly marked and separate from other contract documentation. In the event an "Open Records Act" request is received, all such material will be together so it is not accidentally released.

It is always helpful, and sometimes necessary in cases of large contract volumes, to maintain a manual or computerized tracking system. A tracking system is a handwritten or automated system that provides detailed information to contract managers about each contract, such as contract deliverables, deadlines, amounts, risks, and any other useful information.

The contract administration file, the procurement file, and the payments file for any particular contract may be the same file, depending on the size of the agency or institution and the amount of the contract. If this is the case, the file is normally managed by one person, the contract manager. In large agencies or institutions, contract administration is often a separate function. In this case, the contract manager may be located in a separate section of the agency or institution from the procurement and payroll sections, and would, therefore, require a separate contract administration file. However, even in the case of a large agency or institution, it is likely that the separate contract administration file would include portions of the material and information contained in the procurement and payment files.

The contract administration file should be retained throughout the contract term and all subsequent extensions/renewals, as well as during the final payment period and warranty period. Prior to archiving the contract file, the contract manager should ensure that there are no outstanding issues that could result in a lawsuit, an administrative hearing, or other action as a result of the contract. Retain the contract administration file in the agency's or institution's archived file for at least 6 years after contract completion. The agency or institution should refer to Section 24-80-101, CRS, the State's archiving statute, prior to destroying any contract file.

2.6 Planning for Administration

Assessing the Risk

The resources devoted to managing a contract should bear some relationship to the degree of risk associated with that contract. The size, complexity, and sensitivity of a contract should dictate the amount of resources devoted to its successful completion.

- The size of the contract is measured in terms of its dollar value.
- The complexity of the contract is measured in terms of its scope.
- The sensitivity of the contract is measured in terms of its exposure.

Common sense would indicate that more resources should be devoted to contracts that are large, complex, and sensitive. Although this statement appears true, it is not always the case and it may not always be wise to devote a majority of resources to contracts simply because they are large, complex, and sensitive. Some of the largest contracts, some of the most complex contracts, and some of the most sensitive contracts are the easiest to manage; while some of the smallest contracts, some of the least complex contracts, and some of the least sensitive contracts are the most difficult to manage.

Successful contract management involves continually assessing the risk associated with all ongoing contracts and devoting the necessary resources to successfully complete each of them. If available resources are in short supply, the most successful contract manager will be the person that can best apply the resources available to satisfactorily complete each of the contracts assigned.

Participating in "Partnering"

Partnering is a process designed to assist all parties of a contract to satisfactorily complete their contracted responsibilities. It involves establishing a bond of trust among the parties where problems are identified and solved at the lowest possible level in order to provide a "win-win" situation for all parties involved. Partnering establishes a relationship among the parties to the contract where disputes are resolved and litigation is avoided. If partnering is to be part of the contract, it should be adopted as early as possible in the process.

If partnering is required by the contract, it is usually found in the solicitation as a contract clause and includes a dispute resolution procedure, required meeting participation, and a partnering workshop. Since these partnering activities have the potential of increasing costs to the contractor, if they are required, the contractor prices these activities along with the other contract requirements. For example, if a contractor is expected to participate in a partnering workshop during the planning phase for contract performance, the contract should specify that participation is required.

The strategy for implementing the partnering process is developed by the contracting parties and usually involves designing a mechanism for solving the problems that arise during the performance of a contract. This process is especially suited to those contracts that involve the construction process but the concepts are transferable to other types of contracts. The basic premise is to design a process to which each stakeholder will adhere and allow problem solving at the lowest

possible level in each of the parties' organization. The goal is to save time, energy, and money by providing a structure for problem resolution, resulting in higher quality products and services.

A partnering workshop is normally held at the inception of the contractual relationship to assist all parties in identifying their respective goals and objectives. Subjects covered in the workshop usually include establishing lines of authority and responsibility, meeting financial goals, minimizing paperwork, and avoiding litigation. Other potential problem areas or areas of concern may be discussed. The workshop should stress the fact that the satisfactory accomplishment of the contract should be the major concern, and that all parties can have their individual contract goals and objectives met without detracting from those of another party. In addition, a workshop can be held in the middle of the performance period of most contracts if all stakeholders desire to repair relationships and avoid disputes that appear to be headed toward litigation.

A partnering workshop has no set length but is usually structured to last from a half-day to one or more days depending on the size of the contract involved. The number and complexity of issues raised initially are major determinants to the time required to successfully partner a project. The cost of conducting a partnering workshop is usually shared by all parties on an agreed upon basis of equality.

The partnering process has seven distinct areas of involvement for each party that must be addressed in the partnering workshop. They are commitment**,** equity, trust**,** development of mutual goals and objectives, implementation, continuous evaluation and timely responsiveness. Commitment to the process is required from top management and requires their participation. Typically the parties to the contract formalize their commitment to the partnering process by developing and signing a partnering charter. The charter becomes the symbol of commitment, but is never a contract and is not legally enforceable. Equity is established at the onset of a relationship to include all parties' interests in a specific contract relationship. Each party is assured its concerns are heard and a commitment is made toward satisfying each of its interests. Trust is developed by overcoming each party's critical and cynical outlook of others motives. Teamwork activities should be designed to develop personal relationships and communicate goals. Understanding the "partner(s)" is key to trusting, and trusting relationships lead to synergistic relationships that can accomplish far more, far faster than normal contract relationships.

After working through the above steps, the parties will establish a plan for periodic evaluation of the partnering process. This is done to ensure that the process is accomplishing the agreed upon mutual goals and objectives, each party's interests are being considered and each is carrying its share of the load, as agreed. This phase of partnering allows for corrections that may be needed to keep the process progressing and for avoiding any potential disputes.

The final phase of partnering involves timely responsiveness. Timely communication and decision making are recognized deterrents to wasting resources such as money, time, manpower, and materials. At this step, the contracting parties will develop mechanisms to encourage issue resolution, including an escalation process in which unresolved issues are presented to and resolved by the next highest level of management.

When properly instituted, partnering will result in a team environment where all parties have a heightened awareness of value and fair-dealing and contribute to higher work standards and ethics. Other benefits derived from partnering may include reduced exposure to litigation, a lower risk of cost overruns and delays, improved quality of a project or product delivery, expedited project or product delivery, improved communication between all stakeholders, lower administrative costs, increased opportunity for innovation which may result in substantial savings, and an increased opportunity for a financially successful contract for all stakeholders. These benefits are realized by addressing the human element of contractual relationships and providing a method of improving each relationship, allowing all participants to win.

The major benefit of partnering is the establishment of a non-adversarial relationship which results in lower costs and higher quality products and services.

Conducting a Post Award Conference

A mutual understanding between the parties of all contractual requirements is essential to successful contract performance and, therefore, after a contract is awarded, all key parties should meet to discuss contract terms in a "post award conference". The post award conference provides an opportunity to identify and resolve any existing or potential problems. It is an opportunity for the State contract manager to set the ground rules for contract administration and performance that should prevail throughout the term of the contract. Issues relating to the contract such as reporting, time-lines, and dispute resolution, as well as any problems or misunderstandings, should also be clarified at this time. Note, however, that it is not the intent of this conference to re-negotiate contract terms. Also note that the fact that a post award conference has been held does not eliminate the possibility of additional conferences. If the contract manager determines the need to redirect contract efforts, for example, this must be communicated to the contractor as soon as possible by way of an additional conference.

The contract manager first needs to determine whether a conference is necessary by noting such things as the contractor's qualifications and experience, urgency of delivery schedule, past performance of the contractor, complexity of financial arrangements, and other pertinent issues. If potential problems do not warrant a conference, or if the contract requirements are not particularly complex, the contract manager may choose to simply write a letter to the contractor. The letter may include any notices to the contractor, a brief discussion of any unique or significant contract requirements, and identify all State representatives responsible for administering the contract. The letter should clarify authority and request a central point of contact for all communications with the contractor. The contract manager should make a conscious determination of the extent and the method of post award orientation which would best serve the State's interests. If a full post award conference is to be held, all key agency or institution staff, including the contract manager, procurement officer, accounts payable representative, program manager, and program staff who are the customers or end users of the services and/or commodities provided by the contractor, should attend.

Prior to any post award conference, or the issuance of a post award orientation letter, the contract manager should conduct a preliminary meeting with all State personnel who assisted in the procurement, the preparation of the contract, and who have an interest in the contract

deliverables. During this preliminary meeting a detailed review of the contract and any associated statement of work should be conducted to identify all actions that must be taken by State personnel. The goal is for affected State personnel to gain a common understanding of all specific State and contractor contractual responsibilities, as well as understanding the capability of affected State personnel in performing their specific contract requirements or critical requirements leading up to contractor performance. It is critical that all affected State personnel agree on the contract goals and objectives, standards of performance, and required deliverables before the State meets with the contractor in any post award conference.

The contract manager should prepare and distribute the agenda in a timely manner which allows all meeting attendees adequate preparation time. The agenda should include all topics to be discussed and who will be responsible for leading or facilitating the discussion for each particular topic. Post award conference agenda topics may include:

- Introduction of all participants;
- Identification of all key personnel for the contractor and the State;
- Designation of the specific contact personnel for the State and the contractor regarding all correspondence and communications during the contract term;
- Specifications, work requirements, quality control/testing requirements;
- Special contract provisions;
- Reporting requirements and reporting format;
- Procedures for monitoring and measuring progress; and
- Billing and payment procedures.

As noted above, it should be made clear at the beginning of the post award conference that the purpose of the meeting is to explain or clarify contract requirements and not to make changes to the contract or to re-negotiate contract terms. If during the discussions it is determined by the contract manager that a change is necessary, it will be up to the contract manager to clearly define the justification for, as well as establish the extent of, the change. However, it should be made clear to all parties that until such time as the changes are approved by the required contract officer and a formal contract amendment is fully executed by all required parties, the original contract remains in effect. State personnel present at the meeting should be notified in advance that they are present only to provide information to the contractor and, with the exception of the contract manager, are not to provide direction to the contractor. This is necessary to help eliminate program staff from being held personally liable as a result of acting outside the scope of their authority and to help eliminate arguments regarding the apparent authority of State personnel.

Other items for discussion include any contract requirements regarding the furnishing of State property to the contractor. If State property is to be provided to the contractor, the procedures for obtaining, accounting, and periodic inspection and inventory for such property should be discussed. See Section 3.4 for additional information on the furnishing of State property. During the meeting it should also be made clear to the contractor and to all State employees that the contractor has sole responsibility to inform and manage its subcontractors. All instructions, interpretations, or other contractual dealings with the subcontractor(s) are the business of the prime contractor and not the State. Additionally, if the contractor is to perform contractual

services in a State facility, it will likely be necessary to discuss working hours, security passes, insurance requirements, and other factors related to such performance.

Finally, minutes from the conference should be typed and distributed to all conference participants and a copy should be included in the contract file. The contract manager should make sure that the minutes include, at least, all significant items discussed in the conference, any issues not resolved, any additional actions required, their completion dates, and persons responsible for completing those actions.

Section 3

Day-To-Day Contract Administration

3.1 Fundamental Duties of Contract Administration

A signed contract does not relieve the State of the ultimate responsibility for the quality and quantity of the goods and services provided. For this reason an individual, or individuals, should be designated as contract manager(s). There may be separate performance and fiscal/administrative managers.

In general the contract manager is responsible for:

- Monitoring the contractor's performance;
- Identifying the need for changes, arranging for their implementation in the contract;
- Monitoring and approving payments;
- Conducting financial reviews and audits during the course of the contract;
- Working with the contractor to resolve any problems that arise;
- Terminating the contract, if necessary, which includes determining performance or contractual provisions breached and documenting efforts to correct the breach and recommend termination to the office that has authority to cancel the contract;
- Managing close-out of the contract; and
- Evaluating the contract results. If the evaluation discloses a systematic problem, recommending corrective action be taken to eliminate the problem.

3.2 Work Planning and Scheduling

Careful planning and scheduling of work to be performed by the parties are absolutely necessary to the successful completion of any contract. A work plan is an agenda of the goods to be delivered or the services to be provided by the contractor and the agency or institution set in a time frame. The time frame may be daily, weekly, monthly, or any other agreed upon schedule. The more detailed the project, the more detailed the work plan. A carefully drawn work plan reflects all steps of the project and identifies responsible staff and due dates for deliverables. A detailed work plan facilitates monitoring, evaluating progress and identifying problems early, so proper attention can be directed toward problem resolution. In situations where the contractor provides goods or services on an as-needed basis, the work plan will be very simple.

For simple contracts with few deliverables, the work plan and schedule can be quite simple and may be prepared by hand, if desired. However, project management software is available that will help the contract manager effectively develop a work plan and schedule for even the most complex contracts, automatically preparing Gantt and PERT charts among other things.

The specific requirements set forth in the scope or statement of work or specifications provide the basis for work planning. When a work plan is prepared, the starting point is to list the major tasks in the statement of work or specification review checklists. The specific objectives are the tasks

included in the scope of work, the deliverables under the contract, or both. The objectives should be arranged in a logical manner, showing both the scheduled times for accomplishment and the interrelationships between the objectives. To fully plan the work, major objectives may need to be further broken down into a series of steps. The work plan should be arranged clearly to show events that are necessary in order to accomplish a requirement. It is also necessary to show the dependent relationship between the tasks when, for example, one task must be accomplished before another can be completed.

Once the specific tasks and requirements are developed, a time frame or schedule for the process should be added. Again, use the scope or statement of work or specification review checklists as the starting point. The time frames included in these items, as well as any in the contract itself, should serve as the basis for scheduling.

Typically at this point the work plan and schedule will provide enough information to allow for a determination of appropriate reporting points or milestones. Any event that is critical to the success or further performance of contract tasks is a milestone event. Normally, milestone events and the progress reports associated with them are the primary focus during contract monitoring. It is not feasible to continually monitor a contractor's performance and, therefore, by concentrating on critical or significant events (milestones), the contractor performance can be measured adequately to assure timely performance or to detect problems early in the process.

In order for the work plan and schedule to remain effective throughout the contract process, it is vital to keep the plan current by ensuring it reflects the best information and work/time estimates available at any given time. Plans require revisions to reflect slippage in contractor performance (contractor inability to timely perform a task) and to reflect excusable delays (delays caused by circumstances outside of the contractor's control).

3.3 Inspection, Monitoring, and Accepting Performance

The primary responsibility for performance of the contract rests with the contractor. However, it is imperative that the agency or institution monitor its contracts for adequate performance to ensure protection of the State's (and the contractor's) interests. Post-award administration should be a series of organized and coordinated actions, tailored to the type of contract and contractor involved. Careful monitoring will avoid misunderstandings and prevent small difficulties from becoming major problems. Typically, the more complex the contract, the more extensive the monitoring activity.

Objectives related to monitoring

- To ensure legal obligations are fulfilled, and
- To ensure acceptable levels of service are provided (performance standards, efficiency, and effectiveness).

Elements of a good monitoring program

- **Contractor relations**. The relationship between the contractor and the agency or institution begins immediately after the contract is signed, with an initial meeting before the contractor begins work. The purpose of the meeting is for the key contractor representatives to meet the key agency or institution representatives and to clarify specific contract provisions. Continuous interaction after the initial meeting is necessary, both formal and informal, to provide information between the parties and to provide feedback to the contractor regarding performance.

- **Contract provisions**. The contract must be written properly for an active monitoring process to occur. The most important provisions for monitoring are actual specific performance standards, and the measures of efficiency and effectiveness that are to be applied to evaluate the contractor's performance. Penalties for nonperformance must also be specifically outlined in the contract. See Chapter 6 of the *Manual* for guidance on writing a contract. See Chapter 6, Appendix A, for model contract clauses.

- **Contract Monitor**. This individual needs specific guidelines so that the monitoring process is consistent, effective, and equitable to the contractor. A contract monitor needs detailed information about the contract, the performance standards, the processing of contractor reports, and the handling of user/citizen complaints, in order to effectively monitor a contract.

- **User Relationships**. Users and sometimes citizens or others affected by the contract can be brought into the contracting process in basically two ways: 1) through a formal complaint system and 2) through user surveys. The user should know where to send complaints. The contractor should know the responsibilities with regard to complaints, and the contract monitor must see that complaints are processed in a timely manner and the user is notified of actions taken. Surveys can be an important tool to judge the effectiveness of a contractor's service.

When may monitoring take place?

- **Before the contract is awarded**. Often, specific requirements for contract monitoring and quality management are set forth in the solicitation document. The prospective contractor's ability to fulfill these requirements is then factored in the bid evaluation process.

- **During the course of delivery of services**. Monitoring may take many forms and the best form to use depends on the circumstances of the situation, such as complexity of work, prior experience with the contractor, length of contract, etc. Monitoring may consist of:

  - Contractor Reports. Reports such as progress to date, explanation of costs, problem description, certification that services meet specifications, forecasts, levels of service provided.

- Inspections and observations. Depending on the situation, these should occur based on complaints, upon completion of work, surprise inspections, and periodic samples. Inspections and observations should have a rating scale or form to note problems or quality of service.

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

Who performs the monitoring?

Identification of State personnel who should be responsible for monitoring any given contract will depend on the circumstances involved, such as the complexity of the contract, the size and diversity of the agency or institution, the nature of the service or project being contracted, the qualifications of the program officials, and the nature of the program official's relation to the contractor. Usually, the field or line manager should monitor contractor's performance, because this individual knows the service or project better than the contracting officials. Specific activities of the field manager should include, depending on the circumstances:

- Inspection of work;
- Ensuring required permits are obtained;
- Monitoring work performance to ensure conformance to budget and work schedule;
- Reviewing work performance to ensure conformance to safety rules;
- Reviewing contractor invoices for accuracy and completion;
- Deciding if the percentage of billing is equal to the percentage of work completed, if the contract is fixed price;
- Verifying any withholding of contractor funds;
- Comparing equipment charges for rentals, labor, and material with contract provisions and any change notices;
- Comparing invoiced labor rates with the contract;
- Verifying that services were delivered, material was delivered, laborers worked, and equipment used; and
- Initiating any necessary change orders if the scope of the contract needs to be modified.

Measuring Contract Performance

Often, contracts specify performance standards such as dates tasks are to be completed, contractor payments, and penalties to be levied. Specific standards about exactly what constitutes adequate performance are often missing. Measures of efficiency and effectiveness should be considered and incorporated in the contract to establish the evaluation criteria as to whether the contractor is performing the service at an adequate level.

Caution must be exercised in specifying input vs. output measures in defining performance standards. Often the input measures or resources consumed are specified (e.g. number and

qualifications of personnel assigned, hours committed), which do not specify how well the end product satisfies the user, thus making it often impossible to demand actual contractor performance. Measures of effectiveness and efficiency are important in evaluating the quality of the service. Measures of effectiveness involve actual outputs or the impacts of the service on the user or the public. An example of an effectiveness measure in a contract for custodial services is: "The restroom must be cleaned, at least, on a daily basis." Efficiency is the ratio between inputs and outputs. An example in the same custodial contract of an efficiency measure would be: "Is the restroom being maintained in a satisfactory condition?" Both of these may be comparative measures. The contractor's performance can be compared to similar scores when others were providing the service, or on a year-to-year basis. If the contractor is meeting performance standards but the measures of effectiveness and efficiency are lower than in the past or need to be improved, the standard may need to be revised.

Handling Unacceptable Performance

The key to handling unacceptable performance begins before the contract is in place. The contract manager must identify what constitutes unacceptable performance and include in the contract provisions the actions that are to be taken and the remedies available to the agency or institution if unacceptable performance occurs. This provides a clear understanding with the contractor at the time of signing as to the course of actions to be taken should it not perform. Contract management becomes very difficult if the provisions of the contract do not provide for specific remedies in the event of a party's failure to perform. Keep in mind also that the more explicit the performance standards, the easier it is to determine when unacceptable performance has occurred. See Chapter 6 in the *Manual* for guidance on drafting a contract and Section 7 of this *Guide* for remedies for unacceptable performance and default.

Acceptance

Acceptability for contract performance must be determined by review, test, evaluation, or inspection. Final acceptance concludes performance by the contractor, except for administrative details relating to contract close-out. Once final acceptance has been accomplished, the contractor is no longer responsible for unsatisfactory effort, unless otherwise specified in the contract. Therefore, the contract monitor must ensure the work performed under the contract is measured against the work statement in the contract. Accordingly, acceptability is a natural progression from contract monitoring. An effective contract monitoring process places the contract monitor in a good position to determine acceptance.

Acceptability can be best determined if milestones are established and set forth in the contract, be they the satisfactory achievement of certain standards, tasks, or other output. Progress payments may be tied to the achievement of these milestones, thus establishing their significance to the contractor. As with contract monitoring, determining the appropriate quality standards against which to measure acceptability depends on the situation involved.

3.4 Administration of State Property

When the State furnishes property to a contractor, or the contractor obtains equipment or supplies from the State for use during the term of the contract, and title remains with the State, the property, equipment, or supplies must be properly accounted for by the State.

Types of State Property

State Property means all property owned by the State and furnished to the contractor, or acquired by the State under the terms of the contract. State property is generally of two types: 1) "State furnished property" or 2)"State acquired property".

1. State furnished property is property that the State owned at the time of contract execution, such as equipment or computers, that were furnished to the contractor to use during contract performance. Usually, this property is made available for one of two reasons. First, there may be no other property available that can be used, (e.g. a hybrid, networked State computer system with installed software that is made available to a contractor to enable it to do a study or report). The second reason to provide property is to achieve a price/cost reduction from the contractor by allowing the contractor to use available State property.

2. State acquired property is property that is purchased by a contractor during the course of the contract and, by virtue of a title-vesting clause in a contract, becomes State property at the conclusion of the contract. For example, some grant contracts provide that the State acquires title to any equipment or supplies purchased during the performance of the contract where the value of the equipment or supplies exceeds $5,000.

Administration of State Property

State Fiscal Rules require each agency or institution to be responsible for ensuring that all equipment acquired is properly accounted for when acquired, inventoried and safeguarded throughout its useful life, and properly accounted for at the time of disposal. Generally, the same property management rules should be applied to other types of State property. The following are some general guidelines to follow concerning the administration of State property.

- Read the contract and determine what the contract says about the title to property purchased during the term of the contract, as well as the State's obligation to furnish equipment or supplies for use by the contractor during the term of the contract.

- Establish a "tickler" system to monitor dates when the State is obligated to deliver State-furnished equipment or supplies. Under clauses such as the State-furnished property clause, see Appendix A to Chapter 6 of the *Manual*, the contractor is entitled to an adjustment in time and price if the State does not meet its obligation to deliver State-furnished property.

- Establish an inventory control system before delivering State-provided property to the contractor. Make sure the property is assigned an inventory control number and accounted for in accordance with State Fiscal Rules and agency or institution procedures.

  - Enforce the contract provisions regarding identification of equipment or supplies which are purchased and which become State property.

  - If there are no contract provisions, negotiate a procedure with the contractor that requires State furnished equipment, supplies, or property to be identified in a timely manner, and marked or tagged consistent with State Fiscal Rules and agency or institution procedures. This should be a "no cost" procedure and may be included as an amendment to the contract. Ideally, these procedures should already be contained in the contract.

- Include the property's description in the annual report to Risk Management and specify its contents' value and location.

- Include inspection of State-furnished property when the agency or institution does its own property inventory.

- Establish a "tickler" system to monitor the inspection and return of State property.

Contractor Bankruptcy and State Property

When a contractor files for bankruptcy, issues often arise concerning ownership and return of property. Secured creditors, for example, may see State-furnished property as additional security for their own debts. This is a reason to make sure all State-furnished and acquired property is clearly marked with an inventory control number. Since bankruptcy can cause serious problems, legal advice should be sought as soon as a contractor solvency is in question.

3.5 Funding and Financial Administration

Funding

Prior to the State Controller approving a contract, the contract is reviewed to assure completeness and to ensure that funds are available to cover the contract liability. It is important to note that at times there are restrictions placed on funding sources and that some funds are only available for a certain period of time. The contract manager should investigate the source of the funding for the contract early in the process to determine if any restrictions exist and take whatever actions may be necessary in order to comply with the funding restrictions. If additional funding becomes necessary due to expanding the scope of the project, change orders, or other unforeseen problems encountered during the contract term, the contract manager must know if additional funds are available and how to secure these funds. This also is important when a contract has more than one funding source. For example, if the project is funded equally in cash, federal, and general funds, the contract manager must know

beforehand that additional funds are available from each of the sources prior to committing to additional work by the contractor.

Financial Administration

Once the contract has been fully executed it becomes the responsibility of the contracting agency or institution for the day-to-day financial administration of the contract. The day-to-day financial administration includes making sure that the contract payments are made in accordance with the terms and conditions of the contract and that the contract expenses are paid from the proper funding source(s). It is also the contract manager's responsibility to maintain an adequate contract file where an accurate contract balance is readily available. This contract file is subject to pre-audit prior to contract close-out and post audit after contract completion. A contract should not be closed out until the contract manager has reviewed the contract and determined that all requirements of the contract have been satisfactorily performed and there are no outstanding items to be completed.

Section 4

Modifications To Contracts

4.1 Introduction

While it would be ideal for the original contract to accurately anticipate and provide provisions for all situations that might occur as a contract is being performed, additional needs, changing conditions, unanticipated situations, and innumerable other factors may arise that give cause to modify the contract. Careful consideration as to the nature of the modification and the terms and conditions of the original contract will determine the appropriate action to be taken to successfully execute a change to a contract.

It is critical for the contract manager to understand that the State cannot modify a contract without the contractor's consent, unless provided for under the contract. While this may seem elementary, it is very easy to overlook some basic terms and conditions in the original contract that allow for certain types of modifications once performance has commenced.

4.2 Basis of Modifications

There are basically two ways to modify a contract. One is by a bilateral amendment, in which all parties to the contract agree that a modification is necessary because the scope of work, the term of the contract, or some other provision of the contract needs to be altered. The second is the right to unilaterally modify the contract. In this case, terms and conditions in the original contract set forth the situations under which the State may exercise a right to modify the contract without the contractor's consent.

4.3 Modification Examples

Chapter 6, Appendix A, of the *Manual* provides three provisions generally used in contracts related to modifying the contract. They are: Changes, Price Adjustments, and Modification and Amendment.

Changes Clause

The Changes clause provides the State with the right to modify the contract without the contractor's consent. In this situation, the work required of the contractor must be within the scope of the original contract. For example, suppose that a contract's scope of work requires remodeling and furnishing of a conference room. If the State decides that it now desires the conference table to be oblong in shape rather than rectangular, it may initiate a change in the contract under the Changes clause. If, however, the State desires to add a window to the room, and this changes the scope of the contract, the contractor may not be ordered to make the change.

Price Adjustments Clause

This clause sets forth the ways that the contract price may be modified if contract clauses that provide for price adjustments are exercised in the contract.

Modification and Amendments

This clause states that the contract may be modified or amended as agreed upon between the State and the parties to the contract, but the modification or amendment must be approved by the State Controller.

4.4 Procurement Rules and Approvals Related to Modifications

Procurement Rules

In the case of bilateral amendments to a contract, procurement issues arise when there is an increase in the scope of work required of the contractor. Because the solicitation related to the project did not contain the additional work, the contract manager must consider whether to conduct a solicitation for the additional work or to provide justification as to why the contractor is to provide the services. Such justification must include documentation as to what gave rise to the change in the scope of work. The contract manager should obtain approval from the State Purchasing Director or the agency's purchasing director, as appropriate, before proceeding with the amendment. Section 8.3 has a discussion of contract "scope" as it relates to extensions.

For unilateral changes to a contract, procurement rules are not an issue as the changes do not materially affect the scope of work. The changes are often already specifically priced and provided for in the original contract, and the State is merely exercising its right to require the contractor to provide the goods or services.

Approvals

In general, all modifications to contracts require review and approval by the same parties that approved the original contract, (e.g. the Department of Personnel, State Purchasing Director or a delegate, the Attorney General and the State Controller or a delegate). The State Controller's Office issued a memorandum, dated January 8, 1997, setting forth the approval requirements on various contract modifications. A copy of this memorandum is included in the Policy Annex of the *Manual*. The memo clarifies which modifications do not require the approval of the Attorney General. Basically, if the changes called for are already identified and priced in the original contract, and the State is exercising its option to require performance of those changes, then Attorney General approval is not required. The memorandum also provides examples of language to be used in specific contract modification situations where no Attorney General approval is required. These include examples for extending the term of the contract, purchasing additional goods or services, purchasing indefinite quantities, purchasing tasks, and change orders in grants/subgrant contracts.

4.5 Other Modifications

Besides the "Changes" clause, there are other clauses in some contracts which give the State the right to direct performance in exchange for adjustment in price, or time for performance, or both. Similarly, there are clauses that grant entitlement to additional time or money (or both) based on the occurrence of specified, unanticipated conditions. Examples of these clauses are in Appendix A to Chapter 6 of the *Manual*. The contract manager should become familiar with the specific "remedy granting" clauses in the contract that give the State rights to stop work or otherwise affect contractor performance. The contract manager must know the limits on the rights under those clauses, the responsibilities of the contractor, and what the contractor is entitled to receive under those clauses.

State-Furnished Property Clause

The administration of "State-furnished" or "contractor-acquired" property is discussed in Section 3.4. The model clause for "State-furnished Property" is included in Chapter 6, Appendix A, of the *Manual* and defines the rights and obligations with respect to property the State must deliver. If the property is delivered late or in an unsuitable condition, the contractor is entitled to an equitable contract adjustment, in price, time, or both.

Force Majeure

This clause defines "excusable delay." For reasons specified in the clause that cause delay, such as fires, explosions, unusually severe weather, etc., the contractor is entitled to an extension in time for performance, not additional money.

Stop Work Orders

Like the Suspension of Work clause, usually found in the construction contract general conditions, this clause permits the State to order the Contractor to stop work. Upon termination of the order, the contractor is entitled to "an appropriate adjustment in the delivery schedule or contract price, or both, and the contract should be modified accordingly". The model "Stop Work Orders" clause is included in Chapter 6, Appendix A, of the *Manual*. It is important that the contract manager read the clauses carefully. In some cases, the clause limits the nature of costs that the contractor can claim as damages, or the circumstances under which the contractor can claim any damages or costs for the delay.

Bilateral Change Orders/Letters

Unlike unilateral change orders, described in Section 4.3, bilateral change orders are changes to the scope of work, and adjustments in price/cost and schedule, that are agreed to by the parties. Normally, these "change orders" are processed by a contract amendment, and routed through the contract approval system. Exceptions include capital construction change orders and "supplements" (architect-engineer "change orders") that meet the approved State Buildings Program policies for change orders not requiring review by the Attorney General. Also, the State Controller has defined conditions under which bilateral change orders can be included in other contracts, and used without review as amendments by the Attorney General. Model provisions and a description are included in Chapter 6, Appendix A, of the *Manual*.

Options

Options are also "modifications" in the sense that they usually modify a contract to require more supplies or more performance time in exchange for more money due the contractor. Options are commonly used in State contracts, and the terms to exercise the modifications are contained in the initial contract. It is important to follow the option exercise conditions, (e.g. the lead time for exercising the option). If the conditions are not followed, the right to modify the contract may be lost. A model option provision is included in Chapter 6 of the *Manual*.

Task Orders

Some contracts permit the flexibility to define and price individual tasks during contract performance, because the precise work is not known at the time the contract is signed. Contracts for emergency hazardous waste clean-up are examples. The State Controller's policy has conditions for using task orders, and model provisions are included in Chapter 6, Appendix A, of the *Manual*.

Any task orders, change orders, and other modifications that do not meet the conditions established by the State Controller must be processed and approved as contract amendments.

4.6 Pricing Changes and Modifications

Changes and most other modifications have to be priced like any other contract. For task orders and bilateral change orders meeting the State Controller's conditions for inclusion in the original contract, (e.g. those having pre-priced rates and unit prices that will be applicable to the change), there may not be any need for a price/cost analysis. Usually, where unit rates are pre-priced, evaluation shifts to a technical evaluation of the number of labor hours or other units being proposed to do the work.

Most modifications, though, are not pre-priced and require a cost or price analysis under the procurement rules. The ultimate objective is to achieve a fair and reasonable price for the change or modification. See "Contract Pricing", Chapter 5 of the *Manual*, for a more detailed discussion of contract pricing principles.

4.7 Contractor Name Changes and Novation Agreements

Novations and "Name Change" agreements are two types of modifications that warrant special mention. Neither usually involves an adjustment in time for performance or price/cost of the contract.

Name Changes

Entities such as corporations sometimes change their name, even though the entity itself is still in existence. Changes in name may seem like "technicalities," but they affect such obvious, but important, things as the name on the payment warrant. A "change-of-name agreement" is a legal

instrument executed by the contractor and the State that recognizes the legal change of name of the contractor without disturbing the original contractual rights and obligations of the parties.

When a contractor requests to change the name by which it holds a contract with a agency or institution, the contract manager responsible for the contract must, upon receipt of a document indicating such change of name, enter into an agreement with the requesting contractor to effect the change of name. An amendment to the articles of incorporation, corporate bylaws, or documents filed with the Secretary of State showing the change of name, should be obtained from the contractor. (See Procurement Rule R-24-106-101-09).

The best way to memorialize the name change agreement is as part of another necessary amendment, or in its own amendment, with clauses substantially as follows:

> The [new contractor name] (Contractor), a corporation duly organized and existing under the laws of Colorado, and the [Department or Institution] (State), enter into this agreement to recognize the Contractor's change-of-name as of [date].
>
> The Contractor, by [an amendment to its articles of incorporation], dated [date], and attached as Exhibit A, has changed its corporate name from [old name] to [new name].
>
> Documentary evidence of this change of name has been filed with the Secretary of State.
>
> In consideration of these facts, the parties agree that the name [new name] shall be substituted for the name [old name] wherever it appears in the contract.
>
> Except with respect to the change of the contractor's name, or other modifications identified in this amendment, no other terms or conditions of the original contract are changed, and the rights and obligations of the State and Contractor are unaffected by this change.

If a contractor has multiple contracts with the State through different agencies or institutions, it is possible to have a "lead agency or institution" execute one name change agreement that will recite all of the affected contracts and be recognized by all agencies and institutions having a contract with the contractor. The contract manager should identify each affected contract by its contract number and routing number. Contact the agency or institution contract administrator for assistance.

Novation Agreements

Unlike a name change, where the basic contractual relationship is not changed, a novation agreement essentially substitutes one contractor for another. Sometimes contracts are acquired by other companies, known as "successors in interest", requiring the execution of a novation agreement.

Since the ability to execute a novation agreement may be limited by the Procurement Code, State Purchasing or the State agency's or institution's purchasing director should be contacted prior to

executing a novation agreement. Generally in a procurement covered by the Procurement Code, one company cannot step in and take a contract being performed by another.

The Procurement Code (R-24-106-101-09(b)) permits recognition of a successor in interest novation, when in the best interests of the State, as long as the transferor and transferee agree that:

- The transferee assumes all of the transferor's obligations;
- The transferor waives all rights under the contract against the agency or institution; and
- Unless the transferor guarantees performance of the contract by the transferee, the transferor shall, if required under the contract, furnish a satisfactory performance bond.

A novation agreement is usually executed and approved as a contract amendment, signed by the State, transferor (original contractor), and transferee (new contractor), with WHEREAS recitals and clauses substantially as follows:

NOVATION AGREEMENT

This NOVATION AGREEMENT, is made this 1st day of July, 1997, among _____("Contractor" and "Transferor"), _____ ("Transferee"), and the State of Colorado Department of _____, Division of _____ ("State").

Recitals

A.The Contractor (Transferor) and State have entered into a Contract dated March 2, 1994 ([routing no. or other ID]) and amended by _____ dated September 1, 1995 for the [description of contract]. Copies of these Contracts are attached as Exhibit I hereto.

B.Transferor wishes to assign to Transferee, and Transferee wishes to accept and assume, all of Transferor's right, title and interest in and to, and duties and obligations under, the Contract(s). Transferee's written acceptance of these obligations is acknowledged by letter dated May 1, 1996 and incorporated herein as Exhibit II.

Agreements

NOW THEREFORE, in consideration of the foregoing premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Assignment of Contract. Transferor grants, transfers and conveys unto Transferee, and Transferee accepts and assumes, effective as of the Effective Date as set forth in this Amendment, all of Transferor's right and interest in, and duties and obligations under, the original contract.

2. Waiver of Rights Against State. Transferor hereby waives any and all rights it may have against the State, effective as of the Effective Date set forth in this agreement.

3. The State recognizes the Transferee as the Transferor's successor in interest in and to the contracts. The Transferee by this Agreement becomes entitled to all rights (including payment), titles, and interests, and assumes all duties, obligations, and liabilities, of the Transferor in and to the contracts as if the Transferee were the original party to the contract(s). Following the effective date of this Agreement, the term "Contractor" as used in the contract, shall refer to the Transferee.

4. Except as expressly provided in this agreement, nothing in it shall be construed as a waiver of any rights of the State against the Transferor. All payments and reimbursements previously made by the State to the Transferor, and all other previous actions taken by the State under the contract, shall be considered to have discharged those State's obligations under the contract. All payments and reimbursements made by the State after the date of this Agreement in the name of or to the Transferor shall have the same force and effect as if made to the Transferee, and shall constitute a complete discharge of the State's obligations under the contract, to the extent of the amount paid or reimbursed.

[5. The Transferor guarantees payment of all liabilities and the performance of all obligations that the Transferee assumes under this agreement or may undertake in the future should these contracts be modified under their terms and conditions. The Transferor waives notice of, and consents to, any such future modifications.]

6. The effective date of this agreement is _____.

7. Except for the "Special Provisions," in the event of any conflict, inconsistency, variance, or contradiction between the provisions of this agreement and any of the provisions of the Original Contract, the provisions of this Agreement shall in all respects supersede, govern and control. The

"Special Provisions" shall always be controlling over other provisions in the contract or this agreement. The representations in the Special Provisions concerning the absence of bribery or corrupt influences and personal interest of State employees are presently reaffirmed by the transferee.

8. 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.

9. THIS AGREEMENT SHALL NOT BE DEEMED VALID UNTIL IT SHALL HAVE BEEN APPROVED BY THE CONTROLLER OF THE STATE OF COLORADO OR SUCH ASSISTANT AS HE MAY DESIGNATE.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment of the day first above written.

Transferor:

_____
(Full Legal Name)

_____
(Signature of Individual)

_____
(Name of Individual)

_____
Position (Title)

_____
Social Security Number
or Federal Employer
Identification Number

Attestation

By: _____
Corporate Secretary,
or Equivalent,
Town/City/County Clerk

(Seal)

Transferee:

_____
(Full Legal Name)

_____
(Signature of Individual)

_____
(Name of Individual)

_____
Position (Title)

_____
Social Security Number
or Federal Employer
Identification Number

Attestation

By: _____
Corporate Secretary,
or Equivalent,
Town/City/County Clerk

(Seal)

State of Colorado
ROY ROMER, GOVERNOR

By: _____
Executive Director

DEPARTMENT OF _____

APPROVALS

ATTORNEY GENERAL

By:_____

STATE CONTROLLER

By:_____

Section 5

Subcontracts and Assignments

The State enters into contracts with prime contractors, who may or may not subcontract out portions of the work. This Section outlines considerations in managing contracts where work is performed by subcontractors.

5.1 "Privity of Contract" -- The Implications

There is no contractual relationship between subcontractors of the contractor and the State. The contractual relationship exists only between the prime contractor (or lessor, consultant, etc.) and the State, between whom there is "privity of contract." That means that the obligations, rights, duties, and remedies exist between the State and prime contractor only. It is in the best interests of the State to be able to hold a single entity responsible for completing the contract.

Prime contractors will usually make a discretionary decision of whether to "outsource" or "make or buy", terms commonly used to describe the prime contractor's decision on whether to do the work itself in-house, or subcontract the work. In some instances the prime contractor knows that it does not have the capability to perform a particular aspect of the work, and plans at the beginning of the contract to subcontract the work.

The subcontracting process can create problems with the "responsibility" determination done by the State during procurement, when the State determines that the contractor has sufficient resources and integrity to perform. For example, if the State evaluates IBM Corporation and determines IBM is "responsible", and then IBM subcontracts the whole effort to another company, theoretically the State's interest in assuring successful, on-time performance by a "responsible" entity may be prejudiced.

5.2 State Approval of Subcontractors

The common technique for retaining some amount of State control over the subcontracting process is the use of a solicitation process that requires identification of subcontractors, so the State can evaluate them, and a subcontractor approval clause in the contract that permits the State to approve the proposed use of subcontractors. Consent to subcontracts may be particularly important where the work is complex, dollar value is substantial, the State has a unique interest in having performance personally performed by the prime contractor, or the State's interest is not adequately protected through normal subcontracting practices of prime contractors. An example of such a clause is shown in Chapter 6, Appendix A of the *Manual*.

If disapproval of a subcontractor is done in good faith, and based on legitimate State concerns, (e.g. with subcontractor responsibility in terms of resources and capability), contract approval requirements are enforceable.

Note that the clause does not permit the State to direct the use of any particular subcontractor. It merely permits the State to withhold its assent to the use of subcontractors. Unreasonable withholding of State assent in order to steer subcontracting opportunities to "State favorites" could be characterized as a breach. It may also be a violation of criminal statutes prohibiting State employees from directing selection of subcontractors. See Section 18-8-307, CRS.

5.3 State Relationship with Subcontractors

Legally, there is no direct relationship between the State and the subcontractor. In fact, the clauses in the contract between the prime contractor and the State are not required to be included in any subcontract, unless the prime contract says otherwise. For example, Special Provision paragraph 5, "Discrimination and Affirmative Action," has specific "flow-down" provisions requiring the prime contractor to include certain provisions in its subcontracts.

As a practical matter, the State should exercise caution when specifying "flow-down" clauses to a subcontractor. The State can enforce contract obligations against the prime contractor who has subcontracted out a portion of the work. For example, if the State has specified a delivery schedule, and the prime contractor forgets to flow down the schedule to a subcontractor, the prime contractor is responsible when the State insists on enforcing the delivery schedule. The contractor's failure to include the schedule in its subcontract is no defense. By contrast, audit rights are not very meaningful if not flowed-down to subcontractors. In general, though, there is probably a cost premium when the State interjects itself into the relationship between a prime contractor and its subcontractors and specifies flow-down of contract clauses.

In matters involving patents, copyrights, and other intellectual property rights, caution is also necessary. Subcontractors creating copyrightable works (e.g. software), patentable inventions, and other work protected by intellectual property laws “own” those works and ideas. It is important that the contract language with the prime contractor guarantees the “right to sell” those intellectual property rights and gives the State the right to use them. In some cases involving high technology goods and services, intellectual property indemnification clauses are used to protect the State against claims by third persons and companies that the State has no right to use software or supplies.

With respect to State observations of subcontractor work, as a general rule, a State representative cannot remain silent when aware of deficient performance. The proper course of action is to notify the prime contractor immediately.

As a general rule, avoid directing or instructing subcontractors, unless the prime has agreed to the specific arrangement, and the parties make it clear that technical direction or inspection of the subcontractor by the State does not minimize or limit the prime contractor's obligations under the contract. The scope of these direct communications with the subcontractor should be defined in the contract documents. The State should always "copy" the prime contractor in any communications with the subcontractor.

The risk from technically directing subcontractors is that the prime contractor may be able to escape liability for the subcontractor's deficient performance where the State has entered into an implied

contractual relationship with the subcontractor by directly dealing with the subcontractor and issuing direction or instructions during performance. Further, the subcontractor may have a right to sue the State directly for alleged breaches by the State under the contract. It is wise to limit the State's obligations (and potential liability) to those owing to the single entity--the prime contractor.

5.4 Assignments Distinguished

When the term subcontracting is used, it usually applies to an element of performance due to the State. For example, a subcontractor in a construction contract may be doing foundation work. In a computer systems contract, there may be subcontractors actually writing the software or supplying some of the hardware. The customary "assignment", on the other hand, involves the contractor's giving away the right to receive something--most often payment. Assignments of the right to payment for the benefit of creditors are common. An example is an assignment to a bank. There is usually little interest in the State's interfering with such an assignment. Section 4-9-318, CRS, permits contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract. Legally, the State is obligated to honor such an assignment once it receives notice. If a notice of assignment of payment is received, do not pay the original contractor; contact your agency or institution controller immediately. Other assignments, on the other hand, such as assignment of performance duties or obligations, can be controlled by requiring consent of the State. Appendix A to Chapter 6 has an example of such a clause.

Checklist of Contract Management Considerations

- Read the contract to identify specific subcontract limitations, approval requirements, reporting obligations, etc.

- Do not interfere in subcontracting decisions made by the prime contractor without the contractual right to do so.

- Never direct the use of any specific subcontractor.

- Do not process claims for payment by subcontractors. Refer the subcontractor back to the prime contractor.

- Retain neutrality in disputes involving the prime contractor and any of its suppliers or subcontractors, except that contract rights or statutory obligations to withhold payments (e.g. in construction contracts) may be exercised, BUT ONLY TO THE EXTENT DEFINED IN THE CONTRACT OR OTHER APPLICABLE LAW. Obtain the assistance of legal counsel in cases involving disputes over payment where subcontractors are trying to get the State involved.

- Do not direct or instruct subcontractors or subcontractor employees in performance of work. Work through the prime contractor, unless the contract has specified the scope of technical direction and keep the prime contractor responsible for the work Reduce to writing and provide a copy to the prime contractor of any instructions given directly to the subcontractor.

- Take assignments of payments seriously. Validate the authenticity of an assignment of payment and comply with its terms. Do not pay the prime contractor after notice of a valid assignment. Consult with legal counsel if questions concerning payment arise.

- Ensure, through appropriate prime contract language, that any patented, copyrighted or other proprietary ownership rights of subcontractors are properly licensed or sold to the State through the prime contractor.

Section 6

Dispute Resolution

6.1 Introduction

For purposes of this *Manual*, a “dispute” is defined as a controversy during contract performance that may require litigation to resolve. A dispute usually means that the two contracting parties are at irreconcilable positions. Usually, the contractor wants more money or time for performance, and the State disagrees and believes that better or faster performance is required.

Sometimes the contract sets out remedies available to one or both of the parties where there is a breach of contract or circumstances change. An "inspection and acceptance" clause may give the State the right to deduct payments. A "suspension of work" or "delay of work" clause may give the State the right to suspend the work. The “termination for default” and “termination for convenience” clauses may enable the State to terminate the contract under certain conditions. "Force majeure" or other clauses may grant entitlement to a contract extension for certain delays, (e.g. natural disasters or unusually severe weather).

Where these kinds of clauses are in the contract, the routine exercise of the remedies consistent with the clauses is not usually considered a dispute, unless a dispute has been defined that way in a dispute resolution clause in the contract. The contractor may sue over wrongful termination for default, or deductions for nonpayment, which quickly give rise to disputes that are settled in court. In some instances a contract contains a clause requiring elevation of disputes to senior officials of the contracting parties before legal action is taken. In this case, defining what constitutes a dispute has legal significance, because it may limit the State’s ability access the court system to enforce a contract or sue for damages.

There is always a potential for disputes. Disputes can arise in the contract formation and source selection stages. Disputes commonly arise after contract award and during the performance period of the contract. State agencies or institutions normally have all remedies available against a contractor that exist under State law. When a contract contains a clause requiring a specific remedy for disputes, such as mediation or elevation of the dispute to the next higher management level, the provision can be enforced. Contractual remedies and dispute resolution techniques should be considered, whenever feasible, as a means of expediting and simplifying the resolution of contract disputes. The primary dispute resolution techniques and remedies to consider are:

- Negotiation and Settlement. -- The parties to the contract discuss and resolve their dispute. This is the best available option with minimal disruption to the contract process.

- Mediation. -- The parties to the contract agree to use a neutral third party in an attempt to resolve the dispute. Successful mediation usually results in agreement even though it is not binding on either party.

- Arbitration. -- The parties to the contract choose an independent person or persons to assist in the resolution of the dispute by making a determination as to how the dispute should be resolved. Arbitration can be non-binding or binding on the contracting parties. Normally, the State will not agree to binding arbitration.

- Litigation. -- Both parties to the contract have the right to be present and represented by legal counsel in a court.

It is important to remember that dispute resolution usually requires contract interpretation, considerations of litigation, risk, and knowledge of available judicial remedies. Early involvement of the agency's or institution's contracting and purchasing specialists should be the first step when contract disputes are encountered. The brief summary on dispute resolution contained in this Section cannot substitute for sound legal advice.

6.2 Responsibilities in Dispute Resolution

Introduction to business or contract law classes teach that an enforceable contract has to be supported by "sufficient" consideration. In State contracts, the "consideration" requirement goes beyond merely having sufficient consideration. The State is required to receive "reasonable value" for its payments, including those made in settlement of disputes.

Settlements, or relinquishments of rights by the State, must be in the best interests of the State. The contract manager's responsibility is to ensure the State receives value for its payments and does not relinquish its rights.

The primary purpose of competitive bidding is to ensure the State receives value for its payments. The competitive bidding process is ineffective if the low, responsible bidders are permitted to obtain relief from unreasonably low bids by requesting additional money, time for performance, or relaxation of contract specifications. Not only does the State suffer from not receiving value, the rights of the other bidders are also compromised.

If disputes are to be resolved by granting more money, additional time, or relaxed specifications, the contract manager is responsible for assessing whether the contractor is entitled to more money or time and whether the compensation or other consideration is fair, based on changes in conditions or events giving rise to the dispute. This is an acknowledgment that contractors also have interests. They expect to be compensated for changes in requirements which are not known at the time of the contract award. They also expect relief from some delays or other unforeseen conditions that both parties agree to be outside of the risk normally assumed by the contractor. Every adjustment in price, extension of time, or relaxation of requirements should be the result of a contract provision or other legal principle permitting the adjustment to contract terms. Resolution of disputes requires investigation of the facts, an understanding of the contractor's position, consultation with experts, if necessary, and a process, such as negotiation, that is designed to achieve a settlement that fairly approximates the risks and costs associated with contract performance.

6.3 Negoiation

The first time that the contractor asks for more money or more time, requests relief from specifications, or otherwise notifies the State of a problem concerning the contract, a dispute has started. And, the first time the contractor contacts the State to discuss the dispute, negotiations have started.

Roger Fisher and William Ury, *Getting to Yes--Negotiating Agreement Without Giving In, 2nd Ed.* (Penguin 1991), is an excellent resource tool regarding negotiations. The ideas contained in this summary regarding contract dispute negotiations are adapted from that book. The negotiation process described here is useful for other contract management functions as well as for negotiating contracts, pricing change orders and modifications, and for use in other areas where disagreements may exist. Similarly, these tools, techniques, and planning considerations are useful for other alternative dispute resolution techniques, as well as litigation. Litigation, arbitration, and mediation are all forms of negotiations where a third party is involved, whether an arbitrator, judge, or mediator. The planning requirements for any type of negotiation are much the same, regardless of the method used.

Planning

The key to effective negotiation is planning. The planning elements described here are intended to establish a structure for approaching the negotiation, so that all arguments, risks, and options can be considered. The State contract manager needs to be knowledgeable about all facts the contract file, and the substance of the contract. The contract manager must be prepared and have well developed arguments, and counter points. The contract manager should develop a personal style for writing all of this in a format that can be quickly and effectively used on the phone or at a negotiation table.

- Interests of the Parties. A successful settlement satisfies in some respects the interests of both parties. To succeed in negotiation, the contract manager should identify not only the State's interests, but those of the contractor as well. Examples of interests include:

  - Funding constraints of the State.
  - Maintaining the public trust.
  - Avoiding litigation and excessive costs associated with resolving disputes.
  - Fair and reasonable compensation for work performed.
  - Fostering a good continuing relationship.

- Best Alternative to Negotiated Agreement (BATNA). The concept of the BATNA is a way of getting away from the traditional positional bargaining of "take it or leave it, it's my bottom line", to principled negotiations where both parties focus on all interests and try to reach an agreement accommodating the interests of both parties. The BATNA becomes the litmus test against which all options, offers, and positions implicitly are tested.

  - The BATNA is simply this, "What is the best alternative for the State if an agreement cannot be reached in this negotiation?" Is it to "take your business elsewhere," to re-solicit, to "see you in court" and risk litigation? The BATNA serves to highlight

interests and considerations that become a yardstick for evaluating alternatives and options. The BATNA helps to identify the primary points of negotiations and the commitments that can be made if the opportunity arises.

- Try to assess the contractor's BATNA as well. Questions such as, "What alternatives exist to resolve this issue?" are appropriate questions during negotiations.

- A realistic assessment of litigation risk is necessary if the BATNA is, "See you in court." Three basic questions should be asked. What is the chance that the contractor will be entitled to recover more money? If there is entitlement, how much will the expected recovery be? How much is litigation going to cost?

- Legitimacy Arguments. **INVESTIGATE . . INVESTIGATE .. . INVESTIGATE . . AND PREPARE**. Successful negotiators are the ones who know the facts and can articulate clear, rational arguments.

  - Most contract disputes involve matters of contract interpretation, (e.g. trying to determine the objective intent of the parties at the time the contract was executed). Attachment B contains some of the more common principles of contract interpretation to assist in the process of interpreting the contract and trying to arrive at the objective intent of the parties when the contract was written.

  - Plan arguments to support the position on each of the substantive issues in dispute. Anticipate the contractor's issues and plan counters to the arguments presented. Determine what should be the "standard for agreement," (e.g. "whether the contractor is 'entitled' to more money" or "what the parties objectively intended at the time of contract signing"), and develop reasons why. Sometimes, when communications break down, talking about the "standard for agreement" can be a constructive way to open lines of communications.

  - In the format devised for planning negotiations, write the skeletal arguments/responses for easy reference. Decide what documents to present that best support the State's position.

- Plan Communications.

  - Consider "scripting" the opening argument. This is going to require determining the tone to set, the amount of "support" for the negotiation process (e.g. "I think we all agree that resolving this dispute is in everyone's interest"), and whether an opening offer is to be made. The most difficult part of the negotiation process may be in the beginning. Scripting the beginning communication can set the tone for the rest of the negotiations.

  - Define and record all of the issues that need to be addressed. In many disputes, the issues are, "Is the contractor entitled to more time or money?", and "If so, how

much?" Under each issue that is identified, have two columns. Write down the questions that need to be asked of the contractor, (e.g. "Who authorized the change in reporting format?" "Was the State notified that this was 'out of scope'?" or "Can the invoices and receipts be provided that show how much was paid?"). Anticipate what difficult questions are expected from the contractor, and how to answer them. For example, what is the best response when the contractor asks, "Why did we need to provide written notice, the State's representative knew our position?" or "Does the State at least agree that we are entitled to recover something?" or "Is it possible to make some compromises in this dispute?"

- Think about communications to facilitate the "process," such as, "Help me understand the rationale behind this position a little better" or "How about agreeing to disagree on this point for a while and moving on to the next issue?"

- Plan the Commitments the State is Ready to Make. Fisher and Ury advise to move toward commitment slowly. Identify the points of resistance and the points to change from being readily agreeable to being more cautious. Related to this idea of "commitment" is the opening position. The opening position, and whether to even make an opening offer, represent commitments that should be planned. Finally, decide whether to handle each issue individually, or await agreement globally after a discussion of all of the issues.

- Options. Armed with known interests, the BATNA, a good investigation and development of arguments, brainstorming may be used to identify options. All legitimate options identified should be put in priority; (e.g., "Can we trade a little performance time if the contractor drops the claims for money?" "How about getting some increased maintenance obligations if we give some money for the claim?") Evaluate each option at least provisionally. At the negotiation table, use questions such as, "What if . . ." or "Is there a possibility . . ." to explore options. Remember, raising possible options is, in a sense, a commitment in itself.

Process and "Tactical" Considerations

- The relative advantages/disadvantages of tactical considerations, such as time, location, and who attends the negotiation should be considered. The checklist in Attachment A of this Section notes a few such considerations.

- Take adequate time to reflect on the entire negotiation process and how to facilitate communications:

  - Focus on the issues. Especially when communication starts to break down, focus on the issues and try to depersonalize them. Consider offering to do an initial "draft" so it can jointly be used as a guide to explore ideas.

- If unprincipled negotiation techniques like "good guy/bad guy" or others are being used, confront them head on, try to eliminate them and then proceed with the negotiations.

- Use the negotiation "process" as a way to build consensus, such as, "How can these disagreements best be handled, Can we agree to disagree and move on?"

- Always consider the "continuing relationship" as a goal. It may be difficult for negotiating parties to admit, but continuing their relationship is essential to the negotiations.

- When recapping or asking questions, focus on the State's "misunderstanding" to limit the confrontational atmosphere sometimes associated with direct questions; (e.g. "It is difficult to understand why the notice requirement in the changes clause was not followed.").

- Remember, a little humor never hurts.

Memorialize the Agreement

Write negotiation memoranda to summarize important aspects of the negotiation. Most important, make sure the agreement is written, usually in a contract amendment. See Section 6.5 for more discussion of how to memorialize the agreement.

6.4 Other Dispute Resolution Techniques

Sometimes negotiation is effective and sometimes it is not. Occasionally the dispute will reach a point where the negotiation process breaks down and no longer works. If the contract has a dispute resolution process, it must be followed. If not, an alternate dispute resolution (ADR) process may be used in an attempt to settle the dispute. All ADR processes cost money, however, and one of the first issues is payment for the expenses involved in the ADR process, (e.g. mediator fees). Typically, the parties agree to split the costs.

General considerations for choosing ADR are listed in the dispute resolution checklist at Attachment A of this section. Although there are numerous variations of ADR, this discussion will summarize only three: mediation, mini-trials, and arbitration.

Mediation

Mediation is widely used in the private sector. It tends to be informal and flexible, and still retain the confidentiality that the parties want. Mediation is the term used to describe any process where a third party, not involved in the controversy (often a technical professional or someone trained in mediation), assists the parties in reaching settlement.

The mediator will listen in confidence to the parties, help clarify interests, assist each party in developing or considering options, and facilitate exchange between the parties. Typically a mediation

agreement is signed that defines the role of the mediator and expectations concerning confidentiality during the mediation process. The mediator meets privately with each of the parties, usually several times, and acts as a catalyst in fostering improved communications. The mediator may propose solutions, options for settlement, assess litigation risk, identify unreasonable expectations, etc. The mediator may also help facilitate joint discussions between the parties if they desire.

In short, the parties themselves define this process, the involvement of the mediator, and they control the outcome. No one "decides" anything that is binding on the parties. It is an especially useful process where the communications have broken down, but both parties are still committed to settlement, or when emotions or personalities have interfered with the negotiation process.

Most mediators will have a proposed mediation agreement that can be modified to define the mediation process to be used. At the same time the mediator retention agreement can be processed to address compensation. The negotiation agreement will define the "discovery" or information/document exchange in terms of quantity and scope, the confidentiality of information exchanged by the parties and disclosed to the mediator, the numbers and roles of participants, the allocation of expenses, and the like.

Informal Mini-Trials

An informal mini-trial is a more structured settlement process. Parties engage in informal discovery or exchange of information, even limited depositions, in advance of the mini-trial; the parties agree on the number or scope of requests for information or depositions. Then they agree to a proceeding, usually limited to a day or two in length, in which each party listens to the other's "case". Usually there is a neutral third party present to "preside" at the mini-trial. Each party's attorney gives an abbreviated version of its case, with some "introduction of evidence" as agreed by the parties. Many commentators stress the importance of having key management/executive officers present to hear the case presentations. Sometimes the neutral third party is also asked to issue an advisory, non-binding opinion, concerning the merits of the dispute after the mini-trial. Often the mini-trial is followed by mediation, with the presiding neutral third party serving as the mediator.

Other Forms of Third Party Neutral Involvement

There are other forms of ADR, (e.g. "early neutral evaluation" or "conciliation"), that are modifications of the mediation model. They differ in the role of the third-party, whether the third-party is a specialist in the subject area, whether an opinion is issued after the process, etc. The agreement between the parties is what defines the character of and differences between these other types of ADR techniques.

Arbitration

Apart from mediation, the other major category of ADR is arbitration. Arbitration is the most structured kind of ADR, and most closely resembles a court proceeding. Arbitration can be either "binding" (meaning there is very limited judicial review) or "non-binding" (meaning parties are free to pursue judicial remedies).

The American Arbitration Association (AAA) is a well-known organization providing arbitrators and rules governing the process. When parties agree to submit to arbitration in accordance with the rules

of the AAA, they are implicitly agreeing to a procedure that closely controls the process of dispute resolution. There is a procedure, for example, for selecting an arbitrator from a list furnished by the AAA. Although the rules of evidence are relaxed, there are procedural rules governing these proceedings. Commonly, attorneys are used in arbitration just as they are in litigation. In general, decisions on the disputes may be issued more quickly than they would be in court, and there is more limited discovery, (e.g. document production requests, requests for interrogatories, and depositions).

Paragraph 7 of the Special Provisions makes arbitration provisions in State contracts unenforceable. Binding arbitration provisions may conflict with other State law governing contract disputes and the State Controller's responsibility to approve contracts obligating State funds. The arbitration prohibition could be waived, (e.g. non-binding arbitration provisions), if a vendor insists that an arbitration provision be included in a State contract. If this is the case, legal counsel should be contacted so a provision could be developed that might be acceptable to the State Controller.

6.5 Implementing the Settlement of Disputes

After agreement or resolution of the dispute, appropriate amendments must be made to the contract to permit payment to the contractor and/or to establish a new delivery date. Also a negotiation memorandum should be prepared to summarize the history of the negotiation and discussions that occurred concerning key issues of the dispute.

Settlement Amendments

The standard amendment format can be used for making the contract adjustments necessary to settle the dispute, with factual recitals to explain the basis for the amendment, similar to the sample in Attachment C. Note that there are two kinds of amendments in the sample. In one, the contractor is entitled to an extension of time and adjustment in price based on clauses in the contract giving the contractor more time and money for certain unanticipated events, (e.g. differing site conditions, interference by the State, constructive change of requirements, etc.). In the second factual recital, the contractor has missed the delivery date, but the State decides to waive the late delivery and reestablish a reasonable delivery date. For more information on the distinction, see the discussion in Section 7.1.

Both types of amendments have a release, which cuts off additional claims arising out of the same circumstances. Releases are important because the State does not want to have to address a series of similar claims throughout contract performance. If time must be taken to address a claim, once is enough. Sometimes the contractor may want to negotiate the scope of the release, (e.g. excluding things like "impact", where the scope of the contract adjustment and release are negotiated up-front). The contractor may also reserve the right to submit claims for certain other things. Caution should be taken against limiting the scope of the release by using terms such as "excluding claims from impact," because other claims and negotiations may follow. At least be clear on what the contract price and time adjustment were intended to cover in the release, so that the contractor is not compensated again for the same costs.

"Impact" claims usually follow payments to the contractor for direct costs and time attributable to the changed work. For example, if the State changes door materials and colors in a construction contract,

there may be an impact on the schedule in installing the different doors, and the price may also be more. A contractor may, at the end of the job, try to claim that the door substitution also adversely impacted scheduling other work at the site, such as interior finish, and that the change had a "ripple effect" that caused even more delay and expense. Reserving "impact claims" in a release could result in more similar claims later, and may require additional negotiation when the matter was thought to be resolved.

Negotiation Memoranda

Prepare and sign a memorandum of understanding that explains the history and key aspects of the settlement, especially terms that may seem ambiguous without a full understanding of the history. Any discussion concerning the scope of releases is particularly important. Include all previous versions of the amendment that were exchanged between the parties as attachments, and explain the reasons for the changes to the amendment language. Retain this memorandum in the contract file.

ATTACHMENT A

Considerations During Dispute Resolution

Investigations

- Remember that any representations made to the contractor may be "admissions" held against the State in any subsequent litigation.

- Be aware that written memoranda relating to disputes are not privileged and are "discoverable" by the contractor in litigation or in "open records" requests.

  - Do not speculate when writing factual recitals in memoranda. Be objective and avoid emotional characterizations of the events.

  - When soliciting descriptions or memos from other individuals, make sure they understand the need to be accurate.

- Ask for clarification, preferably written, of the contractor's claim, the circumstances giving rise to the claim, and identification of any people that have first hand knowledge.

  - Obtain as much documentary evidence relating to the contractor's claim as is possible.

- Collect State records, including the contract, memos, other correspondence, and site progress reports. Collect other records that were developed by the contractor, the architect/engineer, or other State representatives, that relate to the dispute.

- READ THE CONTRACT, ALL OF THE CONTRACT

- If there is a dispute resolution clause, comply with the clause.

  - If there is a question concerning whether a contract dispute resolution provision governs the dispute, consult legal counsel.

Planning for Negotiation - Interests and Constraints on Settlement

When planning for negotiations, answer the following questions:

- What are the contractor's interests, (e.g. interest in the relationship)? What are the State interests?

- What is the funding situation? Are there additional funds available? What is the likelihood there will be other claims or adjustments to the contract?

- How can the State summarize its desired "standard of agreement," and convey it to the contractor? Said another way, how is the State going to know a "good agreement"? What is the State going to advocate to the contractor as the "standard of agreement?"

Best Alternative to Negotiated Settlement (BATNA)

- The State's BATNA, (e.g. deny the claim or "see you in court")
  - How good is the case (entitlement)?
  - How much can the contractor recover if entitled to recover?
  - What are the expected costs of litigation?
  - How do the interests, (e.g. the on-going relationship), affect the BATNA?
- What is the contractor's expected BATNA?
  - How do expected interests affect the contractor's BATNA?

Legitimacy Arguments

- What are the arguments for and against the desired resolution of each issue?
  - Should the contractor be entitled to more money, time, or relief from specifications?
  - What is the amount of damage or delay, assuming entitlement?
  - What is the standard for agreement on the negotiation, e.g. fair and reasonable compensation?
  - What is the agreed negotiation process? "Help me understand the factual basis for the claim.", or, "I know there are some hard feelings, but put them aside and focus on the problem."
- What are the critical documents, contractor admissions, and other information relevant to the arguments?
- Is the file organized adequately so it is easy to find critical documents?

Communications During Negotiation

Use the following to develop communications:

- Script opening arguments and include some "negotiation process".

- Be sure that the opening offer is a commitment that the State is willing to make.
- Know what to say if pressed for or confronted with a specific offer. Know the State's "bottom line" prior to negotiations.
- List and organize the issues that need to be discussed.
- Be prepared for difficult questions or arguments.
- Prepare a list in advance of questions to ask the contractor.
- Plan answers to difficult questions the contractor is most likely to ask.

Plan, Discuss and Agree Upon Commitments

Answer the following questions:

- Is a specific opening offer a commitment that is acceptable to the State?
- What are the "resistance points" in terms of price, delivery schedule, and relaxation of specifications? If presented with the opportunity, what commitments can be comfortably made at the table, in terms of price, schedule, relaxation of specifications?
- Are there any commitments the State is willing to make? "Does the State agree that some additional compensation might be appropriate?"
- How is the State going to handle a request for commitment from the other side? "Let's recap what has been agreed upon to this point."
- What "process" commitments can be made to "build the relationship"? "Why not agree to disagree and come back to that issue at a later time?" or "Apparently there are some misunderstandings. Let's take some time now and try to resolve them?"

Options

- Ask, "What if . . ." or "Is there a possibility . . ."
- Prioritize some specific options in terms of delivery schedule, price, relaxation of specifications, waiver of liquidated damages, etc.
- Resort to other forms of ADR, alternate dispute resolution, (e.g. mediation or mini-trial).

Some "Tactical" and Process Considerations

- Focus on "misunderstandings" of the facts or the reasons behind a position, instead of putting the contractor on defensive.

- A little humor/lighthearted communication never hurts.
- Is there an advantage to having the meeting at a particular location?
- Is it an advantage to have all the people capable of making decisions at the negotiation?
- Is it necessary to have all first-hand "witnesses" to events and documents at the negotiation?
- Is it useful to have accessibility to word processing or other resources to immediately document an agreement?
- In "team negotiations," decide who will handle which parts of the negotiation, (e.g. fact-finding, difficult questions, getting the process back on track, etc.).

When Alternative Dispute Resolution (ADR) Does And Does Not Made Sense

- DO consider mediation when the parties want or need to maintain a good relationship.
- DO consider mediation when communication has broken down but both parties seem committed to settlement.
- DO consider ADR when time or limiting costs of settlement are major factors.
- DO consider ADR when emotions or personalities are getting in the way.
- DO consider mediation when an unbiased appraisal of complex or multiple issues might encourage an objective assessment by the parties.
- DO consider mediation if maintaining confidentiality of facts or positions is important.
- DO consider a mini-trial when party positions are reasonably developed, facts or laws are complex, amount in controversy is significant, and involvement of high level decision makers is key to settlement.
- DO try to keep it simple, and reduce the process to writing.
- DO NOT include arbitration provisions in State contracts without advice from the Attorney General and a waiver of Fiscal Rules by the State Controller.
- DO NOT use ADR when a definitive and authoritative decision is needed on an issue that is likely to be precedent setting.

- DO NOT use ADR when established policy must be maintained to avoid variations in implementation and enforcement.

ATTACHMENT B

Principles of Contract Interpretation

- The basic objective of contract interpretation is to determine the intent of the parties.

  - Focus on what a reasonable person familiar with all of the facts and circumstances at the time of the bargain would have understood the meaning to be, not what one party may have subjectively intended the contract to mean.

- Unless a different intent is clear:

  - Where language has a generally prevailing meaning, the contract is interpreted in accordance with that meaning (e.g. dictionary meanings may be relevant).

  - Technical terms and words of art are given their technical meaning when used in a transaction within their technical field (e.g. "expert" testimony may be necessary).

- Read the contract as a whole.

  - All writings that are part of the contract are interpreted together.

  - An interpretation usually will be rejected if it leaves portions of the contract language difficult to understand or otherwise meaningless.

  - An interpretation is favored if it avoids conflict between and harmonizes all of the contract provisions.

  - Contracts are interpreted to fulfill the principal purpose of the parties.

  - Unless written otherwise in an "order of precedence" clause, the more <u>specific</u> language controls in cases of conflict with more <u>general</u> language.

- Where contract language is clear and unambiguous, no extrinsic evidence (evidence outside the contract language) will be considered in the contract interpretation.

  - Custom and trade practice may be used to explain contract terms dependent on the custom and trade practices prevalent in the industry.

  - Custom and trade practice can not contradict plain contract terms, because the parties are free to vary from custom and trade practice during performance.

  - The party asserting trade practice has the burden of proving it.

- Extrinsic evidence (e.g. oral discussions, requests for clarification and responses, bidder's conference presentations, pre-dispute interpretations and actions) can be considered to determine whether there is "ambiguity" within the contract.

- Where an "ambiguity" exists, extrinsic evidence can be considered during interpretation.

  - Oral discussions of the issue conducted before the dispute arose may be considered.

  - Prior interpretation before the dispute arose, or performance before the dispute arose consistent with one party's interpretation, can be considered.

  - Prior course of dealing between the parties on other transactions is probably next in importance. For example, were there similar transactions before that showed how the parties interpreted the issue?

- If, after applying these rules, there are still two reasonable interpretations, the ambiguity is usually construed against the drafter of the contract.

- If the non-drafting party knew or should have known of ambiguity ("patent ambiguity"), that party has a duty to clarify, and if it does not, the contract will be construed against it.

ATTACHMENT C

Sample Settlement Amendment

AGENCY OR INSTITUTION CODE

_____

CONTRACT ROUTING NUMBER

_____

CONTRACT AMENDMENT NUMBER

_____

THIS AMENDMENT, made this ____ day of _____ 1997, by and between the State of Colorado, hereinafter referred to as the State, for the use and benefit of the Department of _____, [Address], and _____, [Address], hereinafter referred to as the Contractor,

FACTUAL RECITALS

Authority exists in the Law and Funds have been budgeted, appropriated, and otherwise made available and a sufficient unencumbered balance thereof remains available for payment in Fund Number _____, Appropriation Code _____, Contract Encumbrance Number _____; and

Required approval, clearance, and coordination has been accomplished from and with appropriate agencies; and

The parties entered into a contract dated October 1, 1996, Contract CE Number C 840095, Contract Routing Number LAW 96-0018, which is hereby incorporated by reference; and attached, and

The contractor has submitted a claim for adjustment to contract price and extension of time of performance, and the parties desire to settle the claim through appropriate adjustments to the contract price and time for performance;

OR

The contractor has exceeded the time for performance in the contract, and the parties desire to reestablish a reasonable time for delivery or performance of the contract;

NOW THEREFORE, it is hereby agreed that:

1. Consideration for this Amendment consists of the adjustment in contract price and/or extension of time for performance, as well as the contractor's release of claims, which shall be made pursuant to this Amendment.

2. It is agreed the Original Contract is and shall be modified, altered, and changed in the following respects only:

a. Page 2 paragraph 9, "Contract Price": The figure $50,000.00 shall be deleted and the figure $60,000.00 shall be substituted in its place.

b. Page 3 paragraph 10, Time for Performance": The date June 30, 1997 in the first sentence shall be deleted and the following substituted in its place, "September 3, 1997," permitting an additional 65 calendar days of contract performance.

3. The effective date of this Amendment is the later of _____, 1997, or the date of approval by the State Controller.

4. Release of Claims. [Two examples of releases here, the first for equitable adjustments in time and price where contractor is entitled to more time and/or money. The second is a waiver of delivery date and re-establishment of a reasonable time for performance.]

(Time and Money Adjustment). In consideration of the [cost][price] adjustments, extensions of time, or other adjustment, promises and relinquishment of rights herein described, all claims for additional compensation or time, based on events recited in the contractor's [letter][claim] dated _____, whether known or unknown, including claims for delays and impacts from any changes or modifications, are hereby released and forever waived.

OR

(Waiver of Delivery Schedule/New Delivery Date) The parties agree that the new time for performance specified in paragraph 2 is a reasonable time for performance and completion of this contract. In consideration of the re-establishment of a new delivery date, the contractor hereby waives any right to claim time extensions, pursuant to provisions of this contract or otherwise, arising out of facts or events, known or unknown, occurring prior to the date of this Amendment.

5. Except for the "Special Provisions," in the event of any conflict, inconsistency, variance, or contradiction between the provisions of this Amendment and any of the provisions of the Original Contract, the provisions of this Amendment shall in all respects supersede, govern and control. The "Special Provisions" shall always be controlling over other provisions in the contract or amendments. The representations in the Special Provisions concerning the absence of bribery or corrupt influences and personal interest of State employees are presently reaffirmed.

6. 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.

7 THIS AMENDMENT SHALL NOT BE DEEMED VALID UNTIL IT SHALL HAVE BEEN APPROVED BY THE CONTROLLER OF THE STATE OF COLORADO OR SUCH ASSISTANT AS HE MAY DESIGNATE.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment on the day first above written.

Contractor:

State of Colorado
ROY ROMER, GOVERNOR

_____
(Full Legal Name)

_____
(Signature of Individual)

By: _____
Executive Director

_____
(Name of Individual)

_____
Position (Title)

DEPARTMENT OF _____

_____
Social Security Number
or Federal Employer Identification Number

Attestation

By: _____
Corporate Secretary,
or Equivalent,
Town/City/County Clerk

(Seal)

APPROVALS

ATTORNEY GENERAL

By:_____

STATE CONTROLLER

By:_____

Section 7

Performance Remedies and Termination

7.1 Performance Remedies

A valid contract requires both parties to complete the expected performance, usually contractor performance of services or delivery of goods in return for payment by the State. Unless the contract grants it to a party, there is no "unilateral right to rescind" a contract. For example, home solicitation sales contracts give a right to rescind if exercised a few days after signature. This Section discusses termination options and remedies available when faced with a breach (failure to perform) by the contractor. Generally, the State can only withhold payment or otherwise suspend its own performance in limited circumstances, unless the contract gives the right to do so.

A contract breach is failure of the performance to measure up to specific contract requirements, in terms of quantity, quality, or timeliness. A warranty (either "express" or "implied") that makes affirmative representations about quality, can also give rise to a breach if not satisfied. Contract interpretation rules used to determine whether there has been a "breach" of the contract by either party are discussed in other sections.

Remedies Where the Contract Is Silent

The contract should address issues such as inspection and acceptance, termination for default, termination for convenience, liquidated damages, and other pertinent topics. If the contract is silent on these issues, the "law" will define duties and determine rights. Where this is the case, legal counsel should be consulted to assist in developing the best strategy for the State. This summary is intended only to introduce some of the issues that may arise when a contractor's performance is not what was specified in the contract.

Remedies for contract breach, where the parties have not otherwise defined remedies in the contract, differ depending on whether the contract is for goods or services. For services contracts that involve the furnishing of goods, the first issue is often whether the contract is predominately one for goods (as in hardware installation) or services (as in pure hardware maintenance involving installation of spare parts). This distinction is important because the Uniform Commercial Code has a detailed remedy procedure for "transactions in goods."

Contracts for Goods

Colorado has adopted the Uniform Commercial Code (UCC), with some modifications. The Code applies to transactions in goods. Title 4, Articles 1, 2, and 2.5, CRS, provides general statutory guidance for contracts governing transactions in goods and leases of personal property.

The statutes cover such issues as when contracts have to be in writing to be enforced, how agreements are to be interpreted, how missing terms in contracts are "filled in", how the "battle of the forms" issues are resolved when there are conflicting terms, what warranties apply and how

they are excluded, the buyer's and seller's obligations during performance, and remedies for breach of contract.

The basic rights of the State (the buyer) in a contract for goods under the Uniform Commercial Code are:

- The State has a right to inspect the goods prior to acceptance at any reasonable place and time, and in any reasonable manner. See section 4-2-513, CRS.

- Unless otherwise agreed in the contract, the buyer may "reject" the goods if they fail to conform in any respect to the contract, including delivery on time, subject to a limited seller's right to cure a defect. This is known as the "perfect tender" rule. See sections 4-2-601 and 4-2-508, CRS.

- To reject goods, the buyer must "seasonably" (defined as the time agreed by the parties in the contract, or if none is specified, a "reasonable" time) notify the seller and hold them with reasonable care at the seller's place of business to permit the seller to remove them. See Section 4-2-602, CRS. If the buyer fails to notify the seller of the reasons for the rejection, the buyer cannot later rely on the defects to justify rejection or establish breach. See Section 4-2-605, CRS.

- After the acceptance of goods, or acts inconsistent with seller's ownership (known as constructive or implied acceptance (e.g. use of the goods after delivery), the buyer is limited to the remedy of "revocation of acceptance." Revocation of acceptance is only permitted if:

  - It is done within a reasonable period of time after discovery of the defect.
  - The value of the goods is "substantially impaired" by the defect, and
  - The seller has assured that the defects would be cured, or
  - The defect was "difficult to discover."

- The UCC also grants the buyer cancellation rights where no delivery is made or the seller repudiates the contract, and gives the buyer the right to "cover", recover excess costs and other damages, and in some cases obtain specific performance of the contract. See Section 4-2-711, CRS.

As noted above, there is a fairly comprehensive statutory structure governing contracts for goods. One important thing to remember about contracting for goods is that these remedies can be complicated, and legal advice should be obtained before using them.

Contracts for Services

By contrast, there are no detailed statutes governing service contracts, and as a general rule, a bilateral contract, one signed by both parties, should be used when contracting for services. The use of a bilateral contract allows the parties to contractually define rights and remedies similar to those that the statutes provide in contracts involving transactions in goods. In a service contract,

there are no laws that grant inspection rights, rejection rights, termination rights, etc. If these rights are not included in the contract and a disagreement arises, something called the "common law", a set of rules inferred from court decisions, will be used to settle the dispute.

The contractor should be notified immediately when performance is observed to be below standard and does not meet contract requirements. Otherwise, the State risks waiving a contract requirement. The following are some guidelines for contract remedies where the contract is otherwise silent.

- The State's performance, usually payment for the service, is excused by a material failure to perform by the contractor. Notice, this is not the "perfect tender" rule that exists by statute in supply contracts. The courts dislike cases involving "forfeitures," and the burden of proving a substantial breach of contract can be difficult. If this remedy is exercised, the State would still be required to pay the contractor for acceptable services received, that is, the value of the benefit conferred on the State by the contractor.

- If the contract provides for periodic payments, generally these payments cannot be withheld to "encourage" better performance from the contractor, unless the contract permits it. As long as the contractor is "substantially" performing, the State has an obligation to pay. There is, however, a limited right to withhold final payment to the contractor where the amount withheld represents the amount of damages to the State caused by the contractor's failure to perform.

- Unlike supply contracts, time is usually not considered "of the essence" unless the parties clearly specify otherwise in the contract. Missing service contract milestones may not be enough to establish "substantial breach" where the contract does not clearly say which milestones are of the essence. Further, standard contract boilerplate may not be enough to make every time milestone an "of the essence" obligation of the contractor.

- Apart from these limited remedies, the State has the option to sue the contractor for breach of contract.

As can be seen, common law contract remedies for service contracts are not very comprehensive. Contractual remedies should be included in all service contracts. Legal advice should be obtained before attempting to exercise any of the common law remedies noted above.

Inspection Remedies, (e.g. Rejection and Payment Withholding)

As noted above, the UCC grants an inspection right in supply contracts. See Section 4-2-513, CRS. However, the only right is rejection, not reduction in payment, unless the seller will agree to a payment offset in exchange for acceptance of goods that do not comply with contract requirements.

By contrast, no inspection rights exist in a service contract, unless agreed to by the parties. Of course, it may be possible to actually inspect the services as they are being delivered. But, absent a specific provision in the contract, the contractor cannot be required to permit inspection of the services it is performing, and there may not be an effective remedy if the performance is defective, other than notifying the contractor of the deficiencies. For an example of an inspection clause for use in service contracts that provides specific remedies, see the model clause in "Inspection and Acceptance", Chapter 6, Appendix A. Notice that the clause gives the State the right to inspect at reasonable times and places, to direct reperformance, and to make an "equitable" reduction in price if services are incapable of reperformance.

Warranties

A "warranty" is an affirmation of fact about the quality or durability of goods or services.

An "express warranty" in a contract usually has an affirmation of fact or representation about quality or durability, with rights if the supply does not measure up. For example, contract language that states, "the contractor warrants that the computers will remain failure-free for 90 days after acceptance by the State," allows the State to escape the normal rule that says that acceptance is "final." Read the contract carefully to determine what warranties exist, and what remedies are available if the goods or services do not comply with the terms of the warranty.

In the case of supplies, there may also be "implied warranties", warranties that apply to goods sold by merchants even if the contract does not say anything about a warranty. The warranty of merchantability contained in Section 4-2-414, CRS states that in order for goods to be merchantable, they must at least:

- Pass without objection in the trade under the contract description; and
- Be of average quality within the description f fungible goods (e.g. bulk grain);
- Be fit for the ordinary purpose for which such goods are used; and
- Be within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
- Be adequately contained, packaged, and labeled as the agreement may require; and
- Conform to the promises or affirmations of fact made on the container or label if any.

Notice that this implied warranty does not mention anything about a guarantee for the future. In fact, implied warranties are not "failure free" warranties in the sense that one usually thinks of them. These warranties really only imply a standard of quality. Also, they are most useful in transactions in fungible goods. In reality, implied warranties offer little, if any, protection.

Another kind of warranty is "fitness for particular purpose". Section 4-2-315, CRS states that "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods will be fit for such purpose.". This warranty may, for example, be some protection if a computer company suggests specific models for a computer system, and the system does not work when

integrated. Because the State was relying on the computer company to make a workable system, there might be a remedy against the contractor.

But beware if these commonly implied warranties are excluded using language such as:

> **THE SELLER SELLS THE SUPPLIES "AS IS" AND DISCLAIMS ALL EXPRESS AND IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

If a disclaimer like this is in a contract, it may prevent reliance on either one of these implied warranties. The State will then have to rely on any express warranties written in the contract.

Note there has been no discussion about service contracts. That is because the Uniform Commercial Code warranty rules do not apply to service contracts, only to transactions in goods. Warranties would have to be written in a service contract to be effective. There are no implied warranties.

Warranties require close reading to determine just what is being warranted. For example, a statement that the seller warrants that a product is free from defects for one year may only mean that the buyer has a year in which to find defects that existed at the time of delivery. A statement that the seller warrants that a product will remain free from defects for a period of one year is probably a "failure free" warranty. Read the warranty clauses carefully.

Liquidated Damages

A liquidated damages provision is a contract clause that gives one party the right to withhold payment at an agreed rate per calendar day if the specified performance is late. This right does not exist unless it is stated in the contract. These clauses are common in construction contracts. They are not commonly used in supply and most service contracts.

Damages for breach (e.g. late performance) by either party can be liquidated in the contract, but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulty in proving the loss, and the inconvenience or unfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void because it is interpreted to be a penalty. See Section 4-2-718, CRS.

Procurement Rule R-24-106-101-07 (reproduced in Chapter 6, Appendix A of the *Manual*), is an example of a liquidated damages provision. Whether liquidated damages will be enforced by the courts depends on whether they are characterized as "penalties." The contract file should contain a memorandum explaining the rationale for the liquidated damages amount. Examples include the rental costs of substitute facilities or equipment, the labor costs of continued oversight or inspection when services contracts are delayed, the lost opportunity for improved efficiencies because of late or unsatisfactory performance, or other specific elements of costs that might have been avoided had performance been completed on-time.

Assuming the clause is enforceable, listed below are some considerations in assessing liquidated damages:

- If the contractor is excused from delay because of an "excusable delay" granted by a "force majeure" clause (see the model “force majeure” clause in Chapter 6, Attachment A) or another contract provision, such as “Termination for Default,” the contractor cannot be assessed liquidated damages for that portion of the delay.

- In services or construction contracts, the right to assess liquidated damages generally ends on the date that there has been "substantial completion," or "beneficial occupancy" in construction contracts, unless some other standard has clearly been defined. "Substantial completion" has been defined as the moment when the deliverable is capable of being used for its intended purpose.

- If a contract is terminated for default, the contractor can be assessed liquidated damages until a substitute contractor is reasonably procured and achieves "substantial completion."

- As a general rule, actual damages for the delay covered by liquidated damages cannot be recovered in addition to liquidated damages.

Waiver of Delivery Dates and Other Requirements

If a State representative observes defective contract performance and remains silent, the contractor may be able to argue that the requirement was waived, particularly if the contractor could have changed its performance and avoided additional costs had the discrepancy been disclosed at the time.

Waiver of performance/delivery dates is a more common problem. The State can wait a reasonable period after a delivery date has expired to determine whether to terminate the contract or exercise other remedies. However, if the State induces the contractor to continue performing, or waits an unreasonable time to decide on a remedy, the State may have "waived" the delivery date. The following steps are recommended to avoid potential problems:

- Comply with any contract clause requirements for notice, (e.g. the termination for default clause, discussed in Section 7.2).

- Do not issue change orders or use other directives after the delivery date has passed, until a decision on remedies has been made.

- Correspondence with the contractor seeking facts is acceptable, but do not "induce" or encourage performance. To do so may waive the delivery date.

- Make decisions to terminate contracts promptly after receipt of the contractor's response to "cure notices".

If a delivery date is waived, make sure to re-establish a reasonable date for delivery or performance, preferably by written agreement with the contractor.

7.2 Termination for Default

The discussion in Section 7.1 emphasized remedies that exist when the contract is silent about them. One of the most significant rights often granted by contract is the right to "terminate" a contract when the contractor has defaulted in performance. In supply contracts, the UCC grants a similar right called "cancellation" that can be exercised under the circumstances and using the procedures in Section 4-2-711, CRS. Otherwise, the right to terminate, and the procedures to execute it, are defined in a clause in the contract. The Procurement Rules have a model clause, that is reproduced at Chapter 6, Appendix A, of the *Manual*. This clause is patterned after the federal procurement termination for default clause that has been in use in government contracts for many years.

There is no Colorado case law on use of the clause, although there are many federal cases discussing the right to terminate, whether the procedure has been properly followed, etc. The clauses are enough alike that some of the same principles apply. When considering terminating a contract for default, legal counsel should always be consulted. Termination for default is disfavored by the courts, because the effect of a termination for default is to stop payment to a contractor even though it has incurred a substantial amount of expense during performance. The "presumptions" are usually against the State in default termination. Justifying the remedy involves a fairly heavy burden of proof by the State agency or institution.

The following are commonly used terms in performance remedies and termination:

Notice

The primary reason to terminate a contract is for failure to perform on time or failure to perform with due diligence. A second reason, usually more difficult to establish, is that progress is such that it appears the contractor cannot successfully complete the work on-time. In both cases, the model clause at Chapter 6, Appendix A, of the *Manual*, requires written notice to the contractor and an opportunity to promptly correct or "cure" the deficiency. Although the clause does not specify a time limit to correct the deficiency, it is recommended that at least 10 days be allowed, which is the same as the federal "notice" period.

Basis for Termination

It is not clear what level of nonperformance will be considered adequate to invoke the termination clause. Because the concept of "forfeiture" will be applied in a court's evaluation of the termination, the safest standard to use is "substantial breach", the standard in services. The UCC "perfect tender" rule will likely govern in the case of goods, although there are exceptions to that

rule also. Consult with legal counsel to determine whether there is an adequate basis for termination.

Compensation

The contractor is entitled to payment up to the date of termination, but only for "completed supplies delivered and accepted by the State." This means that the contractor is not paid for all of its costs of performance, or any at all, if it has not delivered and the State accepted supplies or deliverables.

Excusable Delay

Paragraph (d) of the model clause at Chapter 6, Appendix A, of the *Manual*, gives reasons for delay that will not be held against the contractor. If the contractor asserts these reasons for delay in response to a "cure" letter, the reasons will have to be evaluated to determine if the performance due date needs to be reestablished. This should be completed with the concurrence of the contractor, if possible.

Contractor Liability for Excess Costs

Paragraph (a) of the model clause at Chapter 6, Appendix A, of the *Manual*, states the contractor "shall be liable for excess costs in procuring similar goods or services elsewhere." So long as the reprocurement is conducted reasonably, that is, with competition that is practicable under the circumstances, the contractor will be liable for those excess costs. Competition does not require that the formal bidding process be used again. The federal rule, and State practice, permits agencies or institutions to negotiate with alternative sources to procure similar services or supplies in a reasonable period of time without formal competition. Often, the other competitors in the original procurement will be a source for the reprocurement after a default.

Erroneous Termination for Default

The last paragraph in the model clause at Chapter 6, Appendix A, of the *Manual* parallels the federal clause on termination for default. This clause has been applied to mean that, if the termination for default is not considered a breach of the contract by the State, the termination will not be invalidated but instead be treated as a termination for convenience. As is discussed in Section 7.3, a contractor is entitled to the costs of performance plus a reasonable profit after a termination for convenience. This remedy is significantly different from a contract breach remedy. In normal actions for breach, the contractor is entitled to actual damages and "lost opportunity" or the "loss of the benefit of the bargain." This normally means that a contractor is entitled to recover anticipated profits. The effect of this clause is to limit the damages to those granted in the termination for convenience clause, which do not include anticipated profits.

7.3 Termination for Convenience

In a commercial contract, a buyer cannot normally cancel a contract simply because the buyer's needs change. Government contracts commonly include a clause that grants that right, called a "termination for convenience" clause. The clause in Chapter 6, Appendix A of the *Manual* is the

Termination for Convenience clause prescribed by the Colorado Procurement Rules. This clause is modeled after the federal termination clause that has been in use since the Civil War. The clause permits the State to terminate the contract in whole or in part when "the interests of the purchasing agency or institution so require."

This clause differs from the termination for default clause in that it is not based on defaults by the contractor. A contractor can be performing successfully, and still the State may want to terminate the contract. For example, a software development contract for an agency or institution would no longer be necessary if the agency or institution were abolished, so the State would want to terminate the contract. Similarly, if technological developments made the particular software obsolete, the State would also want to terminate the contract.

Methods of Termination

The clause requires termination by written notice by the State to the contractor. Termination can also occur "by operation of law" if a termination by the State for default is held to be unjustified. See the discussion in Section 7.2.

Compensation of the Contractor

The difference from the contractor's perspective is the compensation. In a termination for default, the contractor is compensated only for supplies and services accepted by the State. In a termination for convenience, by contrast, the contractor gets the contract price for accepted supplies and services plus costs incurred during performance, costs incurred in settling subcontract termination claims, a reasonable profit (not anticipated profits), and reasonable settlement costs. Payments cannot exceed the contract price. "Allowability" and "allocability" of costs are governed by cost principles in the Procurement Code.

Termination in "Good Faith"

In Colorado, no cases have construed the termination for convenience clause. By contrast, there is a considerable amount of litigation in federal courts over the clause.

The litigation usually revolves around the concept of "consideration." There is no legally binding contract where, for example, one party agrees to perform a service and the other party agrees to pay only if it wants the service. We say that the contract fails for "want of consideration." The promise by one side to perform a service is a promise to do something the contractor would not otherwise have to do. But the other side has no such promise. Absolute control over whether performance will be required does not support a binding contract.

Sometimes a contractor will portray a "termination for convenience" right as such a contract, with one party absolutely able to control the bargain. The courts that have considered the issue, however, do not find lack of "mutuality of consideration." But they do impose an implied obligation to exercise the termination right in "good faith." A government may not "dishonor with impunity its contractual obligations." Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982). Courts talk in terms of restricting the termination for convenience right to situations where the circumstances of the bargain or the expectations of the parties have changed.

"Bad Faith"

"Bad faith" may be present if the termination right is exercised by the agency or institution with the specific intent to injure the contractor; or the State knows there is a cheaper price at the time of contract execution, signs the contract anyway, and then terminates the contract during performance to take advantage of a better price of a competitor.

It is unclear how the courts in the State of Colorado will construe these clauses. A termination for reasons related purely to the need for the requirement should be upheld. On the other hand, a termination motivated purely by economic considerations, such as availability of the supply or service at a cheaper price from a competitor, may be challenged on "mutuality of consideration" and "bad faith" grounds. The risk is that the contract would be enforced without the termination clause, making the State liable for normal breach damages, such as "anticipated profits."

Legal advice should always be sought in cases where the termination is motivated by economic considerations such as availability of the supply or service at a cheaper price from a competitor.

7.4 Avoiding Contract Interruptions

Sometimes there is no way to avoid delays and protect against interruptions. Usually, delay is caused by reasons beyond the State's control. However, diligent contract monitoring, inspection, and administration will uncover problems quickly, so the issues can be worked out. Often, contract interruptions become aggravated because no one knew about the problem until it was too late to avoid adverse effects and delays. Use the following checklist to assist in avoiding contract interruptions.

- Plan for contingencies. Have a general approach to the most frequent causes of delay and interruption to projects.

- Become familiar with the information provided in this *Guide* on contract monitoring, inspection, and performance remedies.

- Use "tickler" systems to prompt monitoring or inspections on due dates for delivery of documents, progress reports, supplies, and services.

- Inform other State agencies and institutions personnel who need to know about milestones in the contract and performance standards.

- Identify at the beginning of the contract who in the State has the authority to accept work and reject work, and issue directions.

- Immediately notify contractors using informal notices, if appropriate, about problems with performance.

- Promptly follow up an informal notice with more formal written notification, where appropriate.

- Plan a general approach to these common situations:

  - The contractor misses a required progress report date.

  - Based on past experience, the contractor is not making sufficient progress to complete the contract on time.

  - Problems are observed or complaints are received about the contractor's work.

  - A supply delivery date passes without delivery.

  - The contractor sends a letter stating that it is having supplier problems and cannot meet a delivery date.

  - The contractor sends a letter asking for more time and money, because some of the assumptions about the job were incorrect, or worse, accuses the State of changing the work.

- Make prompt decisions concerning contractor entitlement to more time and money.

ATTACHMENT A

Performance Remedies - A Manager's Checklist

General

- Establish a "tickler" system to follow up on expected delivery dates.

- Insure that personnel inspecting supplies/services know what specifications or standards the supplies the supplies or services have to meet.

- Make sure the follow-up system provides for immediate notice of defects or deficiencies before "acceptance" documents are executed.

- If performance is defective, **READ THE CONTRACT**. Know specific remedial provisions in the contract that define or limit remedial rights, such as inspection and rejection, termination, limitation of liability clauses, etc.

- In addition to specific performance requirements, and specifications, identify terms of express or implied warranties.

- In supply contracts, assess the content of "implied warranties" of merchantability and "fitness for particular purpose" as they apply to the transaction. See Sections 4-2-314 and 4-2-315, CRS.

  - Check for disclaimers of implied warranties in contract.

  - Viability of "implied warranties" may depend on opinions of experts familiar with industry practice with these kinds of supplies.

- Determine whether the contract has specified types of delay that are not the responsibility of the contractor, (e.g. "excusable delay").

- Know the rates and conditions in any liquidated damages clause in the contract.

- Evaluate options that might be proposed and discussed, such as reductions in payment, substitution of "additives" or "extras", or other consideration in exchange for waiving breaches or extending performance schedules.

Supply Contracts Without Remedies

- In the event of defects, late deliveries, or breach of warranty, assemble documents and other evidence and seek immediate legal advice if it is anticipated that there is a need to reject or "revoke acceptance" pursuant to the Uniform Commercial Code.

- -Make preliminary assessments of defenses available due to excusable delays, implied acceptance, or unreasonable delay in rejection

- Prepare written notice to contractor announcing intent to reject and stating reasons for rejection. Give the contractor three days, or reasonable time under the circumstances, to reply, and offer suitable options (e.g. downward adjustment in price in exchange for acceptance of defective supplies).

- Do nothing inconsistent with seller's ownership, (e.g. do not use the supplies).

- Evaluate the seller's response and send a confirming letter stating the reasons for rejecting the goods or accepting the seller’s offer of substitute terms.

- When revoking acceptance, follow the same procedure and assess:

- Whether the defect "substantially impairs" value of the goods.

- Whether the acceptance was induced by "difficulty of discovery" or seller's assurances that defects would be corrected.

Service Contracts Without Contract Remedies

- Insure that personnel inspecting services know what scope of work or other contract provisions govern the standards that services must meet.

- Upon observation of defective performance, notify the contractor orally.

- Make preliminary assessment of defenses available due to excusable delay.

- If the oral communication is not successful, assemble documents and other evidence, seek immediate legal advice, and consider sending a written communication signed by the State representative that notifies the contractor of the breach.

- Next, consider sending the contractor written notification that specifically states that the "service deficiency" is considered a breach of the contract.

- If performance remains defective, assemble documents and other facts and consult legal counsel.

Suggested Procedure in Liquidated Damages

- Document evidence and reasons for delay.

- Determine whether contractor has made claims of "excusable delay" and make preliminary assessment of grounds for excusable delay.

- Send the contractor written notice of intent to assess liquidated damages stating the grounds for the assessment and giving a reasonable time, (e.g. seven days), for the contractor to respond.

- Consider and evaluate, with advice of legal counsel, contractor claims of excusable delay, impossibility of performance, and "substantial completion".

- Send a confirming notice stating the decision, and withhold liquidated damages if the contract language gives the right to do so.

Waiver of Delivery Schedules

- Make rejection/acceptance decisions quickly.

- Consult legal counsel concerning ways to record agreements to waive and substitute delivery schedules.

- Generally liquidated damages are not waived if delivery schedules are waived, although it is best to reach agreement on liquidated damages when reestablishing delivery schedules.

- Make sure, in cases of waiver, that reasonable delivery schedules are established, preferably with the consent of the contractor.

- This can be done by giving written notice to the contractor in accordance with termination for default clause, if one is contained in the contract, and notifying the contractor that the State intends to execute its rights to declare the contractor in breach.

- Obtain a written confirmation from contractor concerning a new delivery schedule, and negotiate if necessary.

- Send a bilateral amendment, or at least a confirming letter, agreeing that the date is a reasonable date for completion and substituting that date as the new delivery date.

Checklist for Termination for Default Situation

- READ THE CONTRACT to find the procedural requirements and basis for termination in the contract's termination for default clause.

- Gather all contract language defining the requirement, proposal clarifications and representations, if any, and correspondence concerning the performance problems.

- Provide the documentation to legal counsel in advance, summarizing by memo any information or facts not otherwise documented.

- Make a preliminary assessment of justification for "excusable delay," or anticipated defenses such as "constructive change" by the State, impossibility, defective specifications, interference by the State, unreasonable delay by the State, etc.

- Consider a meeting with legal counsel and key agency or institution personnel having first-hand knowledge of contractor's performance problems and communications with the contractor.

- Decide if there is preliminarily a basis for the termination.

- Consider other options such as:

- Termination for convenience (assess the likely costs).

- Waiver of delivery schedule, re-establishment of new reasonable delivery date, and liquidated damages assessment (if available).

- Mutual agreement to amend schedule in exchange for reduction in payments or other consideration.

- Send written "cure" letter (return receipt requested) consistent with the written notice requirements in the termination for default clause, giving the required time for response, or 10 days if not otherwise specified.

- Send copy of correspondence to surety, if applicable (return receipt requested).

- Evaluate responses and issue termination notice, if deemed appropriate, after the expiration of the "cure" period.

- If waiver of delivery schedule is deemed appropriate, negotiate a contract amendment reciting new delivery schedule and reduction in payments, if possible.

- Consult with legal counsel concerning how to reprocure or finish the performance in order to protect the right to collect "excess costs".

Complete the Appropriate Letters, Contract Amendments, Memos

- Complete the contractually required notices to the contractor, those required by the UCC, or those recommended in this *Guide* for rejecting, revoking acceptance, assessing liquidated damages, etc.

- If the contractor is offering increased or changed performance, or a reduction in price, in exchange for waived or modified delivery schedules, make sure the agreement is written in a properly executed contract amendment.

- See Section 6 for guidance concerning negotiation, dispute resolution, and contract amendments resolving disputes.

- Complete memoranda summarizing reasons for the action, and admissions by the contractor or other facts supporting the action taken.

Section 8

Contract Close-Out

8.1 Evaluating and Documenting the Results

An effective evaluation of contract performance will determine if full value was received, if the results satisfied the needs, and if experience with the current contract holds any lesson for future contracting. Although early monitoring of contract activity is the best guarantee of successful contract performance, post-completion evaluation is a necessary and valuable requisite for proper contract administration. A proper evaluation will document answers to the questions: Was full value received? Did the results satisfy the needs? Are there any lessons to be learned for future contracting?

Approaches to Evaluating Contractor Performance

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

- Evaluation by an in-house expert (or the contract manager).
- Evaluation by another agency or institution (comparison).
- Evaluation by a knowledgeable committee.
- Evaluation by an internal or external auditor.

Techniques for Conducting the Evaluation

An effective technique for the conduct of an evaluation is to review primary attributes of the contract activity.

- Structure: Were all facilities and equipment adequate and provided on a timely basis? Were all contractor personnel and subcontractors performing adequately? Was the staff skill level appropriate? Were the proper personnel available when needed?
- Process: Were the proper services rendered, relative to type, quantity and standard of service? Was the timing of the provision of service acceptable?
- Outcome: What was the ultimate result of the contract? Was progress made, were skills learned, or were the original needs satisfied? Were original expectations realistic? Did the agency or institution receive the intended benefit contemplated in the contract?

A complete evaluation will consider any residual claims, guarantees, or warranties as well as the actual work performed.

8.2 Renewals and Options, Extensions, and Resolicitation

Sometimes, at the end of the original contract performance it is necessary to continue the contract. This is usually accomplished through renewal (option exercise), extension (contract amendment), or resolicitation.

Renewals and Options

Many contracts are in effect for longer than one year. However, because the State is on a fiscal year spending cycle, contracts commonly start with a one year period of performance, with options to renew the delivery of goods or services every July 1st. State procurement rules prohibit contracting periods in excess of five years without the approval of the State Purchasing Director. See State Procurement Rule 24-103-503.

Some contracts are written with multiyear terms, with automatic renewals subject only to "availability of funds." Often, those contracts require only that the State deliver evidence of available appropriations to the contractor within some period of time before the beginning of the fiscal year, and specify procedures for termination if funds are not appropriated. In this kind of contract, the only reason the State can stop the contract is for nonappropriation. This kind of contract is typically used in lease-purchase agreements, where the contractor (often a bank) wants some assurance that the obligation is considered a long term one by the State, subject only to nonavailability of funds.

The more common kind of renewal mechanism is the "option." An option gives the State the election to continue performance (or not) past the basic contract period. Because the State is generally committing more money, an option exercise requires legal review by the Attorney General and approval of the State Controller, unless an approved form of unilateral option exercise letter is being used that is consistent with the State Controller's policy and approved in the original contract. See Chapter 6, Appendix A, of the *Manual*, which shows the model provision and option exercise letter.

It is important to note that if the option is not exercised in time and in the manner set out in the contract, the State will lose the option rights, and most likely the agreed price. It is important to clearly understand all of the renewal provisions and exactly how and when to exercise the renewals.

Extensions

The term "extension" is used to refer to a performance extension, usually of a service contract, where the renewal option does not already exist in the contract. This type of extension is completed by using a bilateral contract amendment, in an approved form, and usually involves adjustment of the contract price or value. (See the model amendment form at Appendix B to Chapter 6 of the *Manual*.)

An extension is not effective unless it is executed before the expiration of the contract term. An expired contract cannot be extended. Further, an amendment that extends the contract term would have to be routed through all of the approving offices. Start negotiating and drafting the contract extension at least two months before the contract ends, allowing adequate time for the contract approval process to be completed.

A Note About Contract "Scope"

In contracts that are not governed by the Procurement Code, the "scope" of the contract amendment does not usually present a problem. In a grant contract with a political subdivision, for example, the parties can freely negotiate and execute a contract extension, subject only to availability of funds.

In commercial contracts, the scope of an amendment may present a problem. An extension of a supply or construction contract to grant more time for performance is probably acceptable, because no additional requirement is being added without competition. But in a service contract, where the extension is intended to provide the same level of service at the same or higher price, but for a longer time, State procurement laws have to be considered.

This is necessary because it is not fair to complete a service contract for three years, for example, and then keep adding more years of performance by contract amendment. In this example, the contract amendment is not within the scope of the original contract and the additional performance, if required, should be bid and a separate contract negotiated. A similar issue is discussed in Section 4.3 under the changes clause.

The test for the proper "scope" of amendments is to ask the question, “Would the potential competitors, at the time of the original contract or solicitation, have expected the contract extension under these circumstances?”. If the answer is "yes," then the amendment is probably "in-scope." If not, then the amendment may be "out-of-scope" and requires compliance with the procurement code’s competition requirements, or approval as a sole source contract. The State Purchasing Director, or a delegate, will make this determination at the time the contract amendment is routed for review.

Resolicitation

Assuming there is program authority and available funding, resolicitation can be used to satisfy the need for additional performance. However, if resolicitation is the solution, adequate time must be allowed prior to the original contract’s close-out to secure a new contractor to provide the goods or services. For information about purchasing requirements, lead time, etc. See Chapters 2 and 4 of the *Manual*.

8.3 Internal and External Feedback

Contract managers are often called upon to be advocates, defenders, interpreters, or arbitrators. Regardless of the other roles, the contract manager must be a communicator. State agency or institution and contractor personnel should receive periodic reports of contract progress. Such reports may include:

- Checklists and summary sheets to document successful completion of contract steps.
- Schedule of contacts made with the contractor.
- Notes of all work and modifications required, and/or approved.

- Minutes of all meetings.
- Summary of payments made (or due).
- Responses to all contractor and agency or institution requests.

In addition to the routine feedback, it is vital to thoroughly evaluate all complaints. Address all issues, conflicts, disputes, and personality clashes as serious and needing prompt attention. Hold meetings to resolve any unreal or unreasonable expectations. Advise all parties in writing of problems encountered and recommended solutions, as well as final resolutions.

IT IS VERY IMPORTANT TO GIVE FEEDBACK TO BOTH THE PURCHASING AND CONTRACTING OFFICES. Please notify State Purchasing or the State agency's or institution's purchasing director if certain contract language proved successful or if particular problems were encountered because certain other contract language was used. Prepare a "lessons learned" summary or memorandum for the purchasing/contracting office to provide feedback and suggestions for improving the procurement or the contracting process.

Two organizations have been formed to address contract improvement initiatives that have statewide implications. The Central Approval Task Force (CATF) is composed of representatives from the central approval agencies. CATF meets monthly and provides State agencies and institutions a quarterly newsletter, the *CURE* (Contract Users Red-tape Eliminator) that contains helpful information concerning the State contracting process. The Colorado Contract Improvement Team (CCIT) is composed of representatives from all State agencies. The mission of the CCIT is to implement a more effective contract process by acting as a communication link between users and approvers. To become a member of the CCIT or to be added to the *CURE* mailing list, please contact the State Controller's Office.

—A—

Alternate Dispute Resolution (ADR). *See* Dispute Resolution
Amendments
  Sample Settlement Amendment, 10-55
Avoiding Performance Remedies
  Avoiding Contract Interruptions, 10-67

—C—

Checklists
  Administration of State property, 10-24
  Defining Need, 10-5
  Dispute Resolution, *10-48*
  Negotiation, *10-48*
  performance remedies, 10-69
  Subcontract Management Considerations, 10-38
Clauses and Forms
  Contractor Name Changes, 10-31
  Name Changes, 10-31
  Novation Agreement, 10-31
  Release of Claims, 10-56
  Settlement Agreement, 10-55
Contract Close-Out
  Evaluating and Documenting the Results, 10-74
Contract Management, 10-1, 10-25
  Bankruptcy, 10-25
  Beginning Contract Administration, 10-3
  Best Alternative to Negotiated Settlement(BATNA), 10-41
  Close-Out, 10-74
  Contract Administration File, 10-12
  Contract Management Guide, 10-1
  Contract Modifications, 10-27
  Contract Types, 10-7
  Cost and Price Ceilings, 10-12
  Cost Reimbursement Contracts, 10-9
  Definition, 10-2
  Dispute Resolution, 10-39
  Financial Administration, 10-26
  Firm, Fixed Price Contracts, 10-9
  Funding, 10-25
  Indefinite Delivery Contracts, 10-11
  Introduction, 10-1
  Partnering, 10-14
  Performance Remedies, 10-58
  Pre-Contract, 10-3
  Responsibilities, 10-2
  Risk Assessment, 10-14
  Service Contracts, 10-8
  Statement of Work, 10-3
  Supply Contracts, 10-7
  Time and Material/Labor Hour Contracts, 10-10
  Understanding the Contract, 10-5
Contract Modifications, 10-27
Contracts

—D—

Dispute Resolution
  ADR. *See* Dispute Resolution
  ADR Considerations, 10-52
  Alternative Dispute Resolution. *See* Dispute Resolution
  Arbitration, 10-46
  Checklist of Considerations, 10-48
  Contract Adjustments, 10-47
  Contract Interpretation Principles, 10-53
  Generally, 10-39
  Mediation, 10-45
  Mini-Trials, 10-45
  Negotiation, 10-41
  Negotiation Memoranda, 10-47
  Other Techniques, 10-44
  Releases, 10-47
  Responsibilities, 10-40
  Sample Settlement Amendment, 10-55
  Settlement Amendments, 10-46

—I—

Interpretation of Contracts
  Principles, 10-53

—L—

Liquidated Damages, 10-62

—M—

Modifications and Remedial Clauses
  Task Orders, 10-30
  Bilateral Change Orders, 10-29
  Options, 10-30
  Other Types Generally, 10-29
  State Furnished Property, 10-29

—N—

Name Changes by Contractor, 10-31
Negotiation, 10-41

—O—

Options and Renewals, 10-30
  \Generally, 10-75
  Option Explained, 10-75
  Renewals Distinguished, 10-75
  Scope Issues, 10-76
  Use of Contract Amendments, 10-75

—P—

Partnering, 10-14
Performance Remedies

Beneficial Occupancy, 10-63
checklist for managers, 10-69
Contracts for Goods, 10-58
Cover by Seller, 10-59
Damages, 10-65
Excess Costs Liability, 10-65
Excusable Delay, 10-65
Force Majeure, 10-63
Inspection Right, 10-59
Liquidated Damages, 10-62
Rejection, 10-59
Revocation of Acceptance, 10-59
Right to Rescind, 10-58
Substantial Breach, 10-65
Substantial Breach in Service Contracts, 10-60
Substantial Completion, 10-63
Termination for Convenience, 10-66
Termination for Default, 10-64
Waiver of Delivery Dates, 10-63
Warranties, 10-61
Withholding Payments, 10-60
PerformanceRremedies
Contracts for Services, 10-59
Planning and Lead Time
Defining Need, 10-5
Pricing
Pricing Changes and Modifications, 10-30
Procurement
Contractor Selection, 10-5
Property. *See* State Property

—R—

Renewals. *See* Options and Renewals
Resolicitation, 10-76

—S—

Scope Issues
Modifications and Remedial Clauses, 10-76
State Property
State Acquired Property, 10-24
State Furnished Property, 10-24
Statement of Work, 10-3
Subcontracts
”Flow-Down" of State Clauses, 10-36
Administration, Generally, 10-35
Assignments, 10-37
Checklist of Management Considerations, *10-38*
Directing, 10-36
Directing Selection of Subcontractors, 10-36
State Approval, 10-35
State Relationship with, 10-36

—T—

Task Orders, 10-30
Termination for Cause/Default, 10-64
Termination for Convenience, 10-66

—U—

Uniform Commercial Code, 10-58
Inspection Right, 10-60
Remedies for Breach, 10-59

—W—

Waiver of Contract Requirements, 10-63
Warranties, 10-61
Disclaimers, 10-62
Express, 10-61
Implied Warranty of Fitness for Particular Purpose, 10-61
Implied Warranty of Merchantability, 10-61
Service Contracts, 10-62

ANNEX A: STATE BUILDINGS AND REAL ESTATE PROGRAMS

STATE BUILDINGS PROGRAMS

STATE BUILDINGS AND REAL ESTATE PROGRAMS (SBREP) STANDARD DESIGN AND CONSTRUCTION AGREEMENTS, REAL ESTATE LEASE AGREEMENTS AND CONTRACT MODIFICATION DOCUMENTS

TABLE OF CONTENTS

Overview of State Buildings and Real Estate Programs

Architect / Engineer Agreement (Form SC 5.1)

Consultant Agreement (Form 6-AC-02A)

Construction Agreement (Form 395-61-6211)
With Attachments:
- Labor and Material Payment Bond (Form SC-6.221)
- Performance Bond (Form SC-6.22)

Contract Modification Documents:
- Contract Modifications Guidelines (Form SBP/CONTRACTMOD 01-196)
- Contract Amendment (Form SBP-02)

- Change Order Bulletin (Form SC-6.311)
- Change Order Proposal (Form SC-6.312)
- Change Order (Form SC-6.31)

- Supplement (Form SC-7.0)

Checklist of Basic Steps Required in the Administration of Capital Construction and Controlled Maintenance Projects

Lease Agreement (Short Form AC-395-53-01-0016-S)

Lease Agreement (Long Form AC-395-53-01-0016-L)

Interagency Lease Agreement (Form 395-53-01-0032)

Contract Modification Documents for Lease Agreements:
- Amendment to Lease (Form 395-53-01-0040)
- Lease Extension Agreement (Form AC-01-87, 395-53-01-0024)

ANNEX A: STATE BUILDINGS AND REAL ESTATE PROGRAMS

STATE BUILDINGS AND REAL ESTATE PROGRAMS

- **OVERVIEW**

State Buildings and Real Estate Programs is a section within the Department of Personnel/General Support Services' Division of Purchasing. State Buildings functions in a central oversight role with statutory responsibility for the State's capital construction process (including controlled maintenance) and the real estate transaction process.

This oversight role is not applicable to certain functions within the Department of Transportation (highways, bridges and rights-of-way) nor to certain functions within the Department of Natural Resources.

ANNEX A: STATE BUILDINGS AND REAL ESTATE PROGRAMS

STATE BUILDINGS AND REAL ESTATE PROGRAMS

♦ STATE BUILDINGS PROGRAMS

State Buildings Programs, which is a unit of State Buildings and Real Estate Programs, has the following statutory responsibilities:

1. Supervise and be responsible for the expenditure of funds appropriated by the General Assembly for capital construction projects and controlled maintenance projects at the institutions and agencies of the State.

2. Review and make recommendations on capital construction requests.

3. Be responsible for the preparation of the State's controlled maintenance budget request and submit recommendations to the Office of State Planning and Budgeting (OSPB) and the Capital Development Committee.

4. Establish minimum building codes and standards of inspection.

5. Develop and maintain approved lists of qualified architects, engineers, landscape architects, land surveyors, consultants and contractors.

6. Promulgate rules and regulations for the administration of the bid procedure for construction projects and the qualification based selection process for professional services.

7. Promulgate standardized contract language for agreements between State agencies and architects, engineers, consultants and contractors. Review and approve modifications to standardized contract language.

Regulations Affecting Capital Construction

The procurement of services and the administration of capital construction projects must be done according to a variety of laws and regulations. The primary *State* legal standards are:

Colorado Constitution

Colorado Revised Statutes, as amended, ↙ 24-30-1301 et.. seq. and ↙24-30-1401 et. seq.

Colorado Procurement Code (↙24-101-101 et seq., C.R.S. as amended)

Colorado Procurement Rules (1 CCR 101-9, as amended), (issued by the Division of State Purchasing)

Procurement Code of Ethics and Guidelines

Department of Personnel / General Support Services Rules

Governor's Executive Orders

Budget Instructions (issued by the Office of State Planning and Budgeting)

Fiscal Rules (issued by the State Controller's Office)

Capital Construction Accounting Guidelines (issued by the State Controller's Office)

ANNEX A: STATE BUILDINGS AND REAL ESTATE PROGRAMS

Division of Purchasing bulletins and policy statements

State Buildings and Real Estate Programs policies and procedures

In addition, general principles of law and specific related laws also apply (e.g., general contract law, agency and partnership law; uniform commercial code; for construction projects --- Construction Bidding for Public Projects, §24-92-101 et. seq., C.R.S.) In addition, the source of funds (e.g. federal agency) may have additional legal requirements as a condition of expending the funds.

Delegation of Authority

Specific authority to sign and execute contract documents and to administer State construction projects for State Buildings Programs is made pursuant to the authority granted the department in Senate Bill 5, of the 1988-89 legislative session. This bill in part amended C.R.S. ↙24-30-1303 by the addition of a section (5) which reads in part:

> *"The department may delegate to State agencies any or all of the responsibilities and functions outlined in Part 13 of this article and the department's responsibilities and functions under Part 14 of this article, pursuant to rules and regulations promulgated by the department, when the State agency has the professional or technical capability on staff to perform such functions competently."*

Checklist of Basic Steps Required in the Administration of Capital Construction and Controlled Maintenance Projects

(Please refer to the checklist document following this section of the manual.)

STANDARD CONTRACT FORMS

1. Architect / Engineer Agreement (Form SC-5.1)

2. Consultant Agreement (Form 6-AC-02A)

3. Construction Agreement (Form 395-61-6211)

4. Contract Amendment (Form SBP-02)

5. Change Order Bulletin (Form SC-6.311)
   Change Order Proposal (Form SC-6.312)
   Change Order (Form SC-6.31)

6. Supplement (Form SC-7.1)

(Please refer to the contract forms following this section of the manual.)

STATE BUILDINGS AND REAL ESTATE PROGRAMS

- **REAL ESTATE PROGRAMS**

ANNEX A: STATE BUILDINGS AND REAL ESTATE PROGRAMS

Real Estate Programs, which is a unit of State Buildings and Real Estate Programs, has the following specific statutory responsibilities:

1. Negotiate and execute leases on behalf of the State government for land, buildings, office or other space, and state-owned property.
2. Negotiate and approve easements and rights-of-way.
3. Handle purchase and sale of state-owned real estate as required.

Regulations Affecting Real Estate Matters:

The handling of real estate matters must be done according to a variety of laws and regulations. The primary *State* legal standards are:

Colorado Constitution
Colorado Revised Statutes, as amended, ↙ 24-30-1303 et. seq.
Department of Law policies
Fiscal Rules (issued by the State Controller)
Executive Orders (issued by the Governor)

General principles of law, and specific related laws, also apply (i.e., contract law, real estate law, agency and partnership law). In addition, the source of funds (i.e., federal agency) may have additional legal requirements as a condition of expending the funds, with which agencies will need to comply.

Scope of Authority

The State of Colorado leases approximately two million square feet of space throughout the State in approximately eight hundred leases. It is Real Estate Programs' responsibility to oversee all the leases entered into by any of the agencies within the executive branch of State government. Real Estate Programs must assure that the leases in which the State engages not only will serve the needs of the agencies occupying the space, but that they also fulfill all of the specific requirements set out in the State Constitution and statutes regarding what the State must do and what the State is forbidden to do in its leases, and that such leases represent fair value to the State in the prevailing market conditions.

Logistics of the State's Leasing Program

There are two main methods that an agency employs in meeting its necessary leasing requirements.

1. The agency works through one of two pre-selected real estate brokers authorized to provide tenant services for the State. In those geographical areas where one of the real estate brokers is under contract to provide such services, executive branch State agencies **must** use a State real estate broker for any leasing activities (new lease, extension, expansions). The only exceptions to this requirement are those leases which State Buildings Programs elects to exempt, in advance, in a geographical area where the State has a real estate broker under contract. Such exemptions are rarely granted and usually only in those instances where the lease is either intergovernmental or interagency.

   At the time of this writing, the two State brokers are CPC Corporate Planners & Coordinators, in Denver, PH: (303) 831-1818, and Cheyenne Springs Realty in Fountain, PH: (719) 392-4311. CPC serves the five county metro area, i.e. Denver, Adams, Douglas, Arapahoe, and Jefferson. Cheyenne Springs Realty serves El Paso county. Each of the contracts with these real estate brokers presently runs through June 30, 1999, and each of them contains two successive one year options to renew.

The preferred time for the first communication with the real estate broker regarding a lease requirement is twelve to fifteen months before the space is needed. For new leasing requirements, agencies rarely have that much notice of the requirement, so they must contact the appropriate real estate broker as soon as they are aware of the requirement. For existing leases, the real estate brokers will have lists available showing when current leases expire, and they will contact the agency approximately fifteen months in advance.

Once the real estate brokerage firm is engaged on the leasing project, the real estate broker's personnel will meet with designated agency staff; determined their needs; calculate the square footage allowed under the State's leasing standards, explore leasing options in the area; assist in the selection of the site, and ultimately draw up the actual lease to be executed. The lease is then submitted first to the landlord for signature, then to the agency, and then on through the state-required approval process.

No fees are due from the agency to the State's real estate broker for its leasing services. The State's real estate broker earns its compensation through a splitting of the commissions payable by the landlord to the landlord's real estate broker.

2. The agency works through its own personnel and accomplishes its own leases, with assistance as required from Real Estate Programs.

In those areas other than the five-county Denver Metro area and El Paso County, the State does not have any pre-selected real estate broker. Therefore, agency personnel on the site, together with their personnel at the agency headquarters in Denver, and with assistance from Real Estate Programs (as required) must accomplish suitable leases to meet the agency's requirements. Generally, the procedure is simpler in the smaller communities of the State, mainly because there are usually a very limited number of locations available that will serve the State's needs. Usually, the form leases provided by the State are familiar to the landlords because they have leased to the State on previous occasions, and those forms are often employed with no significant variations. In those instances, the leasing process often comes down to agreeing on a square foot rate, plus the number of years, and filling in the blanks on the form. Other times significant additional factors such as a total renovation of the space, are involved.

BASIC STEPS IN THE EXECUTION AND APPROVAL OF A LEASE

1. Formalities of Lease Execution and Approval

The fewer the variations from the State's lease form, the more expeditiously the lease will move through the approval process. This is because all of the wording in the standard forms has been pre-approved. However, it is also recognized that certain wording may be required by certain landlords. In those cases, Real Estate Programs works with the real estate broker, and/or the relevant agency personnel, and the landlord, to arrive at agreeable lease language.

Once the lease and its specifications and provisions are agreed upon, the lease is drafted either by the real estate broker or, if there is no real estate broker, by the agency personnel. Four copies are submitted, first to the landlord for signature, then to an authorized representative of the tenant agency.

2. Signature Authority

The State's form leases contain a provision by which the person signing for the landlord asserts that she or he in fact, has the authority to bind the landlord to the lease. However, in some instances, where the chain of authority for such signature is quite lengthy, (e.g., where the lessor is a partnership, and the managing partner is a corporation, and the signature on the lease is not

a corporate officer, but rather a member of a law firm that claims to hold the corporation's power of attorney), the State may require documentation of the asserted signatory authority, such as copies of corporate minutes or of the relevant power of attorney.

Following the signatures of the landlord and the tenant agency, all four originals of the executed lease, along with the appropriate COFRS documentation showing the encumbrance of the required funds and a CLIN routing slip are sent to the central routing desk at the Controller's office where they are routed to Real Estate Programs. There the lease is reviewed for sufficiency, accuracy and general compliance with the State's requirements. If there are any problems with the lease, it is sent back to the submitting agency for correction.

When a lease is approved by Real Estate Programs, it is sent to the Assistant Attorney General who advises the State Controller. This is done because no lease is valid, nor will any rents be paid on any lease, until it is approved by the State Controller. The Controller requires that his legal counsel first review and approve any document submitted to the Controller for approval.

If the Assistant Attorney General reviews the lease and finds it needs certain modifications, she or he returns it to the relevant agency to be modified. Following approval by the Assistant Attorney General, the lease is sent to the Controller for approval. The controller is the final approval necessary before any rent moneys can be disbursed.

After approving the lease, the Controller retains one fully executed copy, returns one copy to Real Estate Programs, and returns the other copies to the agency. It is the agency's responsibility to retain an executed original in its files; supply an original to the lessor; and provide any additional executed copies that were known to be needed (and therefore added to the first four originals sent through the approval process), to those agencies and/or individuals who require the additional copies.

3. Forms

1. The seven page (short) lease form. (Short Form AC-395-53-01-0016-S)
2. The thirteen page (long) lease form. (Long Form AC-395-01-0016-L)
3. Interagency lease. (Form 395-53-01-0032)
4. Amendment to lease. (Form 395-53-01-0040)
5. Lease extension agreement. (Form AC-01-87,30,15-53-01-0024)

(Please refer to the lease forms following this section of the manual.)

It should be noted that language that addresses specific laws or states requirements (e.g., Americans with Disabilities Act) <u>must</u> be included in leases. If the landlord refuses to accept this language then, barring unusual circumstances, the State <u>cannot</u> lease the premises.

4. Other Real Estate Programs Activities

While the State's leasing program is the largest single responsibility of Real Estate Programs, other areas of real estate activities are handled as required. These include purchase of real estate for the State, sale of state-owned real estate that is no longer productive, and negotiation and execution of rights-of-way and easements, either on non-state land for the use of the State, or on State land for the use of private parties. All activities of Real Estate Programs <u>exclude</u> three areas of real estate activity that are specifically assigned to other agencies: rights-of-way acquisition and maintenance by the Department of Transportation, the long term holding of State land by the State Land Board; and those leases of land that are owned by the Division of Wildlife

or the Parks and Recreation Division of the Department of Natural Resources. Additionally, Colorado statutes require that dispositions of real estate, by any agency, must be reported to State Buildings and Real Estate Programs, and State Buildings and Real Estate Programs then uses this information to fulfill its statutory responsibility of maintaining a current inventory of all state-owned real estate.

5. Lease Review

a) The State's standard lease form should be used whenever possible. It must be signed by lessor and lessee before submission to Real Estate Programs. Lessor should sign at least four originals of the lease.
b) All leases must have a CLIN routing slip attached and be routed to the contract intake section of the State Controller's Office (SCO) before proceeding through the approval process.
c) Any departure from the State's standard lease form tends to slow the approval process and greatly increases the chance that the lease will not be approved.
d) If there is to be a memo requiring changes in the lease before approval, it can come from State Buildings or, if the A/G disapproves the lease after Real Estate Programs has approved it, from the Attorney-General.
e) If changes must be made to the standard lease form, avoid having to re-do the lease by submitting any changes to Real Estate Programs <u>before</u> finalizing negotiations with the lessor. Real Estate programs can provide a preliminary opinion on the likelihood of approval of the changes.
f) If a lease has no apparent problems, it is approved by Real Estate Programs, logged out and routed to the Attorney General's office.
g) Attorney General approval is required before the Attorney General's client, the State Controller, will authorize the payment of rent on the lease.

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

STANDARD
ARCHITECT / ENGINEER AGREEMENT
(FORM SC 5.1)

CONTRACT ROUTING NO. _____

AGENCY IDENTIFICATION NO. _____

PROJECT NO. _____

PROJECT NAME _____

INSTRUCTIONS:

1) This standard contract form is to be used for all Architectural/Engineering services involving design and specification of projects where the product of the service will result in construction, demolition, or asbestos abatement.

2) This standard contract form for professional services is to be used only when the anticipated construction delivery method is to be a lump-sum bid award.

3) Modification of this standard contract form shall be limited to project description, scope of work, payment provision, etc., and does not include modification of standard "boilerplate" language in the contract. (Refer to State Buildings and Real Estate Programs for additional instructions.)

STATE BUILDINGS AND REAL ESTATE PROGRAMS
o ARCHITECT/ENGINEER AGREEMENT (FORM SC 5.1)

TABLE OF CONTENTS PAGE(S)

Recitals 1
Articles:
1. Professional Services 1
2. Compensation 1
3. Basic Services of Architect/Engineer 2-6
    1. The Services 2
    2. Development of the Project 2
        A. Schematic Design Phase 2-3
        B. Design Development Phase 3
        C. Construction Documents Phase 4
        D. General Administration of Construction Phase 5-6
4. Additional Compensation 6-7
5. The Principal Representative's Responsibilities 7-8
6. Project Construction Cost 8
7. Reimbursable Expense 8
8. Payments for Services 8-9
9. Architects/Engineers Accounting Records 9
10. Termination of Agreement 9
11. Ownership of Documents 9
12. Successors and Assigns 9
13. Changes in Drawings 9-10
14. Professional Association Permitted 10
15. Dissolution of Professional Association 10
16. Death or Disability 10
17. Assignment of Agreement Not Permitted 10
18. Equal Opportunity-Affirmative Action 11-12
19. Insurance 12
20. Professional Liability or Errors and Omissions 12
21. Benefits accruing to Other State Employees or Officers 13
22. Governing Law 13
23. Modification of Article 3. Herein Before 13
24. Continuing Financial Obligations 13
25. Wage Rates 13-14
26. Contingent Fee Prohibition 14
27. Public Art Law 14
28. Extent of Agreement 14
    1. Integrated Agreement 14
    2. Incorporation of Other Documents 14
29. Indemnification 14-15
30. Statutory Design Requirements 15
31. Special Provisions 15
    1. Statutory Limitation 15
    2. Independent Contractor 15
32. Work Prior to Execution of the Contract 16
33. Validity of Agreement 16

Signature Approvals 17
Exhibits:
"A" Architect/Engineer Proposal (Not Included)
"B" Wage Rates Schedule (Not Included)
"C" Contractor Certification 18

Contract Routing No.: _____ Agency I.D. Number: _____

STATE OF COLORADO
ARCHITECT/ENGINEER AGREEMENT

PROJECT NUMBER:_____

THIS AGREEMENT made this ____ day of _____, in the year _____, between the STATE OF COLORADO, acting by and through the _____, hereinafter called the Principal Representative, and _____, hereinafter called the Architect/Engineer.

WHEREAS, authority exists in the Law and Funds have been budgeted, appropriated, and otherwise made available, and a sufficient unencumbered balance thereof remains available for payment In Fund Number _____, Account Number _____, Contract Encumbrance Number _____; and

WHEREAS, the Principal Representative intends to _____ _____,hereinafter called the Project; and

WHEREAS, a STATE FUNDED project, the Principal Representative is authorized to expend a total of _____ ($_____) for Construction, Professional Fees, Reimbursable and Contingent Costs. Total Construction Costs are not to exceed $_____.

WHEREAS, the ARCHITECT/ENGINEER was selected and determined to be the most qualified, and fees negotiated in accordance with the provisions of C.R.S., ↙24-30-1401 et seq.

NOW, THEREFORE,

The Principal Representative and the Architect/Engineer, for the considerations hereinafter set forth, agree as follows:

ARTICLE 1. THE ARCHITECT/ENGINEER PROMISES TO PROVIDE PROFESSIONAL SERVICES FOR THE PROJECT AS HEREINAFTER SET FORTH.

ARTICLE 2. THE PRINCIPAL REPRESENTATIVE PROMISES TO PAY THE ARCHITECT/ENGINEER AS COMPENSATION FOR HIS SERVICES TOTAL FEES NOT TO EXCEED:

A.	Schematic Design Phase	$ _____
B.	Design Development Phase	$ _____
C.	Construction Documents Phase (Including Bidding Phase)	$ _____
D.	Construction Phase - General Administration of Construction Contracts	$ _____
	TOTAL FEES	$ _____

ARTICLE 3. BASIC SERVICES OF ARCHITECT/ENGINEER

FOR SERVICES IN CONNECTION WITH THE DESIGN OF A FUNDED OR PARTIALLY FUNDED PROJECT, the Architect/Engineer promises to perform the professional services for the contemplated project as delineated in the proposal letter dated _____, submitted by the Architect/Engineer, which is attached hereto and made a part hereof by reference as Exhibit "A". In addition, the Architect/Engineer promises to perform the professional services as set forth in 1., 2.A., 2.B., and 2.C., below:

1. GENERAL

These services shall be performed by the Architect/Engineer or by consultants licensed or registered by the State of Colorado. If these special consulting services are to be performed by professionals in the Architect/Engineer's employ, then the services must currently be and have been, for at least two (2) years previously, regularly a service of the Architect/Engineer's organization.

In the event the Architect/Engineer does not have as part of his regular staff and services, certain professional consultants and consulting services, such as but not limited to, structural, mechanical, electrical, acoustical and architectural; then such consulting services shall be performed by practicing professional consultants.

All professional consultants, staff or practicing, must be retained for the life of the project; provided, however, that acceptable replacements must have prior approval, in writing, by the Principal Representative.

Prior to designating a professional to perform any of these services, the Architect/Engineer shall submit the name, together with a resume of training and experience in work of like character and magnitude of the project being contemplated, to the Principal Representative, and receive approval in writing therefrom.

No consultant shall be engaged or perform work on the project wherein a conflict of interest exists, such as being connected with the sale or promotion of equipment or material which may be used on the project, provided however, that in unusual circumstances and with full disclosure to the Principal Representative of such interest, the Principal Representative may permit a waiver, in writing, in respect to the particular consultant.

2. DEVELOPMENT OF THE PROJECT

A. SCHEMATIC DESIGN PHASE

The Architect/Engineer, or his duly authorized representative, shall attend such conferences as may be requisite to a complete understanding of the Project. The Architect/Engineer shall document all such conference notes and distribute same to the Principal Representative.

Schematic Design Studies shall be prepared in sufficient detail and number to come to an agreement on the Site Location and the Basic Design of the Project.

Where standards have been adopted by the Governor, the Architect/ Engineer shall use such standards as are applicable.

When agreement has been reached on the Schematic Design, the Architect/Engineer shall prepare a written report, accompanied by Drawings, setting forth the following:

(a) Correlation of Spaces with approved State standards;
(b) Recommended site location;
(c) Scope of site development;
(d) Analysis of the structure as it relates to the Uniform Building Code;
(e) Sketch floor plans, elevations and sections;
(f) Sketches and descriptions of building plumbing, mechanical and electrical systems;
(g) Area computations. Gross square footage, net square footage, volume;
(h) Outline of proposed construction materials;
(i) Preliminary timetable for Design Development;
(j) Architect/Engineer's estimate of construction cost.

The above Schematic Design data shall be approved in writing by both the Principal Representative and State Buildings Programs.

B. DESIGN DEVELOPMENT PHASE

The Architect/Engineer shall prepare a written report and Drawings outlining in detail Design Development Documents from the approved Schematic Design Study. The report, when submitted for approval, shall include:

(a) Outline concepts of the proposed Structural, Mechanical, and Electrical Systems;
(b) Respective floor plans;
(c) Elevations;
(d) Proposed finish schedule;
(e) Outline specifications;
(f) A timetable for the completion of the Contract Construction Documents;
(g) An estimate of the construction costs;
(h) Estimate of the time required for the construction of the Project.

The Architect/Engineer shall make certain to the best of his knowledge, information and belief, that the drawings and specifications prepared by him are in full compliance with all applicable codes (including building codes), regulations, laws and ordinances, including both technical and administrative provisions thereof, of the political subdivision wherein the project is located. Such drawings and specifications shall conform to the Uniform Building Code and related series, International Conference of Building Officials, the current edition as minimum standards. If the Architect/Engineer shall deviate from such codes, regulations, law or ordinance, then he shall at his own expense make such corrections in the construction documents as may be necessary for compliance.

The Architect/Engineer shall prepare the reasonably necessary renderings or perspectives to portray fully the project in whole or in part. Models, if required, will be made by the Architect/Engineer at the Principal Representative's expense.

The final Design Development Documents shall be approved in writing by both the Principal Representative and State Buildings Programs.

C. CONSTRUCTION DOCUMENTS PHASE

The Architect/Engineer shall prepare the final Construction Documents from the approved Design Development Documents. These Construction Documents, when submitted for approval, shall include:

(a) Complete Architectural, Structural, Mechanical and Electrical design drawings. These drawings shall be on mylar or any equally durable and reproducible material. If the Project is a structure, the title sheet of the Project shall reflect an accurate take-off of:
(1) Gross square footage,
(2) Gross building volume.

This takeoff shall be made in accordance with AIA-Document-D101, current Edition. In addition, the net assignable square footage shall be shown when requested. These original drawings shall each bear the seal and signature of the Architect/Engineer and the appropriate responsible professional Engineering Consultants.

(b) Complete Bidding Documents, Architectural, Structural, Mechanical and Electrical specifications. The format for these technical specifications shall be the current edition of "The CSI Format For Construction Specifications" published by The Construction Specifications Institute.

(c) The Architect/Engineer's final estimate of construction cost.

The Architect/Engineer shall cooperate with State Buildings Programs and/or other consultants employed by the State of Colorado to check the drawings and specifications. If and when required, the Architect/ Engineer shall make available for review design data forming the basis for drawings and specifications to such consultants.

The final Construction Documents shall be approved by both the Principal Representative and State Buildings Programs.

The Architect/Engineer shall furnish copies of the construction documents as follows, subject to limitations hereinafter set forth:

(d) For bidding: Sufficient sets to insure distribution among prime contractors and subcontractors in accordance with the advertisement for bids.

(e) For contract documents: The Principal Representative will require up to seven (7) sets for the contract documents. These construction documents may be the same as those used for bidding purposes.

(f) For construction: Each prime contractor shall be furnished with a reasonable number of sets or partial sets of the construction documents to insure prompt prosecution of the work.

(g) Twenty-five (25) complete sets of drawings and specifications shall be the maximum required to be furnished by the Architect/Engineer. The Principal Representative will pay for all other sets of documents or partial sets of documents required at the cost of reproduction.

D. CONSTRUCTION PHASE - GENERAL ADMINISTRATION OF CONSTRUCTION CONTRACTS

The Architect/Engineer under the terms of his agreement with the State of Colorado has agreed that he, his structural, mechanical and electrical engineers will make, and the Contractor has the right to expect, periodic visits to the site to generally monitor the progress and quality of the work to determine in general if the work is proceeding in accordance with the Contract Documents. Observation may extend to all or any part of the work and to the preparation, fabrication or manufacture of materials.

Specifically, the Architect/Engineer has agreed to monitor for contract compliance the following:

(a) Shop drawings;
(b) Bearing surfaces of excavations before concrete is poured;
(c) Reinforcing steel after installation and before concrete is poured;
(d) Structural concrete;
(e) Laboratory reports on all concrete;
(f) Structural steel during and after erection and prior to its being covered or enclosed;
(g) Mechanical work following its installation and prior to its being covered or enclosed;
(h) Electrical work following its installation and prior to its being covered or enclosed.

The Architect/Engineer agrees to notify State Buildings Programs of specific visits he intends to carry out during the various phases of construction.

The Architect/Engineer shall exercise due diligence to safeguard the State of Colorado against defects, deficiencies, noncompliance with drawings and specifications, and/or unsatisfactory workmanship. If, in the opinion of the Architect/Engineer, the work is not being carried out in a sound, efficient and skillful manner, the Architect/Engineer may temporarily suspend the work in accordance with Article 22B of the General Conditions and shall notify the Principal Representative setting forth the reasons.

The Architect/Engineer shall keep accurate accounts with respect to the work on the project and shall see to the proper issuance of State Form SC 7.2, used as a Certificate and Contractor's Application for Payment.

If at any time the Architect/Engineer delegates any of his responsibility for the monitoring of the work to some other person, such other person must be properly qualified by training and experience to monitor the work. The Principal Representative and State Buildings Programs shall review and approve the qualifications of all persons, other than the Architect/Engineer, performing the functions of the Architect/Engineer in respect to the services required by this agreement.

When the work is complete and ready for acceptance, the Contractor, under Article 50(A) of the General Conditions, is required to file a written Notice with the Architect/Engineer, who in turn shall notify State Buildings Programs and the Principal Representative, that the work, in the opinion of the Contractor, is complete under the terms of the Contract. This Notice shall receive prompt action by the notified parties.

Within ten (10) days after the Contractor files written notice that the work is complete, the Architect/Engineer, the Principal Representative and the Contractor shall make a "final inspection" of the project to determine whether the work has been completed in accordance with the Contract

Documents (State Buildings Programs to be notified of inspection). A final punch list shall be made by the Architect/Engineer in sufficient detail to fully outline to the Contractor:

(a) Work to be completed, if any;
(b) Work not in compliance with the drawings or specifications, if any;
(c) Unsatisfactory work for any reason, if any.

The required number of copies of the punch list will be countersigned by the authorized representative of the Principal Representative and will then be transmitted by the Architect/Engineer to the Contractor, the Principal Representative, and State Buildings Programs.

The Architect/Engineer shall notify the Principal Representative that to the best of his knowledge and belief, the project has been completed in accordance with the contract documents; all items on the final punch list satisfied; and recommend the acceptance of the Project.

The Architect/Engineer, the Principal Representative and the Contractor shall make at least two complete inspections of the work after the work has been accepted. One such inspection, the "Six-Month Guaranty Inspection", shall be made approximately six (6) months after the acceptance of the work; and another such inspection, the "Eleven-Month Guaranty Inspection", shall be made approximately eleven (11) months after the acceptance of the work. The Principal Representative shall schedule and so notify all parties concerned, including the State Buildings Programs, of these inspections.

Written punch lists and reports of these inspections shall be made by the Architect/Engineer and forwarded to the Contractor, the State Buildings Programs, and all of the other participants within ten (10) days after the completion of the inspections. The Contractor shall immediately initiate such remedial work as may be necessary to correct any deficiencies or defective work shown by this report, and shall promptly complete all such remedial work in a manner satisfactory to the Architect/Engineer and the State Buildings Programs.

The Architect/Engineer shall follow through on all punch list items and notify State Buildings Programs and the Principal Representative when such have been completed.

ARTICLE 4. ADDITIONAL COMPENSATION

If the Architect/Engineer is caused additional service, drafting or other expense due to changes ordered by the Principal Representative after the Design Development Phase has been approved or by other circumstances beyond the Architect/Engineer's control and not occasioned by any neglect or default of the Architect/Engineer, then the Architect/Engineer shall be reimbursed his cost for such additional service. Additional services by the Architect/Engineer, authorized by the Principal Representative, will be billed at the hourly rates proposed in the Wage Rates Schedule, Exhibit “B”. Other necessary outside services, such as structural, mechanical, or electrical engineering performed by independent consultants, will be billed at the actual cost to the Architect/Engineer, plus ten percent (10%) of such cost for supervision of such outside work. In addition, the Architect/Engineer shall also be reimbursed his actual cost of reproduction of additional drawings and specifications.

The Architect/Engineer shall maintain an accurate cost accounting system as to all such additional expenses and shall make available to the Principal Representative all records, canceled checks and other disbursement media to substantiate any and all requests for payments hereunder.

The Architect/Engineer shall file with the Principal Representative, and, prior to incurring such expenses, secure his approval of rates per hour, per day, or other basis of cost for his architectural, structural, mechanical and electrical engineering services.

The expenditures under this provision shall be disapproved unless the Architect/Engineer first shall have filed with the Principal Representative an estimate of the maximum cost of such additional service and been authorized, in writing, by the Principal Representative to proceed. If such an estimate is filed with the Principal Representative, then payment shall not exceed the maximum cost estimated by the Architect/Engineer and approved by the Principal Representative.

If it shall prove impossible to secure one or more bona fide bids from reliable contractors based on drawings and specifications prepared by the Architect/ Engineer at a price not exceeding the authorized construction cost of the work, then the Architect/Engineer shall, if desired by the Principal Representative, change the drawings and specifications at his own expense in such manner, acceptable to the Principal Representative, as may be found necessary to secure bids from reliable contractors at not more than the authorized construction cost, provided, however, that where the difference between the authorized construction cost and the cost of the work as revealed by the bids is due to an increase in building costs, as substantiated by indices and data secured from reliable sources, or to other circumstances beyond the control of the Architect/Engineer, between the date of authorization by the Principal Representative to proceed with preparation of construction documents and the date when the bids are opened, the Principal Representative shall reimburse the Architect/Engineer as described above.

If any work designed or specified by the Architect/Engineer in the scope and course of his employment hereunder is abandoned or suspended by the Principal Representative for cause not attributable to the Architect/Engineer's services, the Architect/Engineer shall be equitably compensated for the service rendered on account of the work so abandoned or suspended.

ARTICLE 5. THE PRINCIPAL REPRESENTATIVE'S RESPONSIBILITIES

The Principal Representative shall:

(a) Provide full information as to his requirements for the Project.

(b) Designate, when necessary, a representative authorized to act in his behalf. He shall examine documents submitted by the Architect/Engineer and render decisions pertaining thereto promptly, to avoid unreasonable delay in the progress of the Architect/Engineer's work. He shall observe the procedure of issuing orders to contractors only through the Architect/Engineer.

(c) Furnish or direct the Architect/Engineer, in writing, to obtain at the Principal Representative's expense, a certified survey of the site, giving, as required, grades and lines of streets, alleys, pavements, and adjoining property; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries, and contours of the building site; locations, dimension and complete data pertaining to existing buildings, other improvements and trees; full information as to available service and utility lines both public and private; and test borings and pits necessary for determining subsoil conditions.

(d) Pay for structural, chemical, mechanical, soil mechanics or other tests and reports if required.

(e) Arrange and pay for such legal, audit and insurance counseling services as may be required for the Project.

If the Principal Representative observes or otherwise becomes aware of any defect in the Project, he shall give prompt written notice thereof to the Architect/Engineer.

ARTICLE 6. PROJECT CONSTRUCTION COST

The project construction cost means the cost of the work to the Principal Representative, but such cost shall not include any Architect/Engineer's or special consultant's fees or reimbursement or the cost of a Construction Inspector, or equipment installed by the Principal Representative under separate contract unless the Architect/Engineer is required by the Principal Representative to prepare drawings and specifications, and monitor the installation of such equipment.

When labor or material is furnished by the Principal Representative below its market cost, the cost of the work shall be computed upon the market cost as to such labor or materials furnished by the Principal Representative.

ARTICLE 7. REIMBURSABLE EXPENSE

The Architect/Engineer shall be reimbursed:

(a) In accordance with the provisions of ARTICLE 3.2.C. of this agreement, for all copies over twenty-five (25) of the construction documents which are provided for the project.

(b) The costs of all items furnished by the Architect/Engineer in accordance with ARTICLE 5.(c) and (d).

(c) Fees of special consultants if their employment is authorized in advance by the Principal Representative for other than the normal structural, mechanical and electrical engineering services.

The Architect/Engineer shall make as a part of his services all required trips to the project site.

ARTICLE 8. PAYMENT FOR SERVICES

Payments to the Architect/Engineer on account of his fee shall be made as follows:

(a) Upon completion of existing drawing review and field investigations of Schematic Design Phase a sum equal to _____percent (%) of the basic fee.

(b) Upon completion of the Design Development Phase a sum sufficient to increase payments to _____ percent (%) of the basic fee.

(c) During the Construction Documents Phase monthly payments based upon Architect/Engineer's costs and aggregating at the completion thereof a sum sufficient to increase payments to _____ percent (%) of the basic fee.

(d) The balance of the Architects/Engineer's fee, based upon the final cost of the work. Final payment shall not be made until after the project is accepted, all guaranties, certificate of completion, and all as-built drawings and reproducible copies are delivered to the Principal Representative, and the contract is otherwise fully performed by the Architect/Engineer except for the inspections required during the guaranty year.

Payments to the Architect/Engineer, other than those of his fee, fall due from time to time as his work is done or as costs are incurred.

No deductions shall be made from the Architect/Engineer's fee on account of penalty, liquidated damages, or other sums withheld from payments to contractor.

ARTICLE 9. ARCHITECT/ENGINEER'S ACCOUNTING RECORDS

Records of the Architect/Engineer's Direct Personnel, Consultant, and Reimbursable Expense pertaining to this Project and records of accounts between the Principal Representative and Contractor shall be kept on a generally recognized accounting basis and shall be available to the Principal Representative or his authorized representative at mutually convenient times and extending to three (3) years after final payment under this agreement.

ARTICLE 10. TERMINATION OF AGREEMENT

This Agreement may be terminated by either party upon seven (7) days' written notice with copies filed with the State Buildings Programs and the State Controller, should the other party fail substantially to perform in accordance with its terms through no fault of the other. In the event of termination, due to the fault of others than the Architect/Engineer, the Architect/Engineer shall be paid for services performed to termination date, including reimbursements then due.

ARTICLE 11. OWNERSHIP OF DOCUMENTS

Drawings and specifications as instruments of service are the property of the State of Colorado whether the work for which they are made be executed or not, and are not to be used on other work except by agreement with the Architect/ Engineer.

The Architect/Engineer shall, upon completion of the work, furnish the Principal Representative, the original tracings corrected to be record drawings of the Project, plus one set of mylar Reproducibles to State Buildings Programs.

ARTICLE 12. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and inure to the benefit of the partners, heirs, executors, administrators, successors and assigns of the Architect/Engineer.

ARTICLE 13. CHANGES IN DRAWINGS

The Architect/Engineer shall maintain careful supervision over all changes in the final drawings in the course of the work. All change orders shall be on forms supplied by the Principal Representative, and the Architect/Engineer shall keep a current record of all variations or departures from the drawings and specifications as originally approved.

Every change order must be approved by the Principal Representative and the Architect/Engineer, except that the approval of the Principal Representative shall not be required in a case involving a matter of emergency, safety or health. The Architect/Engineer shall carefully monitor all changes during the course of the work.

All requests for change orders must be made in writing and approved by State Buildings Programs and the State Controller.

The architect/engineer and its consultants shall, upon completion of the construction, receive "redline" as built drawings from the contractor. These redline changes shall describe the built condition of the project. This information and all of the incorporated changes directing bidding addenda, change order or architect/engineer's supplementary instructions shall be incorporated by the architect and its consultant into a record drawing document in the form of an electro-media Autocad Release format or as directed by the Principal Representative.

ARTICLE 14. PROFESSIONAL ASSOCIATION PERMITTED

The Architect/Engineer may, with the prior written consent of the Principal Representative, join with him in the performance of this Agreement any other duly licensed Architect or Architects or registered Engineers with whom he may, in good faith, and enter into an association.

ARTICLE 15. DISSOLUTION OF PROFESSIONAL ASSOCIATION

In the event there is dissolution of the association, other than by death of a member, the State of Colorado, acting by and through the Principal Representative, shall designate which former member shall continue with the work and may make all payments thereafter falling due in connection with the work directly to the person or persons so designated and without being required to look to the application of such payments as among the former members.

ARTICLE 16. DEATH OR DISABILITY

In the event of the death of one member of an association, the surviving member or members of the association, as an association, shall succeed to the rights and obligations of the original association hereunder. In the event of the death or disability of a sole Architect/Engineer, which shall prevent his performance of this Agreement after the same shall have been commenced by him, such Architect/Engineer, in the event of his disability, or his executors or administrators, in the event of his death, shall be paid such sums as may be due the Architect/Engineer under this Agreement. In such event all drawings, specifications and models theretofore prepared by the Architect/Engineer shall be delivered to and become the property of the State of Colorado, with full authority to use, employ, or modify the same in the construction of the contemplated building, either at the same site or at some other site.

ARTICLE 17. ASSIGNMENT OF AGREEMENT NOT PERMITTED

The Architect/Engineer may not assign his performance of this Agreement, or any money due or to become due by operation of this Agreement, without prior written consent of the Principal Representative and the State Controller.

ARTICLE 18. EQUAL OPPORTUNITY - AFFIRMATIVE ACTION

The Architect/Engineer agrees to comply with the letter and spirit of the Colorado Anti-discrimination Act of 1957, as amended, and other applicable law respecting discrimination and unfair employment practices (↙24-34-402, C.R.S., as amended), and as required by Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975. Pursuant thereto, the following provisions shall be contained in all State contracts or subcontracts.

During the performance of this contract, the Architect/Engineer agrees as follows:

(a) The Architect/Engineer will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap or age. The Architect/Engineer will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to the above mentioned characteristics. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoffs or terminations; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Architect/Engineer agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth provisions of this nondiscrimination clause.

(b) The Architect/Engineer will, in all solicitations or advertisements for employees placed by or on behalf of the Architect/Engineer, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap or age.

(c) The Architect/Engineer will send to each labor union or representative of workers with which he has collective bargaining agreement or other contract or understanding, notice to be provided by the contracting officer, advising the labor union or workers' representative of the Architect/Engineer's commitment under the Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975, and of the rules, regulations, and relevant Orders of the Governor.

(d) The Architect/Engineer and labor unions will furnish all information and reports required by Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, and by the rules, regulations and Orders of the Governor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the office of the Governor or his designee for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(e) A labor organization will not exclude any individual otherwise qualified from full membership rights in such labor organizations, or expel any such individual from membership in such labor organization or discriminate against any of its members in the full enjoyment of work opportunity, because of race, creed, color, sex, national origin, or ancestry.

(f) A labor organization, of the employees or members thereof will not aid, abet, incite, compel or coerce the doing of any act defined in this contract to be discriminatory or obstruct or prevent any person from complying with the provisions of this contract or any order issued thereunder; or attempt, either directly or indirectly, to commit any act defined in this contract to be discriminatory.

(g) In the event of the Architect/Engineer's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the Architect/Engineer may be declared

ineligible for further State contracts in accordance with procedures, authorized in Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, and the rules, regulations or orders promulgated in accordance therewith, and such other sanctions as may be imposed and remedies as may be invoked as provided in Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, or by rules, regulations, or order promulgated in accordance therewith, or as otherwise provided by law.

(h) The Architect/Engineer will include the provisions of paragraphs (a) through (h) in every subcontract and subcontractor purchase order unless exempted by rules, regulations, or orders issued pursuant to Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, so that such provisions will be binding upon each subcontractor or vendor. The Architect/Engineer will take action with respect to any subcontracting or purchase order as the contracting agency may direct, as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event the Architect/Engineer becomes involved in, or is threatened with, litigation with the subcontractor or vendor as a result of such direction by the contracting agency, the Architect/Engineer may request the State of Colorado to enter into such litigation to protect the interest of the State of Colorado.

ARTICLE 19. INSURANCE

It is agreed and understood Architect/Engineer shall maintain in full force and effect adequate comprehensive general liability insurance and property damage insurance, as well as workmen's compensation and employer's liability insurance. Architect/Engineer shall be responsible for all claims, damages, losses or expenses, including attorney's fees, arising out of or resulting from the performance of the Services contemplated in this Agreement, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom, and is caused in whole or in part by any negligent act or omission of Architect/Engineer, any consultant or associate thereof, anyone directly or indirectly employed by Architect/Engineer, or anyone for whose acts any of them may be liable. Architect/Engineer shall submit a Certificate of Insurance at the signing of this Agreement and also any notices of Renewal of said Policy as they occur.

ARTICLE 20. PROFESSIONAL LIABILITY OR ERRORS AND OMISSIONS

The Architect/Engineer promises and agrees to maintain in full force and effect an Errors and Omissions or Professional Liability Insurance Policy in the amount of $100,000 minimum coverage or such other minimum coverage as determined by the Principal Representative and approved by the State Buildings Programs. The policy shall remain in effect for the duration of this Agreement and for at least two years beyond the completion and acceptance of the facility. The Architect/Engineer shall be responsible for all claims, damages, losses or expenses, including attorney's fees, arising out of or resulting from the performance of Professional Services contemplated in this Agreement, provided that any such claim, damage, loss or expense is attributable to bodily injury or death, or to injury to or destruction of tangible property, or to failures of the structure or facility, including the loss of use resulting therefrom, and is caused, in whole or in part, by any negligent act, error or omission of the Architect/Engineer, any consultant or associate thereof, anyone directly or indirectly employed by Architect/ Engineer. The Architect/Engineer shall submit a Certificate of Insurance verifying said coverage at the signing of this Agreement and also any notices of Renewals of the said policy as they occur.

ARTICLE 21. BENEFITS ACCRUING TO OTHER STATE EMPLOYEES OR OFFICERS

A. It is understood and agreed that no benefits, payments or considerations received by Architect/Engineer for the performance of services associated and pertinent to this Agreement shall accrue, directly or indirectly, to any employee, or employees, elected or appointed officers or representatives, or by any other person or persons identified as agents of, or who are by definition, public servants of the State of Colorado.

B. The signatories hereto aver that they are familiar with ↙18-8-301, et seq., (Bribery and Corrupt Influences) and ↙18-8-401, et seq., (Abuse of Public Office), C.R.S. as amended, and that no violation of such provisions is present.

C. The signatories aver that to their knowledge, no State employee has any personal or beneficial interest whatsoever in the service or property described herein.

ARTICLE 22. GOVERNING LAW

The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution and enforcement of this contract. Any provision of this contract whether or not incorporated herein by reference which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall 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 will not invalidate the remainder of this contract to the extent that the contract is capable of execution.

ARTICLE 23. MODIFICATION OF ARTICLE 3. HEREINBEFORE

The services to be performed by Architect/Engineer, as specified and described in ARTICLE 3. "BASIC SERVICES OF ARCHITECT/ENGINEER" hereinabove, are those services ordinarily contemplated in the design and construction of an entirely new and complete building, whereas the Project hereof is as set forth in the recitals to this AGREEMENT, and the Architect/Engineer of said services of ARTICLE 3. shall perform only those services which are essential to this particular Project, and which are customarily performed in the professional practice of Architecture and Consulting Engineering, in the community, for projects of similar character, scope and magnitude.

ARTICLE 24. CONTINUING FINANCIAL OBLIGATIONS

Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for the purpose being appropriated, budgeted and otherwise made available.

ARTICLE 25. WAGE RATES

In accordance with Title ↙24-30-1404 (1), C.R.S., the Architect/Engineer has executed a schedule, which is attached hereto and made a part hereof by reference as Exhibit "B", stating that wage rates and other factual unit costs supporting the compensation paid by the State for these professional services are accurate, complete and current.

The original contract price and any additions thereto shall be adjusted to exclude any significant sums by which the Principal Representative determines the contract price had been increased due to inaccurate, incomplete, or non-current wage rates and other factual unit costs. All such contract adjustments shall be made within one year following the end of this contract.

ARTICLE 26. CONTINGENT FEE PROHIBITION

In accordance with Title ↙24-30-1404 (4), C.R.S., the Architect/Engineer warrants that he has not employed or retained any company or person other than a bona fide employee working solely for him, to solicit or secure this contract, and that he has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for him, any fee, commission, percentage, gift, or other consideration contingent upon, or resulting from, the award or the making of this contract.

For breach or violation of this warranty, the Principal Representative shall have the right to terminate this contract without liability and, at its discretion, to deduct from the contract price, or otherwise recover the full amount of such fee, commission, percentage, or consideration.

ARTICLE 27. PUBLIC ART LAW

In recognition of the Public Art Law, Title ↙24-80.5-101, C.R.S., if the State determines that this project is eligible for the acquisition of artworks in accordance with this law, the architect agrees to participate in the art selection process as an art jury member and to cooperate with and to advise the State in working with the commissioned artist(s) for this capital construction project.

ARTICLE 28. EXTENT OF AGREEMENT

1. INTEGRATED AGREEMENT

This agreement represents the entire and integrated agreement between the Principal Representative and the architect/engineer and supersedes all prior negotiations, representations or agreements, either written or oral. This agreement may be amended only by written instrument signed by both the Principal Representative, the architect/engineer, the director of State Buildings Programs, the Attorney General or delegee and the State Controller or delegee.

2. INCORPORATION OF OTHER DOCUMENTS

Principal Representative and Architect/Engineer understand and agree the attachments and exhibits hereto are and shall be integral parts of this Agreement and the terms and provisions thereof are hereby incorporated, made a part of and shall supplement those recited herein. In the event of any conflict, or variance, the terms and provisions of this printed Agreement shall supersede, govern and control.

ARTICLE 29. INDEMNIFICATION

To the extent authorized by law, the Architect/Engineer shall indemnify, save and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs,

expenses and attorney's fees, to the extent such claims are caused by any professional act or omission of, or breach of contract by, the Architect/Engineer, its employees, agents, subcontractors or assignees pursuant to the terms of this contract, but not to the extent such claims are caused by any act or omission of, or breach of contract by, the State, its employees, agents, other contractors or assignees, or other parties not under the control of or responsible to the Architect/Engineer.

ARTICLE 30. STATUTORY DESIGN REQUIREMENTS

Principal Representative and Architect/Engineer understand and agree they are familiar with the provisions of Colorado Revised Statutes, as amended, ↙24-82-601 to 602, ↙24-30-1304 to 1305 and ↙9-5-101 to 112, and to the extent applicable, shall comply with those provisions in the design of this Project. Further, when applicable, this Project shall comply with Headnotes 4 and 5 and Footnote 3 of Section 3, Senate Bill 218 of the 1987 Legislative Session as follows:

Headnote (4) - Operating and maintenance costs shall be a major consideration in the design and construction of any project involving renovation.

Headnote (5) - Except as otherwise specifically noted, figures in parentheses beneath the appropriation figures in this section designate the gross square footage, within 5%, to which the structures may be built.

Footnote (3) - Due to problems experienced with roofs with minimal grade, all roofing systems on new construction should have a minimum slope of one-quarter inch per foot. In addition, structural systems of buildings built on bentonite should not be slab on grade.

ARTICLE 31. SPECIAL PROVISIONS

1. STATUTORY LIMITATION

In accordance with the conditions imposed in the appropriation authorizing the construction project herein contemplated, the total fee recited in ARTICLE 2. hereinbefore includes all fees for survey and site investigation (if requested by the Principal Representative) and architectural and engineering services, and nothing herein contained shall be construed or understood to commit State to total expense greater than that which is provided in the appropriation. Further, no funds appropriated for any other purpose shall be expended for such services.

2. INDEPENDENT CONTRACTOR

The Architect/Engineer shall perform its duties herein as an independent contractor and not as an employee. Neither the Architect/Engineer nor any agent or employee of the Architect/Engineer shall be or shall be deemed to be an agent of employee of the State. Architect/Engineer shall pay when due all required employment taxes and income tax withholding, shall provide and keep in force worker's compensation (and show proof of such insurance) and unemployment compensation insurance in the amounts required by law, and shall be solely responsible for the acts of Architect/Engineer, its employees and agents.

ARTICLE 32. WORK PRIOR TO EXECUTION OF THE CONTRACT

Work or services performed, or expenses incurred prior to the execution of this contract (State Controller approval), without the prior written consent of the Principal Representative, SHALL NOT be reimbursable under the terms and conditions of this contract. This is in accordance with the provisions of C.R.S. ↙24-30-202(3), as amended.

ARTICLE 33. VALIDITY OF AGREEMENT

This contract shall not be deemed valid until it shall have been approved by the Controller of the State of Colorado, or such assistant as he may designate.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in original and two counterparts the day and year first above written.

STATE OF COLORADO,
Acting by and Through
The Department of _____

(Corporate Seal)

By_____
Principal Representative

THE ARCHITECT/ENGINEER

_____

_____

_____
Address

ATTEST:

_____
Employer Identification Number

_____

By _____

APPROVED:
DEPARTMENT OF PERSONNEL / GSS
STATE BUILDINGS AND
REAL ESTATE PROGRAMS

By: _____

APPROVED:
STATE OF COLORADO
STATE CONTROLLER'S OFFICE
Clifford Hall, State Controller

By: _____

APPROVED:
STATE OF COLORADO
DEPARTMENT OF LAW
Gale A. Norton, Attorney General

By: _____

ARCHITECT/ENGINEER CERTIFICATION

I hereby certify:

a. That I am the _____ and duly authorized representative of the firm of

_____; and

b. That the wage rates and other factual unit costs supporting the compensation to be paid by the State for these professional services are accurate, complete, and current; and

c. That I understand the original contract price and any additions shall be adjusted to exclude any significant sums by which the State determines the contract price had been increased due to inaccurate, incomplete, or non-current wage rates and other factual unit costs; and

d. That all such contract adjustments shall be made within one year following the end of this contract.

_____
Signature

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

STANDARD
CONSULTANT AGREEMENT
(FORM 6-AC-02A)

CONTRACT ROUTING NO. _____

AGENCY IDENTIFICATION NO. _____

PROJECT NO. _____

PROJECT NAME _____

_____

INSTRUCTIONS:

1) This standard contract form is to be used for all professional services involving studies or other professional services where the product or the services does not result in construction, demolition or asbestos abatement.

2) Modification of this standard contract form shall be limited to project description, scope of work, payment provision, etc., and does not include modification of standard “boiler-plate” language in the contract. (Refer to State Buildings and Real Estate Programs for additional instructions.)

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS
o CONSULTANT AGREEMENT (FORM 6-AC-02A)

TABLE OF CONTENTS PAGE(S)

Recitals	1
Articles:	
1. Scope of Work	1
2. Compensation	1
3. Consultant Certification	1
4. Contract Expiration	2
5. Contingent Fee Prohibition	2
6. Termination of Agreement	2
7. Consultant's Accounting Records	2
8. Assignment of Agreement Not Permitted	2
9. Independent Contractor	2
10. Integration of Understanding	2
11. Benefits Accruing to Other State Employees or Officers	3
12. Incorporation of Other Documents	3
13. Work Prior to Execution of Contract	3
14. Insurance	3
15. Special Provisions	4-5
Controller's Approval	4
Fund Availability	4
Bond Requirement	4
Indemnification	4
Discrimination and Affirmative Action	4-5
Colorado Labor Preference	5
General	5
Signature Approvals	6
Exhibits:	
"A" Consultant's Proposal (Not Included)	
"B" Consultant's Wage Rates Schedule (Not Included)	
"C" Consultant Certification	7

Contract Routing No.: _____ Agency I.D. Number: _____

STATE OF COLORADO
CONSULTANT AGREEMENT

PROJECT NUMBER: _____

THIS AGREEMENT made this _____ day of _____, in the year _____ by and between the State of Colorado, acting by and through the _____, hereinafter referred to as the Principal Representative, and _____, hereinafter referred to as the Consultant.

WHEREAS, authority exists in the Law and Funds have been budgeted, appropriated, and otherwise made available, and a sufficient unencumbered balance thereof remains available for payment in Fund Number _____, Account Number _____, Contract Encumbrance Number _____; and

WHEREAS, required approval, clearance and coordination has been accomplished from and with appropriate agencies; and

WHEREAS, the Principal Representative intends to _____: hereinafter called the Project; and

WHEREAS, the Consultant was selected and determined to be the most qualified, and fees negotiated in accordance with the provisions of C.R.S. ↙24-30-1401 et seq; and

NOW THEREFORE, it is hereby agreed that

ARTICLE 1. SCOPE OF WORK

The Consultant, in consideration of State's promises hereinafter made, promises to perform and accomplish all the work and services proposed, and in accordance with the terms and conditions set forth in the scope of work description and proposal dated _____, which documents are attached hereto and made a part hereof by reference as Exhibit "A". Contractor shall undertake and perform the necessary work and services as is customarily done in the professional practice of architecture/engineering/consulting in the community for undertakings of similar character, scope and magnitude.

ARTICLE 2. COMPENSATION

In consideration for the performance of the said work and services, Principal Representative agrees to pay to Consultant fees and charges not to exceed _____ ($_____). The total fees and expenses shall be payable upon completion of the work and services and acceptance by the Principal Representative. Payment shall be made against Application for Payment (State of Colorado Form SC-7.1), submitted in quintuplicate.

ARTICLE 3. CONSULTANT CERTIFICATION

In accordance with Title ↙24-30-1404 (1), C.R.S., the Consultant has executed a certificate, which is attached hereto and made a part hereof by reference as Exhibit "C", stating that wage rates (Exhibit "B") and other factual unit costs supporting the compensation paid by the State for these professional services are accurate, complete, and current. The original contract price and any additions thereto shall be adjusted to exclude any significant sums by which the State determines the contract price has been increased due to inaccurate, incomplete, or non-current wage rates and other factual unit costs. All such contract adjustments shall be made within one year following the end of this contract.

ARTICLE 4. CONTRACT EXPIRATION

Unless sooner terminated, this Contract shall remain in effect until the work and services are completed and accepted by the Principal Representative.

ARTICLE 5. CONTINGENT FEE PROHIBITION

In accordance with Title ↙24-30-1404 (4), C.R.S., the Consultant warrants that he has not employed or retained any company or person other than a bona fide employee working solely for him, to solicit or secure this Contract, and that he has not paid or agreed to pay any person, company, corporation, individual or firm, other than a bona fide employee working solely for him, any fee, commission, percentage, gift, or other consideration contingent upon, or resulting from the award or the making of this Contract. For breach or violation of this warranty, the State shall have the right to terminate this Contract without liability and, at its discretion, to deduct from the contract price, or otherwise recover the full amount of such fee, commission, percentage, or consideration.

ARTICLE 6. TERMINATION OF AGREEMENT

Any breach of the terms and conditions of the contract by Consultant shall, unless waived by the Principal Representative in writing, constitute a default by the Consultant hereunder and the Principal Representative shall thereafter have no obligation to the Consultant, and may select any of the remedies available to the Principal Representative under law. In the event of default by the Consultant, the contract may be terminated upon seven (7) days written notice to the Consultant by the Principal Representative with copies filed with the State Controller.

ARTICLE 7. CONSULTANT'S ACCOUNTING RECORDS

Records of the Consultant's Direct Personnel, Consultant, and Reimbursable Expense pertaining to this Contract and records of accounts between the Principal Representative and Consultant shall be kept on a generally recognized accounting basis and shall be available to the Principal Representative at mutually convenient times and extending to three (3) years after final payment under this Contract.

ARTICLE 8. ASSIGNMENT OF AGREEMENT NOT PERMITTED

The Consultant may not assign its performance of this Contract or any part thereof without the prior written consent of the Principal Representative, but the contract shall be binding upon and inure to the benefit of the successors and assigns of the contract.

ARTICLE 9. INDEPENDENT CONTRACTOR

The parties of this Contract intend that the relationship between them contemplated by this Contract is that of employer-independent contractor. No agent, employee, or servant of Consultant shall be or shall be deemed to be an employee, agent, or servant of the State. Consultant shall be solely and entirely responsible for its acts and the acts of its agents, employees, servants, and subconsultants during the performance of this Contract.

ARTICLE 10. INTEGRATION OF UNDERSTANDING

This Contract is intended as the complete integration of all understandings between the parties. No period or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a written contract executed and approved by the Principal Representative, State Buildings Programs, and the State Controller.

ARTICLE 11. BENEFITS ACCRUING TO OTHER STATE EMPLOYEES OR OFFICERS

It is understood and agreed that no benefits, payments or considerations received by Consultant for the performance of services associated and pertinent to this Contract shall accrue, directly or indirectly, to any employee, or employees, elected or appointed officers or representatives, or by any other person or persons identified as agents of, or who are by definition, public servants of the State of Colorado.

ARTICLE 12. INCORPORATION OF OTHER DOCUMENTS

The Principal Representative and Consultant understand and agree the attachments and exhibits hereto are and shall be integral parts of this Contract and the terms and provisions thereof are hereby incorporated, made a part of and shall supplement those recited herein. In the event of any conflict, or variance, the terms and provisions of this printed Contract shall supersede, govern and control.

ARTICLE 13. WORK PRIOR TO EXECUTION OF CONTRACT

Work or services performed, or expenses incurred prior to the execution of this Contract (State Controller Approval) without the prior written consent of the Principal Representative shall not be reimbursable and are not eligible expenditures under the terms and conditions of this Contract. This is in accordance with the provisions of ↙24-30-202(3), C.R.S., as amended.

ARTICLE 14. INSURANCE

It is covenanted and agreed by the Consultant that during the course of the services to be undertaken, the Consultant shall maintain in full force and effect Workmen's Compensation and Employer's Liability Insurance as required by applicable law and in addition, Comprehensive General Liability, and Property Damage Insurance from and against all claims, damages, losses or expenses, including attorney's fees, arising out of or resulting from the performance of the said services, with minimum coverages to be determined by the Principal Representative, and provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom, and is caused in whole or in part by any negligent act or omission of Consultant, subconsultant or associate thereof, anyone directly or indirectly employed by Consultant, or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in whole or in part by a party indemnified hereunder.

Consultant shall submit a Certificate of Insurance listing the Principal Representative as additional insured and submitting the endorsement of such to the Principal Representative evidencing such insurance policies and notices of renewals of said policies as they occur shall be forwarded to the address first given above at the signing of this Contract.

ARTICLE 15. SPECIAL PROVISIONS

(Insert Page 1 of the Special Provisions form 6-AC-02B here)

(Insert Page 2 of the Special Provisions form 6-AC-02C here)

CONSULTANT AGREEMENT
EXHIBIT C

CONSULTANT CERTIFICATION

I hereby certify:

a. That I am the _____ and duly authorized representative of the firm of _____; and

b. That the wage rates and other factual unit costs supporting the compensation to be paid by the State for these professional services are accurate, complete, and current; and

c. That I understand the original contract price and any additions shall be adjusted to exclude any significant sums by which the State determines the contract price had been increased due to inaccurate, incomplete, or non-current wage rates and other factual unit costs; and

d. That all such contract adjustments shall be made within one year following the end of this contract.

_____
Signature

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

STANDARD CONSTRUCTION AGREEMENT (FORM 395-61-01-6211)

CONTRACT ROUTING NO. _____

AGENCY IDENTIFICATION NO. _____

PROJECT NO. _____

PROJECT NAME _____

_____

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS
o CONSTRUCTION AGREEMENT
(FORM 395-61-01-6211)

INSTRUCTIONS:

1) This standard contract form is to be used for all construction services when the project delivery method is to be a lump-sum bid award. (Note: Refer to the fiscal rules for construction projects exempt from using this standard contract form when the anticipated construction costs are less than $50,000.)

2) Modification of this standard contract form shall be limited to project description, scope of work, project duration and contract sum, etc., and does not include modification of standard "boiler-plate" language in the contract. (Refer to State Buildings and Real Estate Programs for additional instructions.)

TABLE OF CONTENTS PAGE(S)

Factual Recital	1
Witnesseth, Agreements:	
1. Scope of Work	1
2. Workmanship of Contractor	1
3. Project Completion Time	1
4. Due Diligence of Contractor	1
5. Failure to Complete the Work	1
6. Contract Sum	
7. Incorporation of General Conditions, Article 1	1
8. Validity of Agreement	2
Signature Blocks	2
Attachments	
A. Labor and Material Payment Bond (Form SC-6.221)	1-2
B. Performance Bond (Form SC-6.22)	1-2
C. Certificate of Insurance (Not Included) (Refer to Chapter 6: Writing the Contract, Insurance Requirements, Certificates of Insurance: Overview and Instructions and Example, Page 6-21).	
D. Minority / Women Business Enterprise (MBE/WBE) Compliance Report (Form SBP-04) (Not Included)	
E. General Conditions of the Contract (Not Included)	

(insert Construction Agreement State Form SC 6.21 here)

(insert Labor and Materials Bond State Form SC 6.221 here)

(insert Performance Bond State Form SC 6.22 here)

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

STANDARD
CONTRACT MODIFICATION DOCUMENTS
FOR
DESIGN AND CONSTRUCTION AGREEMENTS

INSTRUCTIONS:

1) The contract modification guidelines (Form SBP/CONTRACTMOD 01-196) are intended to instruct agency personnel involved in the administration of capital construction and controlled maintenance projects on the appropriate use and application of the contract modification documents contained herein.

2) Modification of these standard documents shall be limited to scope of work, changes affecting contract sum and duration, etc., and does not include modification of standard "boilerplate" language in the documents. (Refer to State Buildings and Real Estate Programs for additional instructions.)

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS
CONTRACT MODIFICATION DOCUMENTS
FOR
DESIGN AND CONSTRUCTION AGREEMENTS

TABLE OF CONTENTS PAGE(S)

o	**Contract Modification Guidelines** (Form SBP/CONTRACTMOD 01-196)	1-2
o	**Contract Amendment** (Form SBP-02) (Refer to Chapter 10, Section 14, Modifications to Contracts for additional instructions)	1-2
o	**Change Order Bulletin** (Form SC-6.311)	1
o	**Change Order Proposal** (Form SC-6.312) with Instructions	1-2
o	**Change Order** (Form SC-6.31)	1
o	**Supplement** (Form SC-7.0)	1-2

STATE BUILDINGS PROGRAMS/OFFICE OF THE STATE CONTROLLER **01/96**
POLICIES AND PROCEDURES

CONTRACT MODIFICATION GUIDELINES:
FORMAL AMENDMENTS vs. CHANGE ORDERS AND SUPPLEMENTS

AS PER C.R.S. ·24-30-1303 (1)(s), (IV), & (V)

- These guidelines are intended to instruct all State agency personnel involved in the process of contract modifications pertaining to capital construction and controlled maintenance appropriations.
- Formal amendments, change orders and supplements cannot be used to commit the State to change work which exceeds the funds appropriated and authorized for the project.
- Contract modifications to construction and professional services contracts are to be documented on approved SBP forms.

(The following generally apply to construction contracts and professional services contracts except as noted)

Formal Amendments are required when:

1. Changing a funding source to other than that referenced in the contract.
2. Change work is not at the same project location as referenced in the prime contract.
3. Modifying contracts to reflect negotiated claims settlements.
4. Contract modifications substituting contracting parties or otherwise changing the parties to the original agreement (e.g., novation, assignment, other)
5. Change work amends contract provision other than specifications or drawings.
6. Incorporating anticipated bid packages into the “construction manager/general contractor” (CM/GC) Base Agreement to raise the contract value after establishment of the guaranteed maximum price.
7. Modifying or establishing the guaranteed maximum price (GMP) or the fixed limit of construction cost in a CM/GC Agreement.

Note: The following State approval signatures are required on all amendments: Principal Representative, State Buildings/delegee, Attorney General/delegee and State Controller/delegee. Exception: After the approved amendment establishing the GMP on a CM/GC construction agreement, all subsequent amendments incorporating anticipated bid packages could be waived for attorney general legal review and signature upon request.

(A “Change Order” changes only specifications, drawings, or price/cost for a lump-sum bid construction contract. A “Supplement” is the equivalent format for professional services contracts)

Change Orders or Supplements are permitted as noted when:

1. Implementation of bid alternatives or bid unit prices regardless of value of change work. (Only a change order to the construction contract should be required.)

2. Drawing and specification change work accumulated value at less than or equal to the contingency identified in the construction contract for change orders or 10% of the professional services contract for supplements so long as within the general scope of the contract. (If proposed supplement change work exceeds the 10% accumulated value of the professional services contract, the agency can either request SBP review and approval or issue a formal amendment.)

3. Change work represents essential work necessary to achieve the originally intended results but was not identified in the original bid documents due to A/E omission. (Only a change order to the construction contract should be required.)

4. In the case of differing site conditions adjusting contract price/cost and making required changes to scope of work, specifications or drawings, where entitlement is not in dispute and the adjustment is within the contingency identified in the construction contract for a change order or, less than or equal to 10% of the professional services contract for a supplement.

Note: The following State approval signatures are required on all change orders or supplements: Principal Representative; State Buildings/delegee and State Controller/delegee.

Copies of State Buildings Approved forms for: Formal Amendment, Change Orders and Supplements are attached.

For additional clarifications and/or emergency occurrences, contact State Buildings Programs.

END OF POLICY/SBP/CONTRACTMOD 01
Rev. 1/96

(insert Contract Amendment form SBP-02 here)

(insert Change Order Bulletin form SC-6.311 here)

(insert Change Order Proposal form SC-6.312 here)

(insert Instructions for Change Order Proposal here)

(insert Change Order form SC-6.31 here)

(insert Supplement form SC 7.0 here)

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

CHECKLIST OF THE BASIC STEPS REQUIRED IN THE ADMINISTRATION OF CAPITAL CONSTRUCTION AND CONTROLLED MAINTENANCE PROJECTS (FORM SPB-P1.A)

INSTRUCTIONS:

1) This checklist is provided as a guideline to describe the basic steps involved in the development and management of a “typical” capital construction or controlled maintenance project.

2) Included in each anticipated “basic step” is a description of the appropriate State document to be used and a reference to the governing statute or rule, etc., if applicable. (Contact State Buildings and Real Estate Programs for additional instructions.)

STATE BUILDINGS AND REAL ESTATE PROGRAMS
POLICIES AND PROCEDURES

- **CHECKLIST OF THE BASIC STEPS REQUIRED IN THE ADMINISTRATION OF CAPITAL CONSTRUCTION AND CONTROLLED MAINTENANCE PROJECTS**

TABLE OF CONTENTS — PAGE(S)

A. Setting Up a Project	1
B. **Starting the Project**	1-5
C. **Managing the Project** (Architect/Engineer Agreement)	5
C1. Managing the Project (Contractor's Agreement)	6
D. **A/E Supplements/Change Orders/Amendments**	6-8
A/E Supplements	6
Change Orders	7
Amendments	8
E. Fiscal Year End	8
F. **Closing the Project**	8-10
References	10

(insert checklist here)

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

STANDARD
LEASE AGREEMENT (SHORT FORM)
(FORM AC-395-53-01-0016-S)

CONTRACT ROUTING NO. _____

LESSOR _____

LESSEE _____

LOCATION _____

_____

INSTRUCTIONS:

1) This short form lease is appropriately utilized in the vast majority of the situations where a State agency is the Lessee.

2) If at any time a user of this form determines that a certain paragraph should not be included, (such as Paragraph #27, Broker Representation, when no Broker is involved in the transaction), simply strike through the entire paragraph following such paragraph's number and title. That way a later reviewer of the lease can immediately determine if and where the lease differs from the standard form, and subsequent paragraphs need not be renumbered to preserve sequential numbering.

3) Any terms and conditions unique to a particular lease may be succinctly stated under Paragraph #28, Additional Provisions.

4) In those instances where an agency and a Lessor are working on a lease agreement that involves significantly more than merely filling in the blanks on this form, FAX to State Buildings and Real Estate Programs at (303) 894-7440 a copy of the proposed lease for pre-review prior to execution.

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS
o LEASE AGREEMENT (SHORT FORM, AC-395-53-01-0016-S)

TABLE OF CONTENTS PAGE(S)

Factual Recitals	1
Paragraphs:	
1. Premises, Term, Rent	1
2. Services by Lessor	2
3. Work Requirements	2
4. Lessor's Representations	2
5. Maintenance of Premises	2
6. Lessor's Ownership	2
7. Lease Assignment	3
8. Applicable Law	3
9. Eminent Domain, Termination of Lease	3
10. Damage and Destruction	3
11. Fiscal Funding	3-4
12. Complete Agreement	4
13. Captions, Construction, and Lease Effect	4
14. Federal Funding	4
15. No Beneficial Interest	4
16. No Violation of Law	4
17. Controller's Approval	5
18. Notice	5
19. Holding Over	5
20. Consent	5
21. Lessee Liability Exposure	5
22. Security Deposit	5
23. Interruption of Services	5-6
24. Collection	6
25. Lessee's Tax Exempt Status	6
26. Lessee's Insurance	6
27. Broker Representation	6
28. Additional Provisions	6
Signature Approvals	7

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

STANDARD
LEASE AGREEMENT (SHORT FORM)
(FORM AC-395-53-01-0016-S)

CONTRACT ROUTING NO._____

LESSOR _____

LESSEE _____

LOCATION _____

INSTRUCTIONS:

1) This short form lease is appropriately utilized in the vast majority of the situations where a State agency is the Lessee.

2) If at any time a user of this form determines that a certain paragraph should not be included, (such as Paragraph #27, Broker Representation, when no Broker is involved in the transaction), simply strike through the entire paragraph following such paragraph's number and title. That way a later reviewer of the lease can immediately determine if and where the lease differs from the standard form, and subsequent paragraphs need not be renumbered to preserve sequential numbering.

3) Any terms and conditions unique to a particular lease may be succinctly stated under Paragraph #28, Additional Provisions.

4) In those instances where an agency and a Lessor are working on a lease agreement that involves significantly more than merely filling in the blanks on this form, FAX to State Buildings and Real Estate Programs at (303) 894-7440 a copy of the proposed lease for pre-review prior to execution.

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

- **LEASE AGREEMENT (SHORT FORM, AC-395-53-01-0016-S)**

TABLE OF CONTENTS PAGE(S)

Factual Recitals	1
Paragraphs:	
1. Premises, Term, Rent	1
2. Services by Lessor	2
3. Work Requirements	2
4. Lessor's Representations	2
5. Maintenance of Premises	2
6. Lessor's Ownership	2
7. Lease Assignment	3
8. Applicable Law	3
9. Eminent Domain, Termination of Lease	3
10. Damage and Destruction	3
11. Fiscal Funding	3
12 Lessor/Vendor Offsets	4
13. Complete Agreement	4
14. Captions, Construction, and Lease Effect	4
15. Federal Funding	4
16. No Beneficial Interest	5
17. No Violation of Law	5
18. Controller's Approval	5
19. Notice	5
20. Holding Over	5
21. Consent	5
22. Lessee Liability Exposure	5
23. Security Deposit	6
24. Interruption of Services	6
25. Collocation	6
26. Lessee's Tax Exempt Status	6
27. Lessee's Insurance	6
28. Broker Representation	6
29. Additional Provisions	6
Signature Approvals	7

State Lease I.D.#:____-____-____-____-____-____-____
Contract Routing Number:_____

LEASE AGREEMENT

The printed portions of this form, except bold additions, have been reviewed
by the State of Colorado Attorney General and approved by the State Controller.
All additions to this form must be in bold type. All deletions must be shown by strike-through.

THIS LEASE AGREEMENT, made and entered into this ____ day of _____ , 19 _, by and between _____ , whose address or principal place of business is _____, hereinafter referred to as "Lessor", and THE STATE OF COLORADO, acting by and through the DEPARTMENT OF hereinafter referred to as "Lessee".

WITNESSETH:

WHEREAS, as to Lessee, authority exists in the Law, and Funds have been budgeted, appropriated and otherwise made available and a sufficient unencumbered balance thereof remains available for payment in Fund Number _____, appropriation code _____ Contract Encumbrance Number PO-_____.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties hereto agree as follows:

1. PREMISES, TERM, RENT. (A) Lessor hereby leases and demises unto Lessee the Premises, hereinafter referred to as "Premises" within the building located at _____, hereinafter referred to as "Building" (including land, improvements and other rights appurtenant thereto). The Premises, known and described as _____ includes approximately _____ **(_____)** square feet of rentable floor area; the leased Premises being as shown on the plat attached hereto, made a part hereof and marked "Exhibit _".

(B) TO HAVE AND TO HOLD the same, together with all appurtenances, unto Lessee, for the term beginning _____, and ending _____, at and for a monthly rental for the full term as shown below:

TERM DATE(S)	TERM RENT	MONTHLY RENT	APPROXIMATED ANNUALIZED SQ. FOOT COST
__/__/__ - __/__/__	**$**	**$**	**$**

The Premises is to be used and occupied as _____ space. Payment shall be made on the first of each month during the term hereof, to the Lessor at:

or at such place as Lessor from time to time designates by notice as provided herein, subject to the limitations and conditions set forth in article 11, Fiscal Funding and article 15, Federal Funding, herein.

2. SERVICES BY LESSOR. Lessor shall provide to Lessee during the occupancy of said Premises, as a part of the rental consideration, the following:

3. WORK REQUIREMENTS. All tenant finish alterations in the Premises, now and hereafter undertaken, shall be designed and constructed in accordance with the technical design specifications of the Uniform Federal Accessibility Standards, latest edition. Prior to the Premises being occupied by Lessee, Lessor agrees to:

4. LESSOR'S REPRESENTATIONS. (A) Lessor represents that either: (1) no "asbestos response action", pursuant to that portion of the Colorado Air Quality Control Commission, Regulation 8 entitled Emission Standards for Asbestos, hereafter referred to as "Regulation 8", is contemplated as a part of the tenant finish for this lease; or (2) in the event that an "asbestos response action" is contemplated as a part of the tenant finish for this lease, Lessor agrees to fully cooperate with Lessee in the Lessee's exercise of its duties and responsibilities in accordance with Section V of Part B of Regulation 8.

(B) Lessor, in Lessor's sole opinion, represents that with respect to this lease and the Lessee's Premises, the Building meets the requirements of the Americans with Disabilities Act.

5. MAINTENANCE OF PREMISES. Lessor shall, unless herein specified to the contrary, maintain the Premises in good repair and in tenantable condition during the term of this lease, except in the event of damage arising from an act or the negligence of Lessee, its agents or employees. Lessor shall have the right to enter the Premises at reasonable times for the purpose of making necessary inspections and repairs or maintenance.

6. LESSOR'S OWNERSHIP. Lessor warrants and represents himself to be the owner of, or the authorized representative or agent of the owner of, the leased Premises in the form and manner as stated herein, and during the term of this lease covenants and agrees to warrant and defend Lessee in the quiet, peaceable enjoyment and possession of the leased Premises. In the event of any dispute regarding Lessor's ownership, Lessor shall immediately, upon request from and at no cost to Lessee, furnish proof thereof by delivering to Lessee an "Ownership and Encumbrance Letter" issued by a properly qualified title insurance company.

7. LEASE ASSIGNMENT. Lessee shall not assign this lease and shall not sublet the demised Premises, except to a desirable tenant for a similar use and purpose, and will not permit the use of said Premises to anyone, other than Lessee, its agents or employees, without the prior written consent of Lessor, which consent shall not be unreasonably withheld or delayed.

8. APPLICABLE LAW. The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution and enforcement of this lease. Any provision of this lease, whether or not incorporated herein by reference, which provides for arbitration by

any extra-judicial body or person or which is otherwise in conflict with said laws, rules and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall 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 will not invalidate the remainder of this lease to the extent that this agreement is capable of execution.

9. EMINENT DOMAIN, TERMINATION OF LEASE. If the leased Premises shall be taken by right of eminent domain, in whole or in part, then this lease, at the option of either party, shall forthwith cease and terminate and the current rent shall be properly apportioned to the date of such taking; and in such event the entire damages which may be awarded for such taking shall be apportioned between Lessor and Lessee, as their interests appear.

10. DAMAGE AND DESTRUCTION. In the event the leased Premises are rendered untenantable or unfit for Lessee's purposes by fire or other casualty, this lease will immediately terminate and no rent shall accrue to Lessor from the date of such fire or casualty. In the event the leased Premises are damaged by fire or other casualty so that there is partial destruction of such Premises or such damage as to render the leased Premises partially untenantable or partially unfit for Lessee's purposes, either party may, within five (5) days of such occurrence, terminate this lease by giving written notice to the other party. Such termination shall be effective not less than fifteen (15) days from the date of mailing of the notice. Rent shall be apportioned to the effective date of termination.

11. FISCAL FUNDING. (A) As prescribed by State of Colorado Fiscal Rules, it is understood and agreed this lease is dependent upon the continuing availability of funds beyond the term of the State's current fiscal period ending upon the next succeeding June 30, as financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available. Further, the parties recognize that the act of appropriation is a legislative act, and the Lessee hereby covenants to take such action as is necessary under the laws applicable to the Lessee to timely and properly budget for, request of and seek and pursue appropriation of funds of the Legislature of the State of Colorado which will permit Lessee to make all payments required under this lease during the period to which such appropriation shall apply. In the event there shall be no funds made available, this lease shall terminate at the end of the then current fiscal year, with no penalty or additional cost as a result thereof to the Lessee.

(B) To make certain the understanding of the parties because this lease will extend beyond the current fiscal year, Lessee and Lessor understand and intend that the obligation of the Lessee to pay the monthly rental hereunder constitutes a current expense of the Lessee payable exclusively from Lessee's funds and shall not in any way be construed to be a general obligation indebtedness of the State of Colorado or any agency or department thereof within the meaning of any provision of Sections 1,2,3,4, or 5 of Article XI of the Colorado Constitution, or any other constitutional or statutory limitation or requirement applicable to the State concerning the creation of indebtedness. Neither the Lessee, nor the Lessor on its behalf, has pledged the full faith and credit of the State, or any agency or department thereof to the payment of the charges hereunder, and this lease shall not directly or contingently obligate the State or any agency or department thereof to apply money from, or levy or pledge any form of taxation to, the payment of the annual rental charges.

(C) With such limitations in mind, Lessee contracts to lease the Premises herein before described and has reason to believe that sufficient funds will be available for the full term of this lease. Where, for reasons beyond Lessee's control, Lessee's funding entity does not allocate funds for any fiscal period beyond the one in which this lease is entered into, or does not allocate funds to continue this lease from the then current fiscal period, such failure to obtain funds not resulting from any act or failure to act on the part of Lessee, Lessee will not then be obligated to make the payments remaining beyond

Lessee's then current fiscal period. In such event, Lessee shall notify Lessor of such non allocation of funds by sending written notice thereof to the Lessor forty-five (45) days prior to the effective date of termination.

(D) The parties hereto further understand and agree that the only funds that have or may be so appropriated and available for payment under this lease in any one particular fiscal year are for the purpose and in an amount sufficient only to pay the rental charges provided for in article 1 above. Therefore, notwithstanding anything herein to the contrary, the payment by the Lessee of any other charges, liabilities, costs, guarantees, waivers, and any awards thereon of any kind pursuant to this lease against Lessee are contingent upon funds for such purpose(s) being appropriated, budgeted and otherwise made available through the said State of Colorado legislature process.

12. LESSOR/VENDOR OFFSETS NOTICE. Pursuant to §24-30-202.4 C.R.S., (as amended), the state controller may withhold debts owed to state agencies under the vendor offset intercept system for: (a) unpaid child support debt or child support arrearages; (b) unpaid balance of tax, accrued interest, or other charges specified in Article 22, Title 39, C.R.S., (c) unpaid loans due to the student loan division of the department of higher education; (d) owed amounts required to be paid to the unemployment compensation fund; and (e) other unpaid debts owing to the state or any agency thereof, the amount of which is found to be owing as a result of final agency determination or reduced to judgment as certified by the controller.

13. COMPLETE AGREEMENT**.** This lease, including all exhibits, supersedes any and all prior written or oral agreements and there are no covenants, conditions or agreements between the parties except as set forth herein. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever unless embodied herein in writing. No subsequent novation, renewal, addition, deletion or other amendment hereto shall have any force or effect unless embodied in a written contract executed and approved pursuant to the State Fiscal Rules.

14. CAPTIONS, CONSTRUCTION, AND LEASE EFFECT. The captions and headings used in this lease are for identification only, and shall be disregarded in any construction of the lease provisions. All of the terms of this lease shall inure to the benefit of and be binding upon the respective heirs, successors, and assigns of both the Lessor and the Lessee. If any provision of this lease shall be determined to be invalid, illegal, or without force by a court of law or rendered so by legislative act then the remaining provisions of this lease shall remain in full force and effect.

15. FEDERAL FUNDING. In the event that any or all funds for payment of this lease are provided by the Federal Government, this lease is subject to and contingent upon the continuing availability of Federal funds for the purposes hereof, and if such funds are not made available this lease may be unilaterally terminated by the Lessee at the end of any month provided a ninety (90) day advance notice of termination is given to the Lessor in writing.

16. NO BENEFICIAL INTEREST**.** The signatories aver that to their knowledge, no state employee has any personal or beneficial interest whatsoever in the service or property described herein.

17. NO VIOLATION OF LAW. The signatories hereto aver that they are familiar with §18-8-301, et seq., (Bribery and Corrupt Influences) and §18-8-401, et seq., (Abuse of Public Office), C.R.S., as amended, and that no violation of such provisions is present.

18. CONTROLLER'S APPROVAL. In accordance with the requirements of §24-30-202 (1) C.R.S., as amended, this lease shall not be deemed valid until it has been approved by the State Controller, or such assistant as he may designate.

19. NOTICE. Any notice required or permitted by this lease may be delivered in person or sent by registered or certified mail, return receipt requested, to the party at the address as hereinafter provided, and if sent by mail it shall be effective when posted in the U.S. Mail Depository with sufficient postage attached thereto:

Lessor: Lessee:

Notice of change of address shall be treated as any other notice.

20. HOLDING OVER. If Lessee shall fail to vacate the Premises upon expiration or sooner termination of this lease, Lessee shall be a month-to-month Lessee and subject to all the laws of the State of Colorado applicable to such tenancy. The rent to be paid by Lessee during such continued occupancy shall be the same being paid by Lessee as of the date of expiration or sooner termination. Lessor and Lessee each hereby agree to give the other party at least thirty (30) days written notice prior to termination of this holdover tenancy.

21. CONSENT. Unless otherwise specifically provided, whenever consent or approval of Lessor or Lessee is required under the terms of this lease, such consent or approval shall not be unreasonably withheld or delayed and shall be deemed to have been given if no response is received within 30 days of the date of request was made. If either party withholds any consent or approval, such party shall on written request deliver to the other party a written statement giving the reasons therefore.

22. LESSEE LIABILITY EXPOSURE. Notwithstanding any other provision of this lease to the contrary, no term or condition of this lease shall be construed or interpreted as a waiver of any provision of the Colorado Governmental Immunity Act, §24-10-101 et seq., C.R.S., as now or hereafter amended. The parties hereto understand and agree that liability for claims for injuries to persons or property arising out of the negligence of the State of Colorado, its departments, institutions, agencies, boards, officials and employees is controlled and limited by the provisions of §24-10-101, et seq., C.R.S., as now or hereafter amended and §24-30-1501, et seq., C.R.S., as now or hereafter amended. Any provision of this lease, whether or not incorporated herein by reference, shall be controlled, limited and otherwise modified so as to limit any liability of the Lessee to the above cited laws.

23. SECURITY DEPOSIT. Lessee shall not be required to remit a security deposit to Lessor.

24. INTERRUPTION OF SERVICES. Notwithstanding anything in this lease to the contrary, if there is an interruption in essential services to the Premises (including, but not limited to HVAC, electrical service, elevator service), and such interruption continues for a period of five (5) consecutive days, Lessee shall be entitled to an abatement of rent for the period that such services are not provided to the extent that such interruption interferes with the use of the Premises by the Lessee. If such

interruption continues for a period of ninety (90) days, Lessee shall have the option to cancel and terminate this lease without penalty.

25. COLLOCATION. In the event the State of Colorado builds, leases, or otherwise acquires a building for the purpose of collocating State agencies in one area, or designates an existing State owned building for such collocation of Lessee, this lease may be terminated by the Lessee upon giving written notice to the Lessor not less than sixty (60) days prior to the anticipated termination date.

26. LESSEE'S TAX EXEMPT STATUS. If because of Lessee's tax exempt status the Building is able to reduce its tax liability (hereinafter "Building Taxes"), then Lessee's rental obligation shall be decreased by the amount of the reduction in Building Taxes on a monthly prorata basis.

27. LESSEE'S INSURANCE: Lessee shall at its sole cost and expense, obtain insurance on its inventory, equipment, and all other personal property located on the leased Premises against loss resulting from fire or other casualty. The Lessee shall have the right to provide such insurance under a self insurance program, or, at any time during the term of this lease, to provide such insurance through an insurance company. With respect to general liability, the Lessor recognizes that the Lessee is self insured for general liability in accordance with the provisions of the Colorado Governmental Immunity Act and the Colorado Risk Management Act, §24-30-1501, et seq., C.R.S., as amended.

28. BROKER REPRESENTATION: Lessor and Lessee acknowledge that _____ is acting as a Landlord Agent on behalf of Lessor in this transaction and _____ is acting as a Tenant Agent on behalf of Lessee in this transaction. Further, Lessor and Lessee acknowledge that in consideration of _____ acting as a Tenant Agent on behalf of the State of Colorado in this transaction, _____ will receive a leasing commission by separate agreement with _____.

29. ADDITIONAL PROVISIONS.

IN WITNESS WHEREOF, the parties hereto have executed this lease agreement on the day and year first above written.

LESSOR:

_____

(If Corporation)
Attest (Seal)

By: _____

Title: _____

By: _____
Secretary

_____
Federal Tax Identification Number

APPROVED:

STATE OF COLORADO
DEPARTMENT OF PERSONNEL/GSS
STATE BUILDINGS AND REAL
ESTATE PROGRAMS

By: _____

LESSEE:

STATE OF COLORADO
Roy Romer, Governor
Acting by and through
The Department of _____

By: _____

APPROVED:

STATE OF COLORADO
Gale A. Norton, Attorney General

By: _____

APPROVED:

STATE OF COLORADO
STATE CONTROLLER'S OFFICE
Clifford Hall, State Controller

By: _____

State Lease I.D.#: ____-____-____-____-____-____-____

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

STANDARD
LEASE AGREEMENT (LONG FORM)
(FORM AC-395-53-01-0016-L)

CONTRACT ROUTING NO. _____

LESSOR _____

LESSEE _____

LOCATION _____

_____

INSTRUCTIONS:

1) This form is differentiated from the short form in that this one contains provisions which specifically set out an agreement between the parties, and a formula for carrying out such agreement, whereby the Lessee agrees to pay additional rent to Lessor, over and above the stated base rent, over the life of the lease, to cover Lessor's increased expenses based upon increased costs of building maintenance and repair, such as insurance, utilities, etc.

2) If at any time a user of this form determines that a certain paragraph should not be included, (such as Paragraph #27, Broker Representation, when no Broker is involved in the transaction), simply strike through the entire paragraph following such paragraph's number and title. That way a later reviewer of the lease can immediately determine if and where the lease differs from the standard form, and subsequent paragraphs need not be renumbered to preserve sequential numbering.

3) This form is almost always used by an agency only when it is involved in a considerably more complicated lease agreement than are the vast majority of lease agreements. Very rarely will an agency use this Long Form lease without the active involvement of State Buildings and Real Estate Programs or the services of one of the State's Tenant Brokers.

4) Since this form is usually the basic form for the more complicated and extensive State leases, it often contains numerous customized additions, such as an option to purchase, an option to renew, and/or a provision for certain renovations to the premises part way through the lease term.

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS
o LEASE AGREEMENT (LONG FORM AC-395-53-01-0016-L)

TABLE OF CONTENTS PAGE(S)

Factual Recitals	1
Paragraph:	
1. Premises, Term, Rent	1
2. Services by Lessor	2
3. Work Requirements	2
4. Lessor's Representations	2
5. Maintenance of Premises	2
6. Lessor's Ownership	2
7. Lease Assignment	3
8. Applicable Law	3
9. Eminent Domain, Termination of Lease	3
10. Damage and Destruction	3
11. Fiscal Funding	3-4
12. Complete Agreement	4
13. Captions, Construction, and the Effect	4
14. Federal Funding	4
15. No Beneficial Interest	4
16. No Violation of Law	5
17. Controller's Approval	5
18. Notice	5
19. Holding Over	5
20. Consent	5
21. Lessee Liability Exposure	5
22. Security Deposit	5
23. Interruption of Services	6
24. Collection	6
25. Lessee's Tax Exempt Status	6
26. Lessee's Insurance	6
27. Broker Representation	6
28. Additional Provisions	6-12
(A) Additional Rent	6
(1) Definitions	6-11
(2) Adjustment Mechanism	11-12
Signature Approvals	13

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

STANDARD
LEASE AGREEMENT (LONG FORM)
(FORM AC-395-53-01-0016-L)

CONTRACT ROUTING NO._____

LESSOR _____

LESSEE _____

LOCATION _____

INSTRUCTIONS:

1) This form is differentiated from the short form in that this one contains provisions which specifically set out an agreement between the parties, and a formula for carrying out such agreement, whereby the Lessee agrees to pay additional rent to Lessor, over and above the stated base rent, over the life of the lease, to cover Lessor's increased expenses based upon increased costs of building maintenance and repair, such as insurance, utilities, etc.

2) If at any time a user of this form determines that a certain paragraph should not be included, (such as Paragraph #27, Broker Representation, when no Broker is involved in the transaction), simply strike through the entire paragraph following such paragraph's number and title. That way a later reviewer of the lease can immediately determine if and where the lease differs from the standard form, and subsequent paragraphs need not be renumbered to preserve sequential numbering.

3) This form is almost always used by an agency only when it is involved in a considerably more complicated lease agreement than are the vast majority of lease agreements. Very rarely will an agency use this Long Form lease without the active involvement of State Buildings and Real Estate Programs or the services of one of the State's Tenant Brokers.

4) Since this form is usually the basic form for the more complicated and extensive State leases, it often contains numerous customized additions, such as an option to purchase, an option to renew, and/or a provision for certain renovations to the premises part way through the lease term.

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

- **LEASE AGREEMENT (LONG FORM AC-395-53-01-0016-L)**

TABLE OF CONTENTS

	PAGE(S)
Factual Recitals	1
Paragraph:	
1. Premises, Term, Rent	1
2. Services by Lessor	2
3. Work Requirements	2
4. Lessor's Representations	2
5. Maintenance of Premises	2
6. Lessor's Ownership	2
7. Lease Assignment	3
8. Applicable Law	3
9. Eminent Domain, Termination of Lease	3
10. Damage and Destruction	3
11. Fiscal Funding	3
12. Lessor/Vendor Offsets Notice	4
13. Complete Agreement	4
14. Captions, Construction, and the Effect	4
15. Federal Funding	4
16. No Beneficial Interest	5
17. No Violation of Law	5
18. Controller's Approval	5
19. Notice	5
20. Holding Over	5
21. Consent	5
22. Lessee Liability Exposure	5
23. Security Deposit	5
24. Interruption of Services	6
25. Collection	6
26. Lessee's Tax Exempt Status	6
27. Lessee's Insurance	6
28. Broker Representation	6
29. Additional Provisions	6
(A) Additional Rent	6
(1) Definitions	6 - 10
(2) Adjustment Mechanism	11 - 12
Signature Approvals	13

State Lease I.D.#:____-____-____-____-____-____-____
Contract Routing Number:_____

LEASE AGREEMENT

The printed portions of this form, except bold additions, have been reviewed
by the State of Colorado Attorney General and approved by the State Controller.
All additions to this form must be in bold type. All deletions must be shown by strike-through.

THIS LEASE AGREEMENT**,** made and entered into this _____ day of _____, 19__, by and between _____, whose address or principal place of business is _____, hereinafter referred to as "Lessor", and THE STATE OF COLORADO, acting by and through the DEPARTMENT OF _____ hereinafter referred to as "Lessee".

WITNESSETH:

WHEREAS, as to Lessee, authority exists in the Law, and Funds have been budgeted, appropriated and otherwise made available and a sufficient unencumbered balance thereof remains available for payment in Fund Number _____, appropriation code _____ Contract Encumbrance Number PO-_____.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties hereto agree as follows:

1. PREMISES, TERM, RENT. (A) Lessor hereby leases and demises unto Lessee the Premises, hereinafter referred to as "Premises" within the building located at _____, hereinafter referred to as "Building" (including land, improvements and other rights appurtenant thereto). The Premises, known and described as _____, includes approximately _____**(**_____) square feet of rentable floor area; the leased Premises being as shown on the plat attached hereto, made a part hereof and marked "Exhibit __".

(B) TO HAVE AND TO HOLD the same, together with all appurtenances, unto Lessee, for the term beginning _____, and ending _____, at and for a monthly rental for the full term as shown below:

TERM DATE(S)	TERM RENT	MONTHLY RENT	APPROXIMATED ANNUALIZED SQ. FOOT COST
__/__/__ - __/__/__	**$**	**$**	**$**

The Premises is to be used and occupied as _____ space. Payment shall be made on the first of each month during the term hereof, to the Lessor at:

or at such place as Lessor from time to time designates by notice as provided herein, subject to the limitations and conditions set forth in article 11, Fiscal Funding and article 14, Federal Funding, herein.

2. SERVICES BY LESSOR. Lessor shall provide to Lessee during the occupancy of said Premises, as a part of the rental consideration, the following:

3. WORK REQUIREMENTS**.** All tenant finish alterations in the Premises, now and hereafter undertaken, shall be designed and constructed in accordance with the technical design specifications of the Uniform Federal Accessibility Standards, latest edition. Prior to the Premises being occupied by Lessee, Lessor agrees to:

4. LESSOR'S REPRESENTATIONS. (A) Lessor represents that either: (1) no "asbestos response action", pursuant to that portion of the Colorado Air Quality Control Commission, Regulation 8 entitled Emission Standards for Asbestos, hereafter referred to as "Regulation 8", is contemplated as a part of the tenant finish for this lease; or (2) in the event that an "asbestos response action" is contemplated as a part of the tenant finish for this lease, Lessor agrees to fully cooperate with Lessee in the Lessee's exercise of its duties and responsibilities in accordance with Section V of Part B of Regulation 8.

(B) Lessor, in Lessor's sole opinion, represents that with respect to this lease and the Lessee's Premises, the Building meets the requirements of the Americans with Disabilities Act.

5. MAINTENANCE OF PREMISES**.** Lessor shall, unless herein specified to the contrary, maintain the Premises in good repair and in tenantable condition during the term of this lease, except in the event of damage arising from an act or the negligence of Lessee, its agents or employees. Lessor shall have the right to enter the Premises at reasonable times for the purpose of making necessary inspections and repairs or maintenance.

6. LESSOR'S OWNERSHIP. Lessor warrants and represents himself to be the owner of, or the authorized representative or agent of the owner of, the leased Premises in the form and manner as stated herein, and during the term of this lease covenants and agrees to warrant and defend Lessee in the quiet, peaceable enjoyment and possession of the leased Premises. In the event of any dispute regarding Lessor's ownership, Lessor shall immediately, upon request from and at no cost to Lessee, furnish proof thereof by delivering to Lessee an "Ownership and Encumbrance Letter" issued by a properly qualified title insurance company.

7. LEASE ASSIGNMENT. Lessee shall not assign this lease and shall not sublet the demised Premises, except to a desirable tenant for a similar use and purpose, and will not permit the use of said Premises to anyone, other than Lessee, its agents or employees**,** without the prior written consent of Lessor, which consent shall not be unreasonably withheld or delayed.

8. APPLICABLE LAW. The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution and enforcement of this lease. Any

provision of this lease, whether or not incorporated herein by reference, which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall 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 will not invalidate the remainder of this lease to the extent that this agreement is capable of execution.

9. EMINENT DOMAIN, TERMINATION OF LEASE. If the leased Premises shall be taken by right of eminent domain, in whole or in part, then this lease, at the option of either party, shall forthwith cease and terminate and the current rent shall be properly apportioned to the date of such taking; and in such event the entire damages which may be awarded for such taking shall be apportioned between Lessor and Lessee, as their interests appear.

10. DAMAGE AND DESTRUCTION**.** In the event the leased Premises are rendered untenantable or unfit for Lessee's purposes by fire or other casualty, this lease will immediately terminate and no rent shall accrue to Lessor from the date of such fire or casualty. In the event the leased Premises are damaged by fire or other casualty so that there is partial destruction of such Premises or such damage as to render the leased Premises partially untenantable or partially unfit for Lessee's purposes, either party may, within five (5) days of such occurrence, terminate this lease by giving written notice to the other party. Such termination shall be effective not less than fifteen (15) days from the date of mailing of the notice. Rent shall be apportioned to the effective date of termination.

11. FISCAL FUNDING. (A) As prescribed by State of Colorado Fiscal Rules, it is understood and agreed this lease is dependent upon the continuing availability of funds beyond the term of the State's current fiscal period ending upon the next succeeding June 30, as financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available. Further, the parties recognize that the act of appropriation is a legislative act, and the Lessee hereby covenants to take such action as is necessary under the laws applicable to the Lessee to timely and properly budget for, request of and seek and pursue appropriation of funds of the Legislature of the State of Colorado which will permit Lessee to make all payments required under this lease during the period to which such appropriation shall apply. In the event there shall be no funds made available, this lease shall terminate at the end of the then current fiscal year, with no penalty or additional cost as a result thereof to the Lessee.

(B) To make certain the understanding of the parties because this lease will extend beyond the current fiscal year, Lessee and Lessor understand and intend that the obligation of the Lessee to pay the monthly rental hereunder constitutes a current expense of the Lessee payable exclusively from Lessee's funds and shall not in any way be construed to be a general obligation indebtedness of the State of Colorado or any agency or department thereof within the meaning of any provision of Sections 1,2,3,4, or 5 of Article XI of the Colorado Constitution, or any other constitutional or statutory limitation or requirement applicable to the State concerning the creation of indebtedness. Neither the Lessee, nor the Lessor on its behalf, has pledged the full faith and credit of the State, or any agency or department thereof to the payment of the charges hereunder, and this lease shall not directly or contingently obligate the State or any agency or department thereof to apply money from, or levy or pledge any form of taxation to, the payment of the annual rental charges.

(C) With such limitations in mind, Lessee contracts to lease the Premises herein before described and has reason to believe that sufficient funds will be available for the full term of this lease. Where, for reasons beyond Lessee's control, Lessee's funding entity does not allocate funds for any fiscal period beyond the one in which this lease is entered into, or does not allocate funds to continue this lease from the then current fiscal period, such failure to obtain funds not resulting from any act or failure

to act on the part of Lessee, Lessee will not then be obligated to make the payments remaining beyond Lessee's then current fiscal period. In such event, Lessee shall notify Lessor of such non allocation of funds by sending written notice thereof to the Lessor forty-five (45) days prior to the effective date of termination.

(D) The parties hereto further understand and agree that the only funds that have or may be so appropriated and available for payment under this lease in any one particular fiscal year are for the purpose and in an amount sufficient only to pay the rental charges provided for in article 1 above. Therefore, notwithstanding anything herein to the contrary, the payment by the Lessee of any other charges, liabilities, costs, guarantees, waivers, and any awards thereon of any kind pursuant to this lease against Lessee are contingent upon funds for such purpose(s) being appropriated, budgeted and otherwise made available through the said State of Colorado legislature process.

12. LESSOR/VENDOR OFFSETS NOTICE. Pursuant to §24-30-202.4 C.R.S., the state controller may withhold debts owed to state agencies under the vendor offset intercept system for: (a) unpaid child support debt or child support arrearages; (b) unpaid balance of tax, accrued interest, or other charges specified in Article 22, Title 39, C.R.S., (c) unpaid loans due to the student loan division of the department of higher education; (d) owed amounts required to be paid to the unemployment compensation fund; and (e) other unpaid debts owing to the state or any agency thereof, the amount of which is found to be owing as a result of final agency determination or reduced to judgment as certified by the controller.

13. COMPLETE AGREEMENT. This lease, including all exhibits, supersedes any and all prior written or oral agreements and there are no covenants, conditions or agreements between the parties except as set forth herein. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever unless embodied herein in writing. No subsequent novation, renewal, addition, deletion or other amendment hereto shall have any force or effect unless embodied in a written contract executed and approved pursuant to the State Fiscal Rules.

14. CAPTIONS, CONSTRUCTION, AND LEASE EFFECT. The captions and headings used in this lease are for identification only, and shall be disregarded in any construction of the lease provisions. All of the terms of this lease shall inure to the benefit of and be binding upon the respective heirs, successors, and assigns of both the Lessor and the Lessee. If any provision of this lease shall be determined to be invalid, illegal, or without force by a court of law or rendered so by legislative act then the remaining provisions of this lease shall remain in full force and effect.

15. FEDERAL FUNDING. In the event that any or all funds for payment of this lease are provided by the Federal Government, this lease is subject to and contingent upon the continuing availability of Federal funds for the purposes hereof, and if such funds are not made available this lease may be unilaterally terminated by the Lessee at the end of any month provided a ninety (90) day advance notice of termination is given to the Lessor in writing.

16. NO BENEFICIAL INTEREST. The signatories aver that to their knowledge, no state employee has any personal or beneficial interest whatsoever in the service or property described herein.

17. NO VIOLATION OF LAW. The signatories hereto aver that they are familiar with §18-8-301, et seq., (Bribery and Corrupt Influences) and §18-8-401, et seq., (Abuse of Public Office), C.R.S., as amended, and that no violation of such provisions is present.

18. CONTROLLER'S APPROVAL. In accordance with the requirements of §24-30-202 (1) C.R.S., as amended, this lease shall not be deemed valid until it has been approved by the State Controller, or such assistant as he may designate.

19. NOTICE. Any notice required or permitted by this lease may be delivered in person or sent by registered or certified mail, return receipt requested, to the party at the address as hereinafter provided, and if sent by mail it shall be effective when posted in the U.S. Mail Depository with sufficient postage attached thereto:

Lessor: Lessee:

Notice of change of address shall be treated as any other notice.

20. HOLDING OVER. If Lessee shall fail to vacate the Premises upon expiration or sooner termination of this lease, Lessee shall be a month-to-month Lessee and subject to all the laws of the State of Colorado applicable to such tenancy. The rent to be paid by Lessee during such continued occupancy shall be the same being paid by Lessee as of the date of expiration or sooner termination. Lessor and Lessee each hereby agree to give the other party at least thirty (30) days written notice prior to termination of this holdover tenancy.

21. CONSENT. Unless otherwise specifically provided, whenever consent or approval of Lessor or Lessee is required under the terms of this lease, such consent or approval shall not be unreasonably withheld or delayed and shall be deemed to have been given if no response is received within 30 days of the date of request was made. If either party withholds any consent or approval, such party shall on written request deliver to the other party a written statement giving the reasons therefore.

22. LESSEE LIABILITY EXPOSURE. Notwithstanding any other provision of this lease to the contrary, no term or condition of this lease shall be construed or interpreted as a waiver of any provision of the Colorado Governmental Immunity Act, §24-10-101 et seq., C.R.S., as now or hereafter amended. The parties hereto understand and agree that liability for claims for injuries to persons or property arising out of the negligence of the State of Colorado, its departments, institutions, agencies, boards, officials and employees is controlled and limited by the provisions of §24-10-101, et seq., C.R.S., as now or hereafter amended and §24-30-1501, et seq., C.R.S., as now or hereafter amended. Any provision of this lease, whether or not incorporated herein by reference, shall be controlled, limited and otherwise modified so as to limit any liability of the Lessee to the above cited laws.

23. SECURITY DEPOSIT. Lessee shall not be required to remit a security deposit to Lessor.

24. INTERRUPTION OF SERVICES. Notwithstanding anything in this lease to the contrary, if there is an interruption in essential services to the Premises (including, but not limited to HVAC, electrical service, elevator service), and such interruption continues for a period of five (5) consecutive days, Lessee shall be entitled to an abatement of rent for the period that such services are not provided to the extent that such interruption interferes with the use of the Premises by the Lessee. If such

interruption continues for a period of ninety (90) days, Lessee shall have the option to cancel and terminate this lease without penalty.

25. COLLOCATION. In the event the State of Colorado builds, leases, or otherwise acquires a building for the purpose of collocating State agencies in one area, or designates an existing State owned building for such collocation of Lessee, this lease may be terminated by the Lessee upon giving written notice to the Lessor not less than sixty (60) days prior to the anticipated termination date.

26. LESSEE'S TAX EXEMPT STATUS. If because of Lessee's tax exempt status the Building is able to reduce its tax liability (hereinafter "Building Taxes"), then Lessee's rental obligation shall be decreased by the amount of the reduction in Building Taxes on a monthly prorata basis.

27. LESSEE'S INSURANCE: Lessee shall at its sole cost and expense, obtain insurance on its inventory, equipment, and all other personal property located on the leased Premises against loss resulting from fire or other casualty. The Lessee shall have the right to provide such insurance under a self insurance program, or, at any time during the term of this lease, to provide such insurance through an insurance company. With respect to general liability, the Lessor recognizes that the Lessee is self insured for general liability in accordance with the provisions of the Colorado Governmental Immunity Act and the Colorado Risk Management Act, §24-30-1501, et seq., C.R.S., as amended.

28. BROKER REPRESENTATION: Lessor and Lessee acknowledge that _____ is acting as a Landlord Agent on behalf of Lessor in this transaction and _____ is acting as a Tenant Agent on behalf of Lessee in this transaction. Further, Lessor and Lessee acknowledge that in consideration of _____ acting as a Tenant Agent on behalf of the State of Colorado in this transaction, _____ will receive a leasing commission by separate agreement with _____.

29. ADDITIONAL PROVISIONS.

(A) ADDITIONAL RENT:

(1) Definitions: In addition to the terms elsewhere defined in this lease, the following terms shall have the following meanings with respect to the provisions of this lease:

(a) "Base Year Operating Expenses", as said term is hereinafter defined, shall mean the actual Operating Expenses incurred in the Calendar Year _____ adjusted for occupancy as specified in article 28(A), subparagraph (2)(d) (hereinafter "Base Year Operating Expenses"). It is understood and agreed by Lessee that Lessor has not made any representation that Base Year Operating Expenses will equal, approximate or exceed the actual Operating Expenses for any Lease Year.

(b) "Rentable Area" shall mean all rentable space available for lease in the Building calculated on the basis set forth in the Building Owners' and Managers' Association Publication #ANSI Z-65.1-1980 full-floor basis. If there is a significant change in the aggregate Rentable Area as a result of an addition to the Building, partial destruction thereof, modification to building design, or similar circumstance which causes a reduction or increase thereto on a permanent basis, Lessor's Accountants, as said term is hereinafter defined, shall make such adjustments in the computations as shall be necessary to provide for any such change.

(c) "Lessee's Proportionate Share", as said term is hereinafter defined, shall mean that fraction, the numerator of which is the total number of square feet of the Premises (i.e., _____ square feet) and the denominator of which is the Rentable Area (i.e., _____ square feet), and is equal to _____%. At such time, if ever, as any space is added to the Premises, Lessee's Proportionate Share shall be increased accordingly. If this lease is entered into prior to completion of the Building, and it is determined after completion that the Rentable Area or the square feet of the Premises, or both, are different than as stated in this subparagraph, Lessor shall notify Lessee and Lessee's Proportionate Share shall be recalculated accordingly. Notwithstanding anything contained herein to the contrary, the total number of square feet of the Premises used as the numerator in this subparagraph (1)(c), shall be _____ until such time as additional space is added by amendment to this lease, at which time the rentable area of the additional space will be added to the _____ to determine Lessee's Proportionate Share.

(d) "Lease Year" shall mean each twelve (12) month period beginning with the date the lease term commenced, or any anniversary thereof, and ending on the same date one (1) year later. If the Lease Year is not concurrent with a calendar year, then Lessor reserves the right at any time to make all adjustments provided for herein on a calendar year basis, with an appropriate proration for the Lease Years in which such conversion is made and in which the term ends, and "Lease Year" as used in this subparagraph 28(A) shall thereafter be deemed to refer to "Calendar Year".

(e) "Operating Expenses" shall mean all operating expenses of any kind or nature which are necessary, ordinary, or customarily incurred in connection with the operation and maintenance of the Building as determined by Lessor's Accountants. Operating expenses shall include the following:

(i) "Taxes", which shall include all real property taxes and assessments levied against the Building by any governmental or quasi-governmental authority, including, but not limited to taxes, assessments, surcharges, service or other fees of a nature not presently in effect which shall hereafter be levied on the Building as a result of the use, ownership or operation of the Building, whether in lieu of or in addition to any current real estate taxes and assessments; provided, however, that any taxes which shall be levied on the rentals of the Building shall be determined as if the Building were Lessor's only property and provided that in no event shall the term Taxes include any federal, state, or local income taxes levied or assessed on Lessor, unless such taxes are a specific substitution for real property taxes. In no event shall Taxes include (A) any franchise, capital stock, estate or inheritance taxes; (B) any tax allocable to or measured by the rent payable hereunder, including without limitation, any gross receipts tax, or excise tax levied by any governmental or quasi-governmental body with respect to the receipt of such rent; (C) any tax assessed upon or with respect to the possession, leasing, operation, management, maintenance, alteration, or repair of the Building; or (D) any tax or assessment based on the occupancy by Lessee of the Premises or any portion thereof, unless such taxes described in (A) through (D) herein is expressly in lieu of, and not in addition to, any ad valor em tax upon the Building and the land upon which it is located. Taxes shall also include reasonable expenses incurred by Lessor for tax consultants and the cost of contesting the amount or validity of Taxes;

(ii) Costs of supplies, including but not limited to the cost of "relamping" all building standard lessee lighting as the same may be required from time to time;

(iii) Costs incurred in connection with obtaining and providing energy for the Building, including but not limited to costs of propane, butane, natural gas, steam, electricity, solar energy and fuel oils, coal or other energy sources;

(iv) Costs of water and sanitary and storm drainage services;

(v) Costs of janitorial and security services;

(vi) Costs of general maintenance and repairs, including costs under HVAC and other mechanical maintenance contracts; and repairs and replacements of equipment used in connection with such maintenance and repair work (excluding repairs and general maintenance of the roof, foundation and exterior walls of the Building, repairs and general maintenance paid by proceeds of insurance or by Lessee or other third parties, and alterations attributable solely to lessees of the Building other than Lessee);

(vii) Costs of maintenance and replacement of landscaping; and costs of maintenance of parking areas, common areas, plazas and other areas used by lessees of the Building, provided such areas are equally accessible to all lessees of the Building;

(viii) Insurance premiums, including fire and all-risk coverage, together with loss of rent endorsement; public liability insurance, and any other insurance carried by Lessor on the Building or any component parts thereof provided said premiums are comparable with fair market rates. All such insurance shall be in such amounts as may be required by any mortgagee of Lessor or as Lessor may reasonably determine;

(ix) Labor costs, including wages and other payments, costs to Lessor for worker's compensation and disability insurance, payroll taxes, welfare fringe benefits and all legal fees and other costs or expenses incurred in resolving any labor disputes, provided such expenses are incurred as a direct result of the operation and maintenance of the Building and provided further that said costs, fees, and expenses inclusive within this subparagraph hereof are exclusive of any costs, fees, or expenses contained in subparagraph (e)(x) herein under;

(x) Professional building management fees, provided that such fees are comparable to fees charged by other Class "____" office buildings in the area;

(xi) Legal, accounting, inspection, and other consultation fees (including within reason, fees charged by consultants retained by Lessor for services that are expressly designed to reduce and that results in a reduction in Operating Expenses or reasonably improve the operation, maintenance or state of repair of the Building) incurred in the ordinary course of operating the Building;

(xii) The costs of capital improvements and structural repairs and replacements made in or to the Building in order to conform to changes, subsequent to the lease commencement date, in any applicable laws, ordinances, rules, regulations, or orders of any governmental or quasi-governmental authority having jurisdiction over the Building (herein, "Required Capital Improvements"); the costs of any capital improvements and structural repairs and replacements designed expressly to reduce, and that results in the reduction of, Operating Expenses (herein, "Cost Savings Improvements"); and a reasonable annual reserve for all other capital improvements and structural repairs and replacements reasonably necessary to permit Lessor to maintain the Building as a Class "___" office building. The expenditures for Required Capital Improvements shall be amortized over the useful life of such capital improvements or structural repair or replacement (as determined by Lessor's Accountants); provided that the amortized amount of any Cost Savings Improvement shall be limited in any year to the reduction of Operating Expenses as a result thereof as reasonably determined by Lessor; and

(xiii) Costs incurred by Lessor's Accountants in engaging experts or other consultants in a reasonable capacity to assist them in making the computations required hereunder;

(f) "Operating Expenses" shall not include:

(i) Costs of work, including painting and decorating and lessee change work, which Lessor performs for any lessee or in any lessee's space in the Building other than work of a kind and scope which Lessor would be obligated to furnish to all lessees whose leases contain a rental adjustment provision similar to this one;

(ii) Cost of repairs or other work occasioned by fire, windstorm or other insured casualty to the extent of insurance proceeds received or by the exercise of eminent domain or any expenditures for which Lessor is reimbursed from any source;

(iii) Leasing commissions, advertising expenses, and other cost incurred in leasing space in the Building including but not limited to attorneys' fees, costs and disbursements and other expenses incurred in connection with negotiations or disputes with lessees, other occupants, or prospective lessees or occupants except to the extent incurred in connection with the negotiation and entering into of a sublease or lease assignment at the request of Lessee;

(iv) Lessor's cost of electricity and other services that are sold to lessees and for which Lessor is entitled to be reimbursed by lessees as an additional charge or rental over and above the basic rent payable under the lease with such lessees;

(v) Costs of repairs or rebuilding necessitated by condemnation;

(vi) Costs incurred by Lessor for alterations or improvements which are considered capital improvements or replacements under generally accepted accounting principles, except where such capital improvement or replacement results in a net reduction in Operating Expenses after the cost of the improvement or replacement is amortized and charged to Lessee over the useful life of the improvement or replacement;

(vii) Depreciation and amortization except as provided above;

(viii) Expenses in connection with services or other benefits of a type which are not provided Lessee but which are provided to other lessees or occupants;

(ix) Costs incurred due to violation by Lessor or any lessee of the terms and conditions of any lease;

(x) Overhead and profit increment paid to subsidiaries or affiliates of Lessor for services on or to the real property, to the extent only that the costs of such services exceed competitive costs of such services were they not so rendered by a subsidiary or affiliate;

(xi) Any interest on borrowed money or debt amortization, and rental under any ground or underlying lease or leases;

(xii) Lessor's general overhead except as it directly relates to the operation and management of the Building;

(xiii) Any compensation paid to clerks, attendants or other persons in commercial concessions operated by Lessor;

(xiv) All items and services for which Lessee reimburses Lessor or pays a third person;

(xv) Any costs, fines or penalties incurred due to violations by Lessor of any governmental rule or authority;

(xvi) Wages, salaries, or other compensation paid to any executive employees above the grade of building superintendent/manager;

(xvii) Costs for sculpture, painting or other objects of art;

(xviii) Costs incurred in the operation of the garage or other parking concessions, if applicable;

(xix) Rentals and other related expenses incurred in leasing air conditioning systems, elevators, or other equipment ordinarily considered to be of a capital nature, except equipment which is used in providing janitorial services and which is not affixed to the Building;

(xx) Costs incurred in the encapsulation or other treatment or removal of asbestos or other substances considered to be detrimental to the health or the environment of occupants of the Building;

(xxi) The value or lost income to Lessor of any office space in the Building which is utilized for the management of the Building;

(xxii) Financial costs, including but not limited to points, commitment fees and legal fees;

(xxiii) Costs incurred by Lessor to remedy any defects in the design of or materials used in, or the defective installation of the structural steel framing, roof, foundation and underground utility lines forming a part of or servicing the Building or the real property.

(xxiv) Costs incurred in compliance with the Americans with Disabilities Act or statutes, laws, regulation or other legislation of similar import.

(g) Notwithstanding anything contained herein to the contrary, if any lease entered into by Lessor with any lessee in the Building is on a so-called "net" basis, or provides for a separate basis of computation for any Operating Expenses with respect to its leased premises, then to the extent that Lessor's Accountants determine that an adjustment should be made in making the computations herein provided for, Lessor's Accountants shall be permitted to modify the computation of Operating Expenses for a particular Lease Year in order to eliminate or otherwise modify any such expenses which are paid for in whole or in part by such lessee provided such adjustments are fairly and consistently applied in a proportionate fashion to all lessees of the Building not on a so-called "net" or other computational basis thereof. Furthermore, in making any computations contemplated hereby, Lessor's Accountants shall also be permitted to make such adjustments and modifications to the provisions of this article 28(A) as shall be reasonably necessary to achieve the intention of the parties hereto provided that Lessor notifies Lessee in writing at least thirty (30) days prior to execution of such adjustments and modifications.

(h) Lessor's Accountants" shall mean that the individual or firm employed by Lessor from time to time to keep the books and records for the Building, and to prepare the federal and state income tax returns for Lessor with respect to the Building, all of which books and records shall be certified to by an appropriate representative of Lessor.

(2) Adjustment Mechanism:

(a) It is hereby agreed that commencing in the calendar year "_____"

(hereinafter "Comparison Year"), Lessee shall pay to Lessor as additional rent, hereinafter referred to as "Additional Rent", Lessee's Proportionate Share of the amount of the excess in the Operating Expenses over Lessee's Proportionate Share of the Base Year Operating Expenses; provided, however, that in no event shall Lessee be responsible to pay Additional Rent which exceeds 107% multiplied by the sum of Lessee's Proportionate Share of the Base Year Operating Expenses plus the previous year's Additional Rent minus Lessee's Proportionate Share of the Base Year Operating Expenses. For each Lease Year, Lessee shall pay to Lessor an estimate, as limited above, of Lessee's Proportionate Share of such excess Operating Expenses as limited above, which payment Lessee shall pay to Lessor monthly in an amount equal to one-twelfth (1/12) of the excess, if any (provided, however, that said amount complies with the conditions established herein above and binding hereto), in Lessee's Proportionate Share of the Base Year Operating Expenses, with an adjustment to be made between the parties at a later date as hereinafter provided. On or before March first, following the end of each Lease Year, Lessor shall submit to Lessee a statement setting forth the exact amount of the excess, if any, in Lessee's Proportionate Share of the Operating Expenses for the Lease Year just completed and the estimated amount of Lessee's Proportionate Share of the Operating Expense (which was paid in accordance with this subparagraph) for such year. Such statement shall also set forth the amount of the estimated Operating Expenses reimbursement, as limited above, for the new Lease Year computed by taking the estimated excess in Lessee's Proportionate Share of Operating Expenses for the new Lease Year in excess of Lessee's Proportionate Share of Base Year Operating Expenses and dividing it by the number of months remaining in the new Lease Year. To the extent that Lessee's Proportionate Share of the actual Operating Expense for any period covered by such statement is greater than the estimated excess which Lessee previously paid during the Lease Year just completed, Lessee shall pay to Lessor the difference in cash, as limited above, within thirty (30) days following receipt of said statement from Lessor. To the extent that Lessee's Proportionate Share of the actual Operating Expenses for the period covered by the statement is less than the estimated excess which Lessee previously paid during the Lease Year just completed, Lessor shall credit the difference against the Lessee's estimated reimbursement for Operating Expenses for the new Lease Year as stated above and such credit will be applied to the next payment or payments due from Lessee to Lessor. In addition, until Lessee receives such statement, Lessee's monthly reimbursement applied to the new Lease Year shall continue to be paid at the rate for the previous Lease Year, but Lessee shall commence payment to Lessor of the monthly installments of reimbursement on the basis of the new statement beginning on the first day of the month following the month in which Lessee receives such statement.

(b) Lessee's obligation with respect to Lessee's Proportionate Share of the Operating Expenses shall survive the expiration or early termination of this lease, and subsequent to such expiration or termination Lessee shall pay Lessee's Proportionate Share of the actual Operating Expenses for the portion of the final Lease Year of the lease during which Lessee was obligated to pay such expenses. If Lessee occupies the Premises for less than a full calendar year during the first or last Lease Years of the term hereof, Lessee's Proportionate Share for such partial year shall be prorated based upon the number of calendar months and days during which Lessee occupied the Premises. Lessee shall pay, as limited above, Lessee's Proportionate Share of any such increases within thirty (30) days following the receipt of notice thereof.

(c) Lessee, or Lessee's designee, shall have the right, at any time within thirty (30) days after a statement of actual Operating Expenses (hereinafter "Statement") for a particular Lease Year has been rendered by Lessor as provided herein, at its sole cost and expense, to examine Lessor's books and records relating to the determination of Operating Expenses; provided, however, that Lessee shall give Lessor prior written notice of its intent to exercise such right, the inspection may not take place outside of normal business hours, and Lessee shall not interfere with Lessor's normal business activities. Unless Lessee objects to the rental adjustment within said thirty (30) day period, such statement and adjustment shall be deemed conclusive. However, if said examination right is exercised within the permissible period and Lessee determines an overcharge of Operating Expenses to the Lessee, then the Lessee may request

Lessor to select an independent Certified Public Accountant (CPA) acceptable to Lessee to audit Lessor's books and records. The review of the CPA will be binding upon the parties. In the event that the CPA confirms that an overcharge of Operating Expenses has occurred, then Lessor shall credit the difference against the Lessee's estimated reimbursement for Operating Expenses for the current Lease Year and such credit shall be applied to the next payment or payments due from Lessee to Lessor. Further, Lessor shall be responsible for all costs and expenses of the CPA provided that an overcharge exists; if the CPA confirms that no overcharge to Lessee of Operating Expenses has occurred, Lessee shall be responsible for all costs and expenses of the CPA.

(d) In the event that the Rentable Area is not fully occupied during any particular Lease Year, Lessor's Accountants shall adjust those Operating Expenses for the particular Lease Year, or portion thereof, as the case may be, which are affected by the occupancy rates to reflect an occupancy of ninety-five percent (95%) of all such Rentable Area.

IN WITNESS WHEREOF, the parties hereto have executed this lease agreement on the day and year first above written.

LESSOR:

_____

(If Corporation)
Attest (Seal)

By: _____
Name

Title: _____

By: _____
Secretary

_____
Federal Tax Identification Number

APPROVED:

STATE OF COLORADO
DEPARTMENT OF PERSONNEL/GSS
STATE BUILDINGS AND REAL
ESTATE PROGRAMS

By: _____
For the Executive Director

LESSEE:

STATE OF COLORADO
Romer, Governor
Acting by and through
The Department of _____

By: _____
Executive Director

APPROVED:

STATE OF COLORADO
Gale A. Norton, Attorney General

By: _____

APPROVED:

STATE OF COLORADO
STATE CONTROLLER'S OFFICE
Clifford Hall, State Controller

By: _____

State Lease I.D.#: ____-____-____-____-____-____-____

Contract Routing No.: _____ Agency I. D. Number (Lessor)
Contract Routing No.: _____ Agency I. D. Number (Lessee)

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

STANDARD
INTERAGENCY LEASE AGREEMENT
(FORM 395-53-01-0032)

INSTRUCTIONS:

1) This form is to be used **only** when both Lessor and Lessee are entities of State government. If one party is a city or county, this form shall **not** be used.

2) If at any time a user of this form determines that a certain paragraph should not be included, (such as Paragraph #27, Broker Representation, when no Broker is involved in the transaction), simply strike through the entire paragraph following such paragraph's number and title. That way a later reviewer of the lease can immediately determine if and where the lease differs from the standard form, and subsequent paragraphs need not be renumbered to preserve sequential numbering.

3) Unlike the State's other standard lease forms, this Interagency Lease Agreement provides a greatly simplified paragraph on fiscal funding contingency, (#10). Another paragraph provides for arbitration by the Attorney General in the event of any dispute between the parties, (#7). Additionally, this form does not require an approval by (nor signature block for) the Attorney General.

6664) Few modifications are used on this form. However, some, such as a clause allowing termination upon sixty days' written notice from one party to the other, may occasionally be appropriate. It is a good idea to have those pre-approved by Real Estate Programs.

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS
- **INTERAGENCY LEASE AGREEMENT (FORM 395-53-01-0032)**

TABLE OF CONTENTS PAGE(S)

Factual Recitals 1
Paragraphs:
1. Premises, Term, Rent 1
2. Services by Lessor 1
3. Work Requirements 1
4. Maintenance of Premises 1
5. Ownership 1
6. Lease Assignment 2
7. Applicable Law 2
8. Damage and Destruction 2
9. Cancellation 2
10. Fiscal Funding 3
11. Complete Agreement 3
12. Captions, Construction, and Lease Effect 3
13. Federal Funding 3
14. Controller's Approval 3
15. Notice 3
16. Consent 4
17. Holding Over 4
18. No Beneficial Interest 4
19. No Violation of Law 4
20. Liability Exposure 4
21. Additional Provisions 4

Signature Approvals 5

Contract Routing No.: _____ Agency I. D. Number (Lessor)
Contract Routing No.: _____ Agency I. D. Number (Lessee)

INTERAGENCY LEASE AGREEMENT

The printed portions of this form, except bold additions, have been reviewed
by the State of Colorado Attorney General and approved by the State Controller.
All additions to this form must be in bold type. All deletions must be shown by strike-through.

THIS INTERAGENCY LEASE AGREEMENT ("Lease") made this __, day of _____, 199_ by and between the DEPARTMENT OF ____, acting by and through _____, whose address is _____, hereinafter called the "Lessor"**,** and the DEPARTMENT OF acting by and through _____whose address is _____ hereinafter called "Lessee".

WITNESSETH

WHEREAS, as to Lessee, authority exists in the law and funds have been, budgeted appropriated, and otherwise made available, and a sufficient unencumbered balance thereof remains available for payment in Fund Number ___, G/L Account Number ___, (Organizational Unit Code ___, Appropriation Code Program Code __, Function Code __), Contract Number _____.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties hereto agree as follows:

1. PREMISES, TERM, RENT. (a) Lessor hereby lease and demises unto Lessee the Premises known and described as follows:
, and containing approximately _____**, (#)**, square feet of net rentable floor area. The leased Premises being as shown on the plat attached hereto, made a part hereof, and marked "Exhibit A".

(b) To have and to hold the same, together with all appurtenances, unto Lessee for the term beginning , and ending ____, at and for a rental for the full term at the annual rate(s) as shown below:

TERM DATE(S)	ANNUAL RENT	MONTHLY RENT	SQUARE FOOT COST
/ / - / /	**$, .**	**$, .**	**$.**

To be used and occupied as _____ space. Payment shall be made on the first of each month during the term hereof, through an Interagency Transaction submitted by Lessor to Lessee _____(__) days in advance of the date payment is due and payable, subject to the limitations and conditions of provisions 10 and 13 herein.

2. SERVICES BY LESSOR. Lessor shall provide to Lessee during the occupancy of said Premises, as a part of the rental consideration, the following:

(a) Adequate and reasonable amounts of heat, air conditioning, ventilation, light, electricity, water, sewage, trash removal, janitorial and cleaning services, snow removal, and elevator service. Lessor shall maintain, in a good state of repair, all equipment used to provide the above-described services.

(b) Lessor shall provide adequate parking facilities for the employees, guests, and invitees of Lessee, together with all necessary maintenance, snow removal, and lighting of the parking area.

3. WORK REQUIREMENTS. Prior to the premises being occupied by Lessee, Lessor agrees to:

4. MAINTENANCE OF PREMISES. Lessor shall, unless herein specified to the contrary, maintain the said premises in good repair and in tenantable condition during the term of this Lease, except in the event of damage rising from an act or the negligence of Lessee, its agents or employees. Lessor shall have the right to enter the premises at reasonable times for the purpose of making necessary inspections and repairs or maintenance.

5. OWNERSHIP. The State of Colorado is the owner of the leased premises. Lessor warrants and represents himself to be the authorized agent of the State of Colorado for the purposes of granting this lease.

6. LEASE ASSIGNMENT. Lessee shall not assign this Lease and shall not sublet the demised premises, and will not permit the use of said premises to anyone, other than Lessee, its servants, agents or employees, without the prior written consent of Lessor.

7. APPLICABLE LAW. The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution and enforcement of this Lease. The Attorney General of the State of Colorado or his designee shall arbitrate any disputes that may arise in the interpretation, execution or enforcement of this Lease. His determination shall be binding on the parties hereto. The parties hereto shall share equally all fees and costs attendant to the Attorney General's arbitration of this Lease.

8. DAMAGE AND DESTRUCTION. In the event the leased premises are rendered untenantable or unfit for Lessee's purposes by fire or other casualty, this Lease will immediately terminate and no rent shall accrue to Lessor from the date of such fire or casualty. In the event the leased premises are damaged by fire or other casualty so that there is a partial destruction of such premises or such damage as to render the leased premises partially untenantable or partially unfit for Lessee's purposes, either party may, within five (5) days of such occurrence, terminate this Lease by giving written notice to the other party. Such termination shall be effective not less than fifteen (15) days from the date of mailing of the notice. Rent shall be apportioned to the effective date of termination.

9. CANCELLATION. This Lease may be canceled by either party hereto with thirty (30) days prior written notice to the other party.

10. FISCAL FUNDING. Financial obligations of both Lessor and Lessee after the current fiscal year are contingent on funds for that purpose being appropriated, budgeted, and otherwise made available.

11. COMPLETE AGREEMENT. This Lease, including all exhibits, supersedes any and all prior written or oral agreements and there are no covenants, conditions or agreements between the parties except as set forth herein. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever unless embodied herein in writing. No subsequent novation, renewal, addition, deletion or other amendment hereto shall have any force or effect unless embodied in a written contract executed and approved pursuant to the State of Colorado Fiscal Rules

12. CAPTIONS, CONSTRUCTION AND LEASE EFFECT. The captions and headings used in

this Lease are for identification only, and shall be disregarded in any construction of the Lease provisions. All of the terms of this Lease shall inure to the benefit of and be binding upon the respective heirs, successors, and assigns of both the Lessor and the Lessee. If any portion, clause, paragraph, or section of this Lease shall be determined to be invalid, illegal, or without force by a court of law or rendered so by legislative act, then the remaining portions of this Lease shall remain in full force and effect.

13. FEDERAL FUNDING. In the event that any or all funds for payment of this Lease are provided by the federal government, this Lease is subject to and contingent upon the continuing availability of federal funds for the purposes hereof, and if such funds are not made available, this Lease may be unilaterally terminated by the Lessee at the end of any month provided a thirty (30) day advance notice of termination is given to the Lessor in writing.

14. CONTROLLER'S APPROVAL. In accordance with the requirements of §24-30-202(1), C.R.S., as amended, this Lease shall not be deemed valid until it has been approved by the Controller of the State of Colorado, or such assistant as he may designate.

15. NOTICE. Any notice required or permitted by this Lease may be delivered in person or sent by registered or certified mail, return receipt requested, to the party at the address as hereinafter provided, and if sent by mail it shall be effective when posted in a U.S. Mail Depository with sufficient postage attached thereto:

LESSOR: LESSEE:

Notice of change of address shall be treated as any other notice.

16. CONSENT. Unless otherwise specifically provided, whenever consent or approval of Lessor or Lessee is required under the terms of this Lease, such consent or approval shall not be unreasonably withheld or delayed and shall be deemed to have been given if no response is received within 30 days of the date request was made. If either party withholds any consent or approval, such party shall on written request deliver to the other party a written statement giving the reasons therefore.

17. HOLDING OVER. If Lessee fails to vacate the premises upon expiration or sooner termination of this Lease, Lessee shall be a month-to-month Lessee and subject to all the laws of the State of Colorado applicable to such tenancy. The rent to be paid by Lessee during such continued occupancy shall be the same being paid by Lessee as of the date of expiration or sooner termination. Nothing in this section shall be construed as relieving either party of its obligation to execute a new or extended lease agreement to cover future lease periods, as required by State of Colorado Fiscal Rules and the provisions of §24-30-202, C.R.S., as amended.

18. NO BENEFICIAL INTEREST. The signatories hereto aver that, to their knowledge, no state employee has a personal or beneficial interest whatsoever in the service or property described herein.

19. NO VIOLATION OF LAW. The signatories hereto aver that they are familiar with §18-8-101, et seq., C.R.S. (Bribery and Corrupt Influences) and §18-8-401, et seq., C.R.S. (Abuse of Public Office) and that no violation of such provisions is present.

20. LIABILITY EXPOSURE. The parties hereto understand and agree that liability for claims for injuries to persons or property arising out of the negligence of the State of Colorado, its departments, institutions, agencies, boards, officials, and employees is controlled and limited by the provisions of §24-10-101, et seq., C.R.S. and §24-30-1501, et seq., C.R.S. Any provision of this Lease, whether or not incorporated herein by reference, shall be controlled, limited and otherwise modified so as to limit any liability of the Lessor and the Lessee to the above cited laws.

21. ADDITIONAL PROVISIONS.

Contract Routing No.: _____ Agency I. D. Number (Lessor)
Contract Routing No.: _____ Agency I. D. Number (Lessee)

IN WITNESS WHEREOF, the parties hereto have executed this State of Colorado Interagency Lease Agreement on the day and year first above written.

LESSOR:

STATE OF COLORADO
Department of _____

By/for:_____
Executive Director

LESSEE:

STATE OF COLORADO
Department of

By/for
Executive Director

APPROVED:

STATE CONTROLLER'S OFFICE
Clifford Hall, State Controller

By/for: _____
State Controller or Designee

APPROVED:

DEPARTMENT OF PERSONNEL/GSS
STATE BUILDINGS AND REAL
ESTATE PROGRAMS

By/for:
Executive Director

Contract Routing No.: _____ Agency I. D. Number (Lessor)
Contract Routing No.: _____ Agency I. D. Number (Lessee)

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS

STANDARD
CONTRACT MODIFICATION DOCUMENTS
FOR
LEASE AGREEMENTS

INSTRUCTIONS:

1) The Amendment form may be used for changes to existing leases, whether or not the lease is up for renewal. If several changes to the lease, including extending the lease beyond its existing term are required, the Lease Amendment form is appropriately used for all of the changes on one form at the same time.

2) The Lease Extension form should be used any time the parties wish to extend an existing lease beyond its stated expiration date, with few, if any, other changes to its terms and conditions. The form of the lease does allow space for one or two simply stated changes, such as an increase in the monthly rent, in addition to extending the expiration date.

3) Each of these forms must be cleared through the entire approval process, as it would be a new lease.

Form 395-53-01-0032

Contract Routing No.: _____ Agency I. D. Number (Lessor)
Contract Routing No.: _____ Agency I. D. Number (Lessee)

STATE OF COLORADO
STATE BUILDINGS AND REAL ESTATE PROGRAMS
o CONTRACT MODIFICATION DOCUMENTS

TABLE OF CONTENTS PAGE(S)

o	**Amendment Lease** (Form 395-53-01-0040)	1 - 2
o	**Lease Extension Agreement** (Form AC-01-67)	1

Contract Routing No.: _____ Agency I. D. Number (Lessor)
Contract Routing No.: _____ Agency I. D. Number (Lessee)

_____ AMENDMENT TO LEASE

The printed portions of this form, except bold additions, have been reviewed
by the State of Colorado Attorney General and approved by the State Controller.
All additions to this form must be in bold type. All deletions must be shown by strike-through.

THIS _____ AMENDMENT TO LEASE made and entered into this ___ day of _____, 19__, for the purpose of amending that certain lease have Contract Routing No._____, and C.E. No**.** , (the "Lease") dated _____, 19__, by and between _____, as Lessor, and THE STATE OF COLORADO, acting by and through the DEPARTMENT OF _____, as Lessee, relating to the leasing of a portion of a building located at _____ (the "Building").

WHEREAS, as to Lessee, authority exists in the Law and Funds have been budgeted, appropriated and otherwise made available and a sufficient unencumbered balance thereof remains available for payment in Fund No. _____, G/L Account No. _____, (Organizational Unit Code ___, Appropriation Code ___, Function Code ___, and Program Code ___), Contract Encumbrance No**.** _____**.**

WHEREAS,

Except as modified by the provisions of this _____ Amendment to Lease, all other terms and conditions in the Lease are hereby ratified and confirmed and remain in full force and effect.

NOW, THEREFORE, Lessor and Lessee, in consideration of the mutual promises contained herein, hereto agree to amend the Lease as follows:

A copy of the Lease is attached hereto as "EXHIBIT ONE".

In accordance with the requirements of §24-30-202(1), C.R.S., as amended, this _____ Amendment to Lease shall not be deemed valid until it has been approved by the State Controller, or such assistant as he may designate.

Contract Routing No.: _____ Agency I. D. Number (Lessor)
Contract Routing No.: _____ Agency I. D. Number (Lessee)

IN WITNESS WHEREOF, the parties hereto have executed this _____ Amendment to Lease on the day and year first above written.

LESSOR:

(If Corporation)
(Attest Seal)

By:

Title:

By: _____
Secretary

Federal Tax Identification Number

APPROVED:

STATE OF COLORADO
DEPARTMENT OF PERSONNEL/GSS
STATE BUILDINGS AND REAL
ESTATE PROGRAMS

LESSEE:

STATE OF COLORADO
Roy Romer, Governor
Acting by and through the
DEPARTMENT of _____

By: _____
For the Executive Director

By/for:
Executive Director

APPROVED:

STATE OF COLORADO
Gale A. Norton, Attorney General

By/for: _____

APPROVED:

STATE OF COLORADO
STATE CONTROLLER'S OFFICE
Clifford Hall, State Controller

By/for

Form 395-53-01-0032

Contract Routing No.: _____ Agency I. D. Number (Lessor)
Contract Routing No.: _____ Agency I. D. Number (Lessee)

LEASE EXTENSION AGREEMENT

The printed portions of this form, except bold additions, have been reviewed
by the State of Colorado Attorney General and approved by the State Controller.
All additions to this form must be in bold type. All deletions must be shown by strike-through.

Re: Lease dated _____, Contract Routing No. _____, C.E. No. _____, between , as Lessor, and THE STATE OF COLORADO, acting by and through the DEPARTMENT OF _____, as Lessee, and relating to the lease of the Premises known as .

It is hereby mutually understood and agreed that the lease term of the aforesaid lease is hereby extended to , 19__.

All other provisions set forth in said lease shall remain the same except:

A copy of said lease is attached hereto as "EXHIBIT ONE".

Dated this _____ day of _____, 19__.

IN WITNESS WHEREOF, the parties hereto have executed this Lease Extension Agreement on the day and year first above written.

LESSOR:

(If Corporation)
(Attest Seal)

By:

Title:

By: _____
Secretary

Federal Tax Identification Number

APPROVED:

STATE OF COLORADO
DEPARTMENT OF PERSONNEL/GSS
STATE BUILDINGS AND REAL
ESTATE PROGRAMS

By: _____
For the Executive Director

APPROVED:

STATE OF COLORADO
Gale A. Norton, Attorney General

LESSEE:

STATE OF COLORADO
Roy Romer, Governor
Acting by and through the
DEPARTMENT OF _____

By/for:
Executive Director

APPROVED:

STATE OF COLORADO
STATE CONTROLLER'S OFFICE
Clifford Hall, State Controller

Form 395-53-01-0032

Contract Routing No.: _____ Agency I. D. Number (Lessor)
Contract Routing No.: _____ Agency I. D. Number (Lessee)

By: _____ By/for:

GRANT CONTRACT OFFER AND ACCEPTANCE POLICY

INSTRUCTIONS TO AGENCIES

These instructions and model provisions for "one-step" grant applications/awards apply to any grant application and award that adequately define the parties agreement, scope of work, time of performance, and payment provisions. Using these procedures and model provisions, the application (the "offer") and award (the "acceptance") legally merge into a single document, the "contract", without a need to write a separate document. Use of this procedure will satisfy statutory requirements that a commitment document be executed and approved by the Controller or his delegate prior to disbursement of funds.

1. Application must contain performance dates/contract term.

2. Award without amendment must conform to the terms of the "offer" (application). If specific amounts are referenced in the application or otherwise made known to the [sub]grantee, any change to the amount would be a counter offer. If agencies want to have the latitude to make unilateral awards without getting formal acceptance, something many grantees may not care about, include the "Designation or Adjustment of Award Amount" Clause.

3. In General Provisions attached to the application, include:

   a. Payment provisions;
   b. Financial Management and Audit provisions;
   c. Independent Contractor and Personnel clauses;
   d. Termination provisions;
   e. Modification provisions;
   f. Conflict of Interest provisions;
   g. Other program requirements, such as compliance with federal statutes, OMB Circulars, grant administration requirements, or other state or federal requirements; and
   h. Colorado Special Provisions.

   These clauses will be the bulk of what is already included in contracts now and they will be a part of the "offer" submitted as the application.

4. Include the clauses below in the application immediately before the applicant's signature because we want to highlight these particular clauses.

5. Complete any program-specific certifications and include them in the package. It is preferable to put the certifications immediately prior to the signature on the application.

6. After grant award, complete either the “award without amendments” or “amended award” clauses which requires written acceptance by the contractor. Include an Exhibit One to outline amendments such as deleted or changed language in the application.

NOTE: Normal external review must be obtained until a waiver is granted for these procedures.

ADD TO APPLICATION OF [SUB]GRANTEE

Designation or Adjustment of Award Amount

- ❑ The amount of the award is a material part of this application. The award of a [sub]grant in an amount higher or lower than that referenced in this application, or otherwise made known to me, shall be considered a counter offer requiring my acceptance.

- ❑ The determination of an award amount is not a material part of this offer and determination of a specific amount, or upward or downward adjustment of any tentative amount referenced in this application, or otherwise made known to me, shall not be considered a counter offer requiring my acceptance.

Payment and Limitation of Funds

1. Upon award of the grant, the state will pay to the contractor, in consideration for the work and services to be performed, an amount not to exceed the amount awarded. The method and time of payment shall be made in accordance with the [ ] clause of this contract. Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted and otherwise made available.

2. [IF APPLICABLE] Upon award, this contract is subject to and contingent upon the continuing availability of federal funds for the purposes hereof.

Assignment

The contractor may not assign their rights or duties under this contract without the prior written consent of the state.

Order of Precedence

Any inconsistency or conflict in this contract shall be resolved by giving precedence in the following order: (a) Colorado Special Provisions; (b) amendments or changes to the grant application; (c) general provisions governing grants [sub]grantee information package [compliance package] [etc.]; and (d) the application.

Severability

To the extent that this contract may be executed and performance of the obligations of the parties may be accomplished within the intent of the contract, the terms of this contract are severable and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof. The waiver of any breach of a term hereof shall not be construed as waiver of any other term.

<u>NOTICE TO APPLICANT:</u> Your submission of this application constitutes an offer, acceptance of which shall result in a binding contract effective upon acceptance of your application and award of the grant. In the event that the terms of the agreement are changed, your acceptance of the changed terms and signature of the "Acceptance" on the signature page shall likewise constitute a binding contract. The terms of the contract include the (general provisions governing the grant) (subgrantee/grantee information package) (compliance document) (etc.) Dated _____, your application, the Colorado Special Provisions dated _____, [ ], and any amendments or changes to the grant application accepted by you and incorporated by the "Acceptance" of Grant signed by you.

<u>Certification</u>

I certify the following:

1. I _____ am _____ am not debarred and suspended. . .
2.

I hereby submit this application and acknowledge that acceptance of this application and award to me, or amendment of the terms of the grant and my acceptance of those terms, constitutes a binding contract.

I swear under penalty of perjury that the foregoing certifications, representations, and statements are true, accurate, and complete to the best of my knowledge and belief.

_____

Contractor/[Sub]Grantee

AWARD WITHOUT AMENDMENTS

This Contract, made this ____ day of _____ 199__, by and between the State of Colorado for the use and benefit of the Department of _____

_____

hereinafter referred to as the State, and _____

_____

hereinafter referred to as the contractor or [sub]grantee,

WHEREAS, required approval, clearance and coordination has been accomplished from and with appropriate agencies; and

WHEREAS, authority exists in the law and funds have been budgeted, appropriated, and otherwise made available and a sufficient unencumbered balance thereof remains available for payment in Fund Number _____, Appropriation Code _____, Org. Number _____ _____, GBL Number _____, Contract Encumbrance Number _____;

Award is hereby made to _____*(grantee/[sub]grantee)*_____ in the amount of _____, for performance from ___*(date)*_____/the date of contract approval (strike inapplicable language) to ____*(date)*_____ in accordance with the application dated ___ _____, the (general provisions governing the grant) (subgrantee/grantee information package) (compliance document) (etc.) dated _____, [ ], all of which are hereby incorporated by reference.

STATE OF COLORADO

By _____

Executive Director
Department of _____

APPROVALS

CONTROLLER

By _____

Controller or Designee

AWARD WITH AMENDMENTS AND ACCEPTANCE BY CONTRACTOR/[SUB]GRANTEE

This Contract, made this _____ day of _____ 199__, by and between the State of Colorado for the use and benefit of the Department of _____

_____

hereinafter referred to as the State, and _____

_____

hereinafter referred to as the contractor or [sub]grantee,

WHEREAS, required approval, clearance and coordination has been accomplished from and with appropriate agencies; and

WHEREAS, authority exists in the law and funds have been budgeted, appropriated, and otherwise made available and a sufficient unencumbered balance thereof remains available for payment in Fund Number _____, Appropriation Code _____, Org. Number _____, GBL Number _____, Contract Encumbrance Number _____; Award is hereby made to _____*(grantee/[sub]grantee)*_____ in the amount of _____ _____, for performance from _*(date)*_____/the date of contract approval (strike inapplicable language) to ___*(date)*_____ in accordance with the application dated _____, the (general provisions governing the grant) (subgrantee/grantee information package) (compliance document) (etc.) dated _____, and the Colorado Special Provisions dated _____,[ ], all of which are hereby incorporated by reference, and if the parties initials appear hereon in the space provided (initials: _____) the amendments to the [sub]grant application, attached as Exhibit One.

STATE OF COLORADO

By _____
Executive Director

Department of _____

CONTRACTOR/[SUB]GRANTEE

_____
(Full Legal Name)

_____
(Position/Title)

APPROVALS
CONTROLLER
By _____
Controller or Designee

PURCHASE ORDER MODIFICATION POLICY

TO: Purchasing Agents at State Departments and Institutions of Higher Education

FROM: Clifford W. Hall
State Controller

Nanci Kadlecek
State Purchasing Director

DATE: June 24, 1996

SUBJECT: *Purchase Order Modifications/Incorporation of Vendor Contracts*

The purpose of this memorandum is to clarify the distinction between purchase orders, which do not require Attorney General and Controller approval under the Fiscal Rules, and State Contracts--which do (Fiscal Rule 4-1, page 3). This policy does not affect the use of the purchase order Form DP-01 for award of contracts after solicitations by competitive sealed bids or competitive negotiation.

General. Purchase orders issued on Form DP-01 (or other approved form purchase orders) may be accepted either by performance or acknowledgment. See Form DP-01 (reverse), paragraph 1. Any acknowledgment which contains additional or different terms or conditions to those on or attached to the DP-01 as issued by the purchasing agency constitutes a "counteroffer." Counteroffers are construed as a cancellation of the purchase order, but they may be accepted using a "change order" accepting the counteroffer. DP-01 (reverse), paragraph 1.

a. Such a change order should be issued using a DP-01 (or other approved purchase order), titled a "change order" and referencing the original purchase order, and bearing the annotation, "Pursuant to paragraph 1 on the reverse, the vendor's [counteroffer] [acknowledgment], as modified by the parties, is accepted. In the event of conflict or inconsistencies between the terms and conditions of the original purchase order, the [counteroffer] [acknowledgment], and this change order, such conflicts will be resolved by reference in the following priority to the following documents: this change order, including the terms and conditions on the reverse; the vendor's [counteroffer][acknowledgment], as modified; and the original purchase order.

b. The specific terms of the above "order of precedence" provision may be modified to identify the documents defining the transaction.

Permitted Changes to Terms and Conditions. In general, no changes may be made, or agreements reached, which change, modify, or add to the provisions on the reverse of the purchase order unless consistent with the following policies. Changes or agreements that are not consistent with this policy constitute "State Contracts" which must be approved in accordance with the Fiscal Rules.

a. Paragraph 1 (offer and acceptance) and paragraph 2 (Safety Information): No changes to the language are permitted. Agencies may, however, add program-specific safety requirements.

b. Paragraph 3 (Changes): No changes or additions to the language are permitted.

c. Paragraph 4 (Delivery): No changes to the language are permitted. Agencies may add language that clarifies times, methods, and other procedural aspects of delivery.

d. Paragraph 5 (New Products): Agencies may change or add to the language to meet program requirements.

e. Paragraph 6 (Quality): Agencies may change or add to the language to clarify contracting party expectations concerning quality requirements under the contract.

f. Paragraph 7 (Warranties): So long as the effect on their bargain is understood, agencies may agree to a disclaimer of implied warranties of fitness for particular purpose and merchantability in transactions in goods. §§ 4-2-314 to 316, CRS (1988). Agencies may write their own express warranty provisions. § 4-2-313, CRS (1988).

g. Paragraph 8 (Inspection): No changes to the language are permitted. Agencies, however, may add language to clarify the timing and procedural aspects of the inspection rights and corresponding payment. Agencies may also clarify the procedural aspects of remedies granted by the Uniform Commercial Code in transactions in goods, e.g. rejection, §§ 4-2-602 to 605, CRS (1988), and revocation of acceptance, § 4-2-608, CRS (1988).

h. Paragraph 9 (cash discount): Agencies may modify or add to the clause to define the cash discount terms.

i. Paragraph 10 (Taxes), Paragraph 11 (Prompt Payment); Paragraph 12 (Assignment); Paragraph 13 (Indemnification); Paragraph 14 (Independent Contractor): No changes or additions are authorized:

(1) Agencies may not agree to indemnify, hold harmless, or defend the contractor.

(2) Vendor language that can alter the purchase order indemnification clause can be "hidden" in provisions such as "limitation of liability" or "exclusion of consequential damages" provisions. See the policies below with respect to those and similar provisions.

(3) Absent clear and unequivocal language reflecting intent to agree otherwise, an indemnity provision will not be construed to include negligent conduct of indemnitee, e.g. state negligence. Public Service Co. v. United Cable Television of Jeffco, Inc., 816 P.2d 289 (Colo. App. 1991). Use this case to satisfy vendor concerns that they are being held responsible for negligence of the state or its employees.

j. Paragraph 15 (Communication): Agencies may add to the language to clarify the addresses, telephones, and other specifics concerning notice to the agency.

k. Paragraph 16 (Vendor Forms): No change is permitted, except for clarification as permitted in the second paragraph of this memorandum in order to issue the change order and define the "order of precedence" when terms are conflicting or inconsistent.

l. Paragraph 17 (Compliance with laws); Paragraph 18 (Americans with Disabilities Act Requirements); Paragraph 19 (Insurance); Paragraph 20 (Venue): No changes or additions are permitted.

m. Limitation of Liability/Remedies, and Exclusion of Consequential Damages:

(1) Agencies may not agree to exclusion of consequential damages, i.e. § 4-2-715(2), CRS (1988)(transactions in goods), unless those damages are defined as "excluding damages or claims arising out of bodily injury (including death) or damage to tangible property."

(2) Agencies may agree to limitation of remedies/liability provisions, i.e. § 4-2-719, CRS (1988)(transactions in goods), so long as those terms are defined as "excluding damages and claims arising out of bodily injury (including death) and damage to tangible property."

(3) The purpose of these limitations is to preserve the right of the state to hold the contractor liable for personal injury and damages to state property. Consistent with these limitations, though, agencies may agree to limit contract damages or remedies that are available to the state in the event of breach by the contractor of its contract obligations.

Approvals. Changes or additions to the terms and conditions on the reverse of purchase orders consistent with these policies must be approved by the head of a purchasing agency, a principal representative (construction), or the state purchasing director.

Conclusion. These policies do not eliminate the need to read and understand vendor forms and acknowledgments to purchase orders. Do not rely on "order of precedence" provisions to resolve patent conflicts or inconsistencies in the language. However, these policies do permit limited negotiation of purchase orders terms and conditions, and acceptance by "change order" of counteroffers, without the requirement to treat the agreement as a State Contract for purposes of Fiscal Rule 4-1. Legal advice should be sought whenever vendor provisions, or their effect upon the state purchase order, are not understood.
Attachment: Purchase Order (DP-01) Terms and Conditions

TASK ORDER - FUNDING LETTER POLICY

Policy for Processing Contract Modification Documents, Task Order Assignments and Funding Letters Included In Original Contract Provisions

State contracts may be modified by processing an amendment to the contract, a change order, or in the case of a professional services contract a supplement. Some state contracts contain provisions that allow an agency to order additional goods and /or services by using a "task order" or "funding letter". For purposes of this policy, a "change order" means a bilateral change order agreed to by the parties and issued consistent with State Buildings or state controller policy.

Contract amendments must be reviewed by the Attorney General's office and approved by the state controller or his designee. Change orders and supplements, which are additions to the existing contract, are not reviewed by the Attorney General's office but must be approved by the state controller or his designee. Task orders or funding letters, which are incorporated in the contract, are not reviewed by the Attorney General's office after the contract has been approved, however, they must be approved by the state controller or his designee.

Without a copy of the original contract and all previous amendments, the Attorney General's Office cannot perform a legal sufficiency review for a new amendment. Further, it is difficult for the State Controller's Office to determine the correct performance period and the dollar amount to be encumbered. Similarly, it is very difficult for the State Controller's Office to ensure that the task order or funding letter is being used according to the terms of the contract unless a copy of the contract is attached to the task order or funding letter. However, we understand that it is time consuming and costly for an agency to copy the contract for every task order and funding letter forwarded to the State Controller's Office for approval. Therefore, the following policy shall apply:

- All amendments to contracts are to be forwarded for review and approval with a copy of the original contract and all previously approved amendments attached.

- Capital construction change orders, and supplements to professional contracts do not require copies of the original contract or other modifications to be attached for processing and approval.

- All non-capital construction change orders, task orders or funding letters must be forwarded with a copy of the original contract attached **or** a letter from the program manager that identifies the original contract by agency and routing number and includes a statement that the change order, task order or funding letter is being used in accordance with the contract.

CONTRACT MODIFICATION POLICY

TO: Controllers and Chief Financial Officers of State Departments and Higher Education Institutions

FROM: Clifford W. Hall
State Controller

DATE: January 8, 1997

SUBJECT: *Contract Modifications, Changes, Amendments, and Approval Routing*

The purpose of this memorandum is to clarify circumstances under which I will approve contracts that contain modification provisions, i.e. change orders, that do not require review by the Attorney General in accordance with Fiscal Rule 3-1, page 7. All of the letters used to exercise options, order changes, etc. require state controller approval unless approval authority has been delegated.

Change order/modification policies for construction, controlled maintenance, and architect/engineer contracts written by the Department of Transportation (CDOT) or within the jurisdiction of the State Buildings Programs (SBP), Department of Personnel, are governed by separate policies approved by this office.

General. No disbursements may be made unless a commitment document has been approved by the controller or his designee and filed in the division of accounts and control. § 24-30-202(1) and (2), CRS (1988 and 1996 Supp.). Fiscal Rule 3-1 defines State Contract as a formal, legally binding agreement between two state agencies or one state agency and another party or an amendment to such agreement which ultimately results in the disbursement of funds. State Contracts and amendments to State Contracts (except for Interagency Agreements) require legal review by the Office of the Attorney General, as well as approval by the state controller. The general rule is that any modification to a contract that changes the scope of work or specifications, price or cost, time of performance, or other terms and conditions is an amendment requiring Attorney General review. This memorandum defines the scope of permissible modification provisions in State Contracts that may be approved by this office, use of which will not constitute "amendments" under the Fiscal Rules and will not require legal review by the Office of the Attorney General. Additionally, I will consider requests for delegation of State Controller authority to approve the option exercise, change order, task order, or other letters that are used consistent with this policy. The following subsections describe various types of contract modifications and how they may be used under this policy. The term "amendment," as used in this memorandum, refers to a contract modification requiring legal review by the Attorney General.

Options. A right in a State Contract granted the agency to continue or elect additional contract performance at a specified price or cost ceiling, exercisable during a specific period of time during contract performance, with no change to contract specifications/scope of performance and terms and conditions, is an option. The exercise of options in State Contracts consistent with this policy are not treated as amendments. Options may be exercised through the written procedure and form identified in the State Contract and previously reviewed by the Attorney General. Option exercises may not include changes in contract specifications, scope of performance, and other terms and conditions. The contract must contain a sample of the written

option exercise instrument as an attachment or exhibit, and that letter or memorandum must bear the signature block of the authorized agency official and the Controller or his designee. Modifications that purport to exercise options and simultaneously change contract terms or scope of work must be processed as amendments and receive legal review. (Model Option Provisions at Attachment A)

Change Orders. State Contracts may contain a provision allowing the State to unilaterally make "changes" to the specifications or scope/statement of work in exchange for an adjustment of price. However, unilateral or bilateral changes may only be made by contract amendment unless the conditions of this memorandum are satisfied. State Contract provisions permitting the issuance of a bilateral change order letter instead of an amendment, without the necessity of Attorney General review (and state controller approval, if delegated), are permitted under the following circumstances:

1. Changes are permitted only to specifications or scope/statement of work. Changes to terms and conditions, such as warranty, indemnification, payment and contract type, liability limitations, indemnifications, and other provisions defining the basic contractual relationship between the parties are not permitted using bilateral change order letters.

2. Unless changes will result in "no cost" to the State, as reflected on the change order, the State Contract must define the unit prices to be paid for the goods or services, incorporated by an exhibit or attachment, such as the incorporation by reference of an offeror's proposal holding unit prices firm for a specified period of time. Alternatively, change order pricing may be based on established catalog prices generally extended to the public or prices set by law or regulation (e.g. utilities rates). The contract must adequately define this pricing methodology.

3. Change orders may not be used to settle disputes, such as those arising out of claims of delay or State changes to contract requirements. Such settlements must be processed by contract amendment, contain a suitable release, and be reviewed by the office of the Attorney General.

4. Change orders may only be used for work that is "in scope"--changes to specifications and scope/statements of work that are in the general scope of the contract, i.e. reasonably anticipated by offerors who may have participated in the competition or objectively within the scope of any sole source approval.

5. The State Contract must define this change order procedure and include as an exhibit/attachment the written instrument used to issue the change order. The model written instrument must bear the signature block of the authorized agency official, the contractor, and the state controller or his designee. The change order letter shall refer to the basic contract by date, parties, and routing number and include a detailed description of the changes to the contract, the price or cost ceiling adjustment, the effective date, and (where applicable) the time within which the changed work must be done. The letters must be cumulatively numbered, indicating the number of previous such modifications to the contract.

6. Change orders may not be used to modify the contract term of performance.

7. Change orders that change the specifications or scope/statement of work in a personal services contract must be approved by the Department of Personnel.

(Model Change Order Provisions at Attachment B)

Task Order Contracts. A task order contract is a master contract negotiated by an agency that sets unit prices and rates for supplies, materials, and services for tasks that are later ordered under the contract as-needed. An order placed consistent with the task order provisions is not an amendment. To be approved, task order contracts must, as a minimum, contain:

1 Fixed, negotiated rates, e.g. for labor hours, materials, supplies, indirect cost rates, overhead or "mark-up", and profit, or reference to publicly available catalog prices or prices set by law or regulation, for negotiating the price of the task;

2. A procedure that requires the contractor to submit a task proposal that details estimates of time, material, costs, etc., and a technical/cost evaluation of that task proposal by the agency prior to executing the task order;

3. Attachment of a model ordering document as an exhibit that bears the signature block of both parties, the price or cost ceiling for the work, a time for performance, a detailed description of the work or contract performance, and the signature block of the Controller or his designee;

4. Contractual description of the task order process, as well as a representation in the task order clause that, "[u]pon negotiation and acceptance of the task order, the contractor warrants that performance will be successfully completed within the time and price/cost identified in the task order."

5. A "not-to-exceed" amount for tasks ordered pursuant to the contract.

6. Cumulatively numbered documents, indicating the number of previous tasks ordered under the contract.

Adjustments to the "not-to-exceed" amount, if necessary, will be accomplished by contract amendment. (Model Task Order Provisions at Attachment C)

Funding Letters in Indefinite Delivery Contracts. An indefinite delivery contract provides for an indefinite quantity of specific supplies or services to be furnished during a fixed period, with deliveries to be scheduled by placing orders with the contractor.

a. To insure that the contract is binding, a "minimum quantity" greater than a nominal amount is specified, not exceeding the amount the agency is fairly certain to order. The contract may specify maximum or minimum quantities that the government may place in subsequent orders. A "requirements contract" provides for filling all actual purchase requirements of the agency of specific supplies or services during a specified contract period, with deliveries to be scheduled by placing orders with the contractor. The unit prices, statement/scope of work, and times for performance in both "minimum quantities" and "requirements" contracts are specified in the contract. The minimum encumbrance amount is either the minimum quantity (in minimum quantity contracts) or the estimated quantity (in requirements contracts) for the fiscal year. Procurement Rule R-24-106-101-04(b) says that as a minimum, the solicitation and contract should include:

(1) the minimum quantity, if any, the purchasing agency is obligated to order and the contractor to provide;

(2) whether there is an approximate quantity the purchasing agency expects to order and how this quantity relates to the minimum and maximum quantities that may be ordered under the contract;

(3) whether there is a maximum quantity the purchasing agency may order and the contractor must provide; and

(4) whether the purchasing agency is obligated to order its actual requirements under the contract, with exception for a stated quantity, which if exceeded, separate bids may be solicited.

b. All State Contracts must have a maximum contract amount that can readily be determined. Fiscal Rule 3-1, page 4. Indefinite quantity contracts give agencies the flexibility to write contracts in which the contractor is obligated to perform above the minimum specified amount (estimated quantity contracts) or where the actual requirement exceeds the previous, reasonable estimates (requirements contracts). Consequently, the basic contract must specify the amount of available funds, which may initially be less than the final value of the contact as requirements are identified and satisfied. The contract must also notify contractors that the state's obligation under the contract is limited to the amount of funds identified in the contract. Letters which notify the contractor of adjustments in the level of funding in these types of contracts need not be processed as amendments.

c. Such funding letters must reference the contract and the applicable paragraph, clearly notify the contractor of the amount available for funding, and bear the signature of the agency and the State Controller or his designee. Other than funding adjustments, the letter may not change estimates, minimum or maximum quantities, line item prices, or other terms and conditions of the contract. The letters must be cumulatively numbered, indicating the number of previous such modifications to the contract. A sample of the funding letter with signature blocks for the agency and the Controller or his designee must be attached to the contract.

(Model Indefinite Quantity/Funding Letter Provisions at Attachment D)

Grant and Subgrant Contracts. The change order letter procedure and model letter included at Attachment E may be used in State Contracts with political subdivisions and private entities who are eligible recipients of an agency's grant, subgrant, or similar program funds. That procedure is acceptable in program services contracts for health or social welfare benefits where: the volume of services being performed are directly proportional to the level of funding, e.g. "purchased services" contracts; modifications to the services are easily expressed in levels of services for eligible recipients; and contract administration is substantially accomplished through approval and monitoring of an approved budget by the contractor. The change order letter procedure at Attachment E is suitable only for contracts with political subdivisions of the State or nonprofit, public service delivery organizations; contracts that contemplate commercial services such as software programming support, consulting, or other commercial services are not appropriate for use of Attachment E. Agencies may, however, use the other modification provisions in this letter for commercial transactions to the extent that those policies are followed.

To the extent that contracts are within the scope of permissible use of this modified change order letter procedure, agencies may also modify their renewal letters to reflect modification of level of services and budgets for ensuing fiscal years. All such change order letter and renewal procedures will include substantially the language in Attacahment E and will include a model change order or renewal letter as an exhibit to the contract that refers to the basic contract and specifies the effective date, funding change,

nature of any adjustment or modification of services, and amendments to the contractor's budget, if applicable. The change order/renewal notification shall bear the signature of both parties and the Controller or his designee.

(Model Grant/Subgrant Change Order Provisions at Attachment E)

Controller Authority. The policies in this memorandum only define permissible procedures in State Contracts for later modifying the contract without the necessity of legal review of an "amendment" by the Office of the Attorney General, or approval by the State Controller where authority has been delegated. All modifications described in this memorandum--except no-cost change orders described above--require approval by the Controller or his designee on the face of the document that exercises the option or renewal, orders the change, orders the work under a task order contract, or adjusts available funding in indefinite delivery contracts. All State Contract provisions and clauses that establish these streamlined modification procedures will include the following clause:

> The [change order][option exercise] [renewal] [task order] [funding] letter shall not be valid until approved by the state controller or such assistant as he may designate.

Model Provisions. Model provisions for each of these modification methods are attached.

These policies do not change requirements for approval by other central approving agencies, other than the Office of the Attorney General, and the State Controller where authority has been delegated to agency fiscal officer to approve the letters described in this policy. The modification provisions described in this memorandum have two things in common: they are all defined in the basic contract and reviewed by the Attorney General; and they all either involve no change to contract price/cost, or the pricing is based on previously agreed rates and prices that are incorporated in the basic contract.

Attachments

A. Options Clauses/Exercise Letters
B. Bilateral Change Order Clauses/Letters
C. Task Order Clause/Ordering Letters
D. Indefinite Quantity Clauses/Funding Letters
E. Grant/Subgrant Change Order Letters

OPTION CLAUSES AND OPTION EXERCISE LETTERS

General Comments

Multiyear procurements may be contracted for in several ways. A contract for one year with the option to "renew" or "extend" has the effect of renewing or extending contract performance beyond the original contract performance period, but it requires an affirmative act by the state to exercise the option and bind the contractor to performance in future years or option periods. If the state fails to follow the contract procedure for exercising the option, the state loses the right to require performance beyond the original contract term.

By contrast, a multiyear contract can be written that obligates the state to pay for contract performance, subject only to availability of funds, over consecutive fiscal years. So long as the legislature appropriates the money, the state is obligated to pay the contractor for continued performance. Theoretically, this kind of a multiyear contract does not require an option provision. However, by agreeing to multiyear contracts, which typically do not include termination for convenience provisions, the state forfeits an important right: the right to make a discretionary decision about whether to permit the contractor to continue performance for an additional period of time. The choice between an "extendable" or "renewable" contract, versus a multiyear contract subject only to appropriation of funds, must be carefully considered. For example, what is the state getting in return for waiving its rights to discontinue performance regardless of funding availability? If you choose a multiyear contract, because the state is getting something of value in return, or there is no other commercially feasible way to structure the contract, normally an annual option exercise letter would not be necessary.

These model provisions are written as "options," preserving the right of the state to decide whether to continue performance by a contractor. Further, these options can be written to permit, not only more performance time, but also more services or supplies. So long as these options are written to comply with the controller's memorandum, these letters do not have to be reviewed by the Attorney General, although they still require approval by the Controller or his designee.

Here are two model option provisions:

Paragraph # - Option for Increased Quantity

The state may increase the quantity of supplies [services] called for in [paragraph __] [the schedule] [Exhibit ___] at the unit price specified therein. The state may exercise the option by written notice to the contractor deposited in the mail [within ____ days of execution of the contract] [not later than 90 days prior to the expiration of the contract, including any of its extension terms,] using a form substantially equivalent to Exhibit ___. [Delivery] [performance] of the added [items] [services] shall continue at the same rate and under the same terms as the like items called for under the contract. Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

Paragraph # - Option to Extend Services

The state may require continued performance for a period of [one year] of any services within the limits and at the rates specified in the contract. The state may exercise the option by written notice to the contractor deposited in the mail before the end of the performance period of the contract using a form substantially equivalent to Exhibit ___. [The state shall give the contractor ____ days preliminary written notice of its intent to execute the option. Preliminary notice does not commit the state to an extension.] If the state exercises this option, the extended contract shall be considered to include this option provision. The total duration of this contract, including the exercise of any options under this clause, shall not exceed five (5) years. Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

SAMPLE OPTION EXERCISE LETTER

Exhibit _____

Date: _____

TO: [Contractor]
[Address]

SUBJ: Option Exercise Letter

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the state hereby exercises the option for

[maintenance services for three additional 486 CPUs at the prices specified in Exhibit ___.]; or

[an additional one year's performance period at the (cost) (price) specified in paragraph ___.]

The maximum amount payable by the State in Paragraph ___ is (increased/decreased) by ($ amount of change) to a new total of ($_____). The first sentence in Paragraph ___ is hereby modified accordingly.

State of Colorado:
Roy Romer, Governor

For the Executive Director
Colorado Department of _____

_____
Title

APPROVALS:

By: _____
For _____ Division

FOR THE STATE CONTROLLER
Clifford W. Hall

By: _____
State Controller or Designee

Attachment A

Page 3

CHANGE ORDER CLAUSES AND LETTER

General Comments

Without a "changes" clause, the right of the state to direct changes in statement/scope of work or specifications is dependent on the willingness of the contractor to agree to amend the contract. These "changes" clauses give the state a limited right to direct changes to the contract that are "within the scope of the contract." Of course, the contractor would be entitled to a price adjustment is such a change is ordered. Because the state would be committing to a payment of money by exercising this right, use of a unilateral change would require review by the Attorney General and approval by the Controller.

These sample provisions give the state the right to direct changes, and also sets up an informal "bilateral" (meaning both parties agree and sign the letter) change procedure that does not have to be treated as a formal contract amendment. So long as the bilateral change satisfies the requirements in the Controller's policy, these letters do not have to be reviewed by the Attorney General. One key restriction, one that may limit the use of this modification procedure in many commercial contracts, is a requirement that the changes be pre-priced.

Here are examples of changes clauses:

Paragraph # - Changes Clause (Procurement Rule R-24-106-102-02).

(a) **Changes Clause in Fixed-Price Contracts.** In fixed-price contracts, the following clause may be inserted:

(i) **Change Order.** By a written order, at any time, and without notice to any surety, the procurement officer may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

(A) [drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the purchasing agency in accordance therewith] [description of services to be performed];

(B) method of shipment or packing [time of performance of services]; or

(C) place of delivery or performance of services.

(ii) **Adjustments of Price or Time or Performance.** If any such change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this Contract. [Procurement Rule R-24-106-101-05]

Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the purchasing agency promptly and duly makes such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of the time for completion.

(iii) **Time Period for Claim.** Within 30 days after receipt of a written change order under the Change Order paragraph of this clause, unless such period is extended by the procurement officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment.

(iv) **Claim Barred After Final Payment.** No claim by the contractor for an adjustment hereunder shall be allowed if asserted after final payment under this contract.

Paragraph # - Bilateral Change Order Letters

Bilateral changes within the general scope of the contract, as defined in paragraph ___ above, may be executed using the simplified change order letter process described in this paragraph and the model letter attached as exhibit _____ for any of the following reasons:

a. Where the agreed changes result in no adjustment to the [price] [ceiling cost], delivery schedule, or other terms and conditions of the contract. The change letter will contain a mutual release of claims for adjustment of price, cost, time for performance, or other terms and conditions, whether based on costs of changed work or direct or indirect impacts on unchanged work, as a result of the change; or

b. Where the changes to the contract are priced based on the unit prices to be paid for the goods or services in [Exhibit ___] [Attachment ___] of the contract; or

c. Where the changes to the contract are priced based on established catalog prices generally extended to the public.

The written change letter will be substantially in the form at Exhibit ____, must bear the signature of the authorized agency official, the contractor, and--except where the parties agree on the face of the change order that no price/cost, schedule, or other contract adjustments are due the contractor--the state controller or his designee. The change order letter shall refer to the basic contract and include a detailed description of the changes to the contract, the price or cost ceiling adjustment, the effective date, and (where applicable) the time within which the changed work must be done.

Other bilateral modifications to this contract not within the scope of this paragraph must be executed by formal amendment to the contract, approved in accordance with state law.

SAMPLE BILATERAL CHANGE ORDER LETTER

Exhibit _____

Date: _____

State Fiscal Year 1997-98

Bilateral Change Order Letter No. _____

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the undersigned agree that the supplies/services affected by this change letter are modified as follows:

Services/Supplies

Exhibit A, Schedule of Equipment for Maintenance, is amended by adding two (2) 486 Central Processing Units, serial numbers _____ and _____.

Price/Cost

The maximum amount payable by the State for _____[service] [supply]_____ in Paragraph _____ is (increased/decreased) by ($ amount of change) to a new total of ($_____), based on the unit pricing schedule at Exhibit ____. The first sentence in Paragraph ____ is hereby modified accordingly;

OR

The parties agree that the changes made herein are "no cost" changes and shall not be the basis for claims for adjustment to [price] [cost ceiling], delivery schedule, or other terms or conditions of the contract. The parties waive and release each other from any claims or demands for adjustment to the contract, including but not limited to price, cost, and schedule, whether based on costs of changed work or direct or indirect impacts on unchanged work. Controller approval of this "no cost" change is not required. ____ Contractor initials. ____ Agency initials.

This change to the contract is intended to be effective as of _____, but, except with respect to "no cost" changes identified above, in no event shall it be deemed valid until it shall have been approved by the state controller or such assistant as he may designate.

Please sign, date, and return all copies of this letter on or before _____ 19____.

Contractor Name: State of Colorado:
Roy Romer, Governor

Attachment B Page 3

By: _____
Name _____
Title _____

By: _____
For the Executive Director
Colorado Department of _____

APPROVALS:

FOR THE STATE CONTROLLER
Clifford W. Hall

By: _____
For _____ Division

By: _____
State Controller or Designee

TASK ORDER CLAUSES AND ORDERING LETTER

General Comments

Task order contracts let parties agree to the basic terms and conditions of the contract, including the pricing methodology and rates to be used in pricing later tasks. Then, as the specific tasks are identified, the parties negotiate the basic task scope and price. These kinds of contracts are useful when the specific work has not been defined, but a requirement is certain, and the parties are trying to avoid time consuming contract negotiation every time a task is identified.

The Controller's policy allows use of these contracts and execution of specific task orders (without Attorney General review) under certain circumstances. Most notably, the basic pricing rates must be identified in the original contract. Even if your contract cannot satisfy that requirement, though, these contracts can be useful tools in managing complex contracts with changing requirements. If the Controller's policies cannot be satisfied though, tasks would have to be issued using normal amendment procedures.

The following are essential provisions in task order contracts which would not require treatment as an amendment each time a task was issued by the agency:

Paragraph # - Task Orders

Tasks will be defined, negotiated, and ordered from time to time by agreement of the parties based on the rates in Appendix ___, such task orders hereinafter to as "orders". Amendments to terms and conditions, the ceiling amounts specified herein for task orders, or other provisions of the contract other than as specified in this paragraph shall be by formal amendment processed and executed in compliance with the Fiscal Rules and signed by the state controller or his designee. Orders processed in accordance with this paragraph to add work shall occur as follows:

a. If the state has need of services, and the contractor agrees to provide those services, the state will provide a definition of the requirement to the contractor. The contractor will propose a [price] [cost ceiling] for the task using the rates agreed to and attached as Appendix ___ [attachment ___ to the contractor's proposal]. The proposal shall include the estimated number of hours, material costs, and amount of other elements of cost priced by the parties in the rates attached as Appendix ____, as well as the proposed time for performance, in a form acceptable to the state.

b. Upon negotiation and agreement by the parties about the scope of the task, the [price] [cost ceiling], and the time for performance, the task order letter attached as Appendix ____ shall be prepared and signed by the parties.

c. Performance of the work, and payment for that work, shall be governed by the standards and procedures set forth in this contract. Upon negotiation and acceptance of the task order, the contractor warrants that performance will be successfully completed within the time and [price] [cost ceiling] identified in the task order. The state's financial commitment memorialized by the task order letter shall not be effective until signed by the Controller or such assistant as he may designate.

d. The cumulative "not to exceed" amount for all additive tasks under this paragraph shall be $50,000. The state's financial obligation is limited by this amount, and the contractor shall accept no orders which result in a cumulative contract value which exceeds the "not to exceed" value. Amendments to the "not to exceed" amount, and any other modification or amendment to the terms and conditions of this contract other than as specified in this paragraph, must be in writing, executed in accordance with the State Fiscal Rules, and be approved by the Controller or his designee.

SAMPLE TASK ORDER LETTER

Exhibit _____

Date: _____

State Fiscal Year 1997-98

Task Order Letter No. _____

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the undersigned agree that the supplies/services affected by this change letter are modified as follows:

Task Order Description

The contractor shall perform the _____ task in accordance with [the following specifications/statement of work] [the contractor's task order proposal dated _____, as amended by amended task order proposal dated _____, both of which are hereby incorporated by reference].

Price/Cost

The [price] [maximum amount payable by the State] for _____[service] [supply]_____ described above _____ is ($ _____) for a new contract total of ($_____).

Performance Period.

The contractor will complete the performance in this task order by _____ [date].

This task order is executed pursuant to paragraph ____ of the original contract. The parties agree that all work shall be performed according to the standards and terms set forth in the original contract. In the event of any conflict or inconsistency between this amendment and the original contract, such conflict, inconsistency shall be resolved by reference to these documents in the following order: Special Provisions, original contract, attachments/exhibits to the original contract, this task order letter, attachments/exhibits to this task order letter.

This task order is effective as of _____. In no event shall it be deemed valid until it shall have been approved by the state controller or such assistant as he may designate.

Please sign, date, and return all copies of this letter on or before _____ 19____.

Attachment C Page 3

Contractor Name: _____

By: _____
Name _____
Title _____

State of Colorado:
Roy Romer, Governor

By: _____
For the Executive Director
Colorado Department of _____

APPROVALS:

By: _____
For _____ Division

FOR THE STATE CONTROLLER
Clifford W. Hall

By: _____
State Controller or Designee

INDEFINITE QUANTITY CONTRACT CLAUSES/FUNDING LETTER

Comments

Many of these modification concepts are related. Indefinite Quantity and Requirements contracts are two types of a broad category of contracts known as "indefinite delivery" contracts. These kinds of contracts obligate the contractor to satisfy contract requirements that are not clear in terms of how much is needed.

The "requirements contract" defines the obligation in terms of all requirements for a service or supply that the state may have. In this agreement, the consideration for the contractor's promise to satisfy all state requirements is the state's promise--not only to pay at specified rates--but also the state's promise to place all of its orders to satisfy a requirement through this particular contractor. An example would be a state contract with XYZ Computer Maintenance, Inc. to order all department requirements for computer maintenance through XYZ at maintenance prices/rates set in the contract. The state would usually get better prices in this kind of contact. The "downside" is: the state would breach the contract if the department contracted with another vendor for these services during the life of the contract.

The other kind of indefinite delivery contract, and the kind that the model provisions are based on, is the "indefinite quantity" contract. This gives the department or agency flexibility to change the amount of services at a specified price or rate, without promising to satisfy all of its requirements through one vendor. In this kind of a contract, in order to make it binding on the contractor, a commercially reasonable (not nominal), minimum order is specified in the contract. Usually the contractor also has a ceiling amount that represents the maximum order. Often, the contract also contains ordering limits, such as a minimum order or maximum order that could be placed at any one time. In this kind of contract, the state has no obligation to order any quantities in excess of the minimum. In the computer maintenance example, the contract might order a minimum of 30 service calls in a fiscal year, with a maximum order available of 100 service calls, at $50.00 per call. The contract also might provide that the contractor would not be required to honor more than 5 calls in any single day.

Sample indefinite quantity clauses follow. The purpose of the funding letter is to notify the contractor how much funding has been made available to satisfy orders within the minimum and maximum quantities specified in the contract. In the computer maintenance example, at the time of execution $1,500 would be encumbered initially to cover the minimum quantity. Periodically during performance, more money would be encumbered to cover estimated orders.

Paragraph # - Indefinite Quantity Contract.

This is an indefinite quantity contract for the [services] [supplies] specified herein. Any estimates of quantities of supplies or services in the solicitation or otherwise made known to the contractor are estimates only and not purchased by this contract. The state will order, and the contractor agrees to perform, services [for maintenance of ____ personal computers during the contract period] [for the minimum quantity specified in the solicitation]. The per unit price for maintenance services is [$_____ per machine per visit] [specified in Exhibit ____] plus the cost of materials, not exceeding $_____ unless otherwise approved in advance by the state. The state has the right, through the representative designated in paragraph ____ of this contract, to order service for additional machines at [the same rate] [rate specified in Exhibit ___], up to a maximum quantity of ____ service calls, in accordance with the ordering provisions of this contract during its period of performance. [The contractor is not obligated to honor maintenance services orders in increments of less than ____ machines per order, greater than _____ machines per order, or a combination of orders within _____ days that exceeds _____ machines.] All orders are subject to the terms of this contract.

Funds are available and encumbered in the amount of _____. The contractor shall not accept any orders which create a financial obligation of the state exceeding the amount of available funds specified herein. [Additionally, the contractor shall notify the representative when state commitments, paid and unpaid, are within 10% of the amount of funds available.] The state is not liable beyond the amount of funds specified as available in this paragraph.

The state may from time to time, in a form substantially equivalent to that in Exhibit _____, and bearing the approval of the state controller or his designee, make more funds available on this contract. The funds availability letter shall not be deemed valid until it shall have been approved by the state controller or such assistant as he may designate.

INDEFINITE QUANTITY CONTRACT FUNDING LETTER

Exhibit _____

Date: _____

TO: [Contractor]

SUBJ: Indefinite Quantity Funding Letter No. _____

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the undersigned commits the following funds to the contract:

The amount of funds available and specified in paragraph ____ is (increased/decreased) by ($ amount of change) to a new total funds available of ($_____) to satisfy orders under the contract. Paragraph ____ is hereby modified accordingly.

This funding letter does not constitute an order for services under this contract.

This funding letter is effective upon approval by the state controller or such assistant as he may designate.

State of Colorado:
Roy Romer, Governor

By: _____
For the Executive Director
Department of _____

APPROVALS:

By: _____
For _____ Division

FOR THE STATE CONTROLLER
Clifford W. Hall

By: _____
State Controller or Designee

GRANT/SUBGRANT CHANGE ORDER CLAUSE AND LETTER

Comments. This clause/change order letter procedure has been in use since 1993 for grant/subgrant contracts (e.g. programs with health or social welfare benefit contracts) with political subdivisions and nonprofit organizations. The 1993 edition of the Contract Procedures Manual described the development of the clause. The clause was approved for use to alleviate the problems of programs who historically used "blanket encumbrances," a waiver to the individual encumbrance rule that was sometimes granted to programs having multiple contracts where factors not under the parties' control made it impossible to estimate the encumbrance for each contract. Because blanket encumbrances were sometimes misused and prejudiced the ability of the State to keep track of its ongoing expenditures, these change order clause/letter provisions were developed to enable the program to encumber the maximum State liability but use a simplified amendment procedure/format (a "change order letter") to adjust the contract amounts up and down. Note that service modifications are permitted in these change orders and, unlike other change order letters described in this State Controller policy, do not have to based on agreed unit prices incorporated in the basic contract. Use of these clauses through is restricted to grant-type programs with nonprofit organizations and political subdivision; these provisions are not appropriate for personal services or supply contracts.

Paragraph # - Change Order Letter.

The State may prospectively increase or decrease the amount payable under this Contract through a "Change Order Letter," approved by the state controller or his designee, in the form attached hereto as Exhibit __, subject to the following conditions:

a. The Change Order Letter ("Letter") shall include the following:

(1) Identification of contract by contract number and affected paragraph number(s);

(2) Types of services or programs increased or decreased and the new level of each service or program;

(3) Amount of the increase or decrease in the level of funding for each service or program and the total;

(4) Intended effective date of the funding change;

(5) A provision stating that the Change shall not be valid until approved by the state controller or such assistant as he may designate;

b. Upon proper execution and approval, such letter shall become an amendment to this Contract and, except for the General and Special Provisions of the Contract, the letter shall supersede the Contract in the event of a conflict between the two. It is understood and agreed that the letter may be used only for increased or decreased funding, and corresponding adjustments to service levels and any budget line items.

c. If the Contractor agrees to and accepts the change, the Contractor shall execute and return the letter to the State by the date indicated in the letter. In the event the Contractor does not accept the change, or fails to timely return the executed letter, the State may, upon notice to Contractor, terminate this Contract effective at any time after twenty (20) days following the return deadline specified in the letter. Such notice shall specify the effective date of termination. In the event of termination, the parties shall not be relieved of their obligations up to the effective date of termination.

d. Increases or decreases in the level of contractual funding made through the letter process during the term of this contract may be made under the following circumstances:

(1) If necessary to fully utilize Colorado State appropriations and/or non-appropriated federal grant awards.

(2) Adjustments to reflect current year expenditures.

(3) Supplemental appropriations or non-appropriated federal funding changes resulting in an increase or decrease in the amounts originally budgeted and available for the purposes of this program.

(4) Closure of programs and/or termination of related contracts.

(5) Delay or difficulty in implementing new programs or services.

(6) Other special circumstances as deemed appropriate by the State.

SAMPLE CHANGE ORDER LETTER IN GRANT/SUBGRANT CONTRACTS

Exhibit _____

Date: _____

State Fiscal Year 1997-98

Change Order Letter No. _____

In accordance with Paragraph _____ of contract routing number _____, FAA ADA _____, between the State of Colorado Department of _____ (_____ Division) and

[Contractor]

covering the period of July 1, 1997 through June 30, 1998 the undersigned agree that the maximum amount payable by the State for non-medicaid eligible services in Paragraph 24 is (increased/decreased) by ($ amount of change) to a new total of ($_____). The first sentence in Paragraph 24 is hereby modified accordingly.

The services affected by this (increased/decreased) are modified as follows:

The Budget is revised accordingly, as set forth in the Revised Budget, Attachment E (1,2,3), attached and incorporated herein by reference.

This amendment to the contract is intended to be effective as of _____, but in no event shall it be deemed valid until it shall have been approved by the state controller or such assistant as he may designate.

Please sign, date, and return all copies of this letter on or before _____ 19____.

Contractor Name:	State of Colorado: Roy Romer, Governor
By: _____ Name _____ Title _____	By: _____ For the Executive Director Colorado Department of _____
APPROVALS:	FOR THE STATE CONTROLLER Clifford W. Hall
By: _____ For _____ Division	By: _____ State Controller or Designee

Attachment E Page 3

SPECIAL PROVISIONS POLICY

State Fiscal Rule 3-1 requires all state contracts to contain Special Provisions as set forth in Appendix A of that rule. As you recall, state agencies may purchase these forms from Juniper Valley. Several state agencies have inquired whether the language of the Special Provisions can be keyed into a word processor for subsequent incorporation into state contracts. Yes, this may be accomplished however, you must be extremely careful to ensure that the exact language is correctly keyed, including comma's, periods, etc. No changes of any kind are authorized. For ease of review, the format of the Special Provisions must be as similar as possible to Appendix A. Also, the Special Provisions must continue to be the final pages of the contract.

In addition, if an agency is delegated to sign a contract on behalf of the state controller, the agency may change the signature block portion of the Special Provisions to coincide with the requirements of their delegation letter. Please refer to your delegation letter and the signature block you are required to use when signing on behalf of the state controller. Also, is a state agency has contracts where the legal review by the Attorney General has been waived by the state controller, the state agency may remove the Attorney General signature block and insert a signature block for the state agency pre-approved form contract reviewer.

ADVANCE PAYMENT POLICY

1. It is the policy of the state controller that the state shall not make advance payments. Vendors of the state are expected to have adequate resources or working capital in order to provide goods and/or services to the state. An advance payment requires issuing a state warrant and accounting for the advance payment which incurs additional costs for the state. Further, an advance payment results in a loss of interest earnings for the state and the risk of loss of the funds advanced because of vendor bankruptcy. Should an advance payment be made, it potentially places the state in a difficult negotiating position with the vendor if the goods and/or services received are not adequate. This is because the state is unable to withhold payment pending resolution of the matter.

2. Notwithstanding this policy, it is accepted practice in some commercial transactions to make advance payments. In the limited instances set forth below, advance payments are authorized by the state controller. They include:

   - Purchase of services for annual maintenance of computers, copiers or other office equipment. Generally, in these instances, full payment is expected annually at the beginning of the term of the agreement.

   - Grants received by the state from the federal government that are awarded by the state to a subgrantee. Federal grants often require monthly or quarterly advances to subgrantees.

   - Services provided by entertainers, speakers or for seminars. For entertainers or speakers it is customary to advance a portion of the fee prior to the engagement date. For seminars, payment of the entire fee may be expected upon registering for the seminar.

   - Annual payments made for software license agreements. Generally, such payments are required at the beginning of the contract term.

3. While the need for an advance payment in an interagency agreement should be infrequent, there may be circumstances when it is warranted. In such an instance the risk of loss of funds to the state is practically non-existent and a process exists to resolve disputes. Therefore, advances on interagency agreements may be made if appropriate.

4. Advance payments may be appropriate in other instances based upon the specific facts of the situation. In all such instances a demonstrated need must be documented to ensure the state's interests are adequately protected. If the amount of the advance payment requested is substantial and/or for an extended period of time, financial statements may be requested from the vendor. Generally, an advance payment will not be approved if the contract was made as a result of a competitive solicitation and no mention of an advance payment was in the solicitation.

5. **Except as noted under #2 and #3 above, advance payments required by a state contract must have the prior written approval of the state controller or a delegate authorized by the state controller.**

CONTRACT ROUTING WAIVER POLICY

PURPOSE, BASIS, SCOPE AND PRIORITY OF REVIEW

Purpose

A significant number of contracts based on a single form do not require routing for central approvals each year (State Personnel, State Purchasing, Attorney General or State Controller). The required oversight may be performed by an analysis of the form of contract(s) used for all expenditures of a single type and how the agency uses such contracts. Through these guidelines, the Colorado Central Approval Task Force (CATF) will identify eligible contract types for streamlining and implement procedures to remove qualifying individual contracts from the external routing process. This will free additional time for central approvers and agency users to focus greater attention on more important matters in the entire state contracting process (e.g., continuing education, training, standardization, risk-benefit analysis, unique problem solving, etc.). A primary purpose of the conditions described in these Guidelines is to retain at the agency level the legislative intent for consistency in the oversight of fiscal commitments; the efficiency intended by waived central oversight does not eliminate the need for consistency in applying contract requirements. **For purposes of Personnel waiver, "contract" includes Purchase Orders.**

Basis

State Personnel authority is found at 24-50-509, CRS and associated rules. State Purchasing authority is at 24-102-202, CRS and associated rules. The state controller authority, which also governs the Attorney General's contract review functions, derives from 24-30-202, CRS and associated rules.

PERSONNEL	The State Personnel Director determines whether contracts or PO's for services are permissible under State civil service laws.
PURCHASING	The State Purchasing Director verifies that proper procedures have been followed in selecting which vendor to use.
AG	The Attorney General reviews contracts for the state controller to verify that minimum legal requirements have been met.
CONTROLLER	The state controller determines if the proposed commitment to pay money is properly documented and whether or not available funds have been properly set aside to meet the proposed commitment.

Scope

This document describes the procedures for removing multiple contracts of the same type from central routing and oversight. The procedures will be known as "Routing Waiver Guidelines."

These Guidelines apply only to "grants" and "services" contracts, as defined below. These Guidelines deal only with the requirement to route each contract of the same type and do not address delegations of authority, which are treated separately by each central approval official. **Current delegations are unaltered by this waiver process; agencies may request a waiver for each contract form for those approvals not already delegated.** For example, full Controller delegation does not eliminate required legal review. That step may be waived through this process. All legal requirements for the selection and use of contractors must be met before a Routing Waiver may be obtained. All State programs presently operating under waivers will be required to re-apply for a waiver under these Guidelines.

Priority of Review

High volume, annually recurring grants and purchased services contracts with identical fill-in-the-blank forms will be given highest priority. The greater the potential variance among individual contracts, the lower the priority. Therefore, personal services and professional services will generally be considered after grants and purchased services contracts.

CONTRACT TYPE DEFINITIONS

These definitions are solely for the purpose of assisting the CATF in its efforts to prioritize requests for waiver of contract routing. They are not intended as substitutes for statutes or rules on the subject. Each approving agency will apply its own governing laws in deciding whether or not to approve a waiver. CATF members may re-classify your contract type in order to properly apply the law and prioritize the review of waiver requests. For example, if a personal service is erroneously characterized in the application as a purchased service, the State Personnel Director is required to analyze the request under the personal services statutes, not the purchased services statutes. This does not mean a waiver can not be granted. It simply means that State Personnel must apply the correct law in evaluating the waiver request, and the entire CATF may give the contract a lower priority for completion than true grants and purchased services contracts. Please call us with questions about what type of contract you have.

Grant: A distribution of money by the state, usually by an agency "program" set up for the purpose, where either the authorizing law (state or federal) uses the term "grant" or the intent of the program is to distribute money to encourage certain described activity benefiting the public or defined groups as a whole (e.g., Community Development Block Grant contract to build flood control improvements for a community consisting of 51% or more low and moderate income people). Funds are not spent directly on service delivery to the target group. Grant recipients are typically public entities (governments) exempt from personnel and procurement laws, but may occasionally be private parties selected either by application or proposal for specific projects, or by formula distribution specified in law. In some cases, a program may have both public and private grantees. Private grantees are typically non-profit entities.

Purchased Services: A distribution of money by the State, usually by an agency "program" set up for the purpose, which is intended to deliver benefits directly to a specified group of people (third parties) as defined in law, on a unit, per day or other formula basis (e.g., alcohol and drug

abuse treatment at $ _X_ per client hour for convicted drunk drivers). Federal use of the term "grant" is not the determining factor as to whether the contract is a grant or a purchased service. The term does not include services to persons in the legal or physical custody of the state. Purchased services contractors may be either: (1) public entities (governments); or (2) private non-profit parties licensed, certified, or otherwise authorized by law to provide such services, selected by competitive requests for proposals to serve the specified population of individuals.

Personal Services: A distribution of money by the state to acquire a benefit directly for the state in carrying out its operations (e.g., janitorial services or private consulting expertise to the state in implementing state programs). The term includes acquisition of services for the benefit of persons in the state's legal or physical custody (e.g., community corrections). Usually, although not always, there is no formal agency "program"; the contracted services benefit the department, division or institution as a whole. Contractors are generally private for-profit entities selected by competitive sealed bidding or competitive requests for proposals to provide something of value directly to the state. In some cases public entities may provide personal services to the state (e.g., community corrections). The benefit is primarily in the rendering of the service itself, whether or not the contract contemplates a specific deliverable or deliverables at the end. The term does not include construction services.

Professional Services: A distribution of money by the state to acquire directly for state use the personal services of licensed professionals, such as architects, accountants, doctors, lawyers, engineers, etc. The relationship may be pure personal services (e.g., an expert witness), or it may include both a deliverable product and personal services (e.g., a building design and the assistance to the owner in administering the construction contract to build it). Contractors are selected by requests for qualifications or proposals, pursuant to which Qualifications are, by law, given some form of preference over price.

Construction Services: A distribution of money by the state to demolish or construct any real property improvement. The term does not include leases involving tenant finish by the landlord. The primary purpose of the contract is to retain private expertise and equipment necessary to achieve a finished product (e.g., a new building). Contractors are selected only by competitive sealed bidding.

GENERAL CONDITIONS OF APPROVAL

The following Conditions apply to all waivers granted:

1. All waivers granted in prior years must be renewed pursuant to these Guidelines. Once a waiver is granted under this new process it remains valid until there is a change in the facts or the law related to the program or contract. If such changes occur, you must identify them by resubmitting your application and receiving renewed authority to proceed with the next ensuing round or use of contracts or amendments. General state law or policy changes required by any or all of the central approvers and affecting large numbers of contracts will be handled on a case by case basis. It is the CATF policy to handle such changes by simply modifying the waiver conditions and redistributing them; we will minimize to the degree possible contract changes or waiver renewals.

2 . **Amendments:** Approval does not cover subsequent amendments unless the form and circumstances of the amendment are approved as part of the original contract approval.

A. Where the need for mid-contract changes is predictable, consult the Colorado Contract Procedures and Management Manual or call the AG's Office for guidance on how to incorporate a streamlined amendment form into your contract at the outset. Advance approval of amendment forms is limited to narrow circumstances. Before wasting time drafting such a contract, call first with questions about whether or not your contract qualifies.

B. A standard amendment form may also be waived after the waived contracts are in place. Simply send a request memorandum briefly explaining the need and attaching both the form amendment and a copy of Part I of your approved contract waiver application. If Part II is inaccurate as a result of such changes, please submit a revised Part II as necessary.

3. The waiver covers only the named program or contract type and approved contract form. Changes to an approved contract form in future years should be handled by submitting a memorandum explaining the change and attaching both the new pages highlighting language changes and a copy of Part I of your approved contract waiver application. If Part II is inaccurate as a result of such changes, please submit a revised Part II as necessary.

4. The waiver is subject to the Special Conditions of particular approving officials.

5. Only the state controller may grant a waiver of legal review, not the Attorney General. Approval of the Attorney General is advice to the state controller and does not authorize anything independent of action by the state controller.

6. **NO ONE EXCEPT AN AUTHORIZED STATE ATTORNEY MAY SIGN A CONTRACT ON THE LINE RESERVED FOR THE ATTORNEY GENERAL'S APPROVAL.** That line must be left blank for waived contracts. Agencies may use the designated AG approval line for their own internal approval processes, or for any contract reviewer approval required by the state controller as part of the waiver, by removing the "Attorney General" reference and substituting their own heading. Remember, a legal review for the Attorney General is always required for state contracts unless the state controller himself grants a waiver of that requirement; only the state controller can waive Fiscal Rule requirements. Therefore, even if you have full Controller delegation, you must apply for a waiver of legal review in order to eliminate that step.

7. State law requires that every contract to pay money must be signed by or for the state controller. This necessarily means that the state controller's approval under this waiver procedure constitutes a limited delegation of his function to the named individual agency controller or equivalent. The state controller is waiving only two requirements: (1) that the contract have an AG legal review; and (2) that the contract be sent to the State Controller's Office for approval. The delegee must apply all other State Fiscal Rules to the

contract and, if approved, sign the contract for the state controller. The individual signing for the state controller may not also sign for the agency as a party to the contract; the person obligating the agency to pay money on a contract may not also countersign that commitment for the Controller. All requirements and liabilities applicable to the state controller are applicable to the delegee.

8 . It is each agency's responsibility to maintain current waiver files, including a fully signed copy of each individual contract for the retention period mandated by state law. You must file with each contract executed, pursuant to the waiver, a photocopy of the approved waiver Application form, the accompanying list of contractors to which the waiver applies, and a copy of the agency routing form showing required internal approvals. For proper record keeping and for your own protection, it is imperative that each contract file properly document required approvals. State agencies may use an internally developed form to document required internal approvals.

9 . "Programs" of grants, purchased services, or personal services to wards of the state (e.g., community corrections) may apply for waivers whenever they are ready. Other personal services, professional services, or construction services contracts of a general nature, which are used by an agency only when a specific need arises, must be coordinated and made consistent agency-wide before a waiver may be applied for. This means we will not entertain waivers for ten different ways of doing the same thing within one department or institution until the agency or institution as a whole demonstrates the need for each different type. Forms should be made consistent to the degree possible for similar types of services.

10. ALL CONTRACTS SHALL CONTAIN THE INDEPENDENT CONTRACTOR PROVISIONS REQUIRED BY STATE PERSONNEL DIRECTOR'S PROCEDURES. Submit with your waiver application a completed Certification of Personal Services Contracts form.

SPECIAL CONDITIONS

Each waiver may pose unique concerns for one or more of the central approvers. In addition to the General Conditions of Approval applicable to all waivers, Special Conditions further define the scope or parameters within which the waiver must operate. If Special Conditions are in effect for your waiver, this will be noted in the approval returned to you and the full text of such Conditions will be attached to the approved waiver.

APPLICATION FORM AND INSTRUCTIONS

The "application form" consists of two parts. Part I contains General Information and space for recording the requested and approved waivers. This is the document you will retain as evidence of all required approvals, along with the accompanying master list of all contracts covered by the waiver (see General Condition 8). Part II contains agency-supplied background information the CATF needs. Please use a separate word-processed document in order to fully respond to the items requested. Please include (repeat) the question or request at the beginning of each response. Please be thorough and complete all items in both Parts.

Send Waiver Applications To:

Contract Routing Waiver
1525 Sherman Street, Room 250
Denver, Colorado 80203

Attn: Phil Holtmann

SUBMIT WAIVER APPLICATIONS <u>THROUGH</u> YOUR CCIT REPRESENTATIVE FOR COORDINATION.

Revised 03/14/96

APPLICATION FOR CONTRACT ROUTING WAIVER

PART I

GENERAL INFORMATION

Instructions: Complete all items and submit one signed original and three copies, including four copies of the form of contract submitted for waiver. Submit one application for each contract form. Slight variations on a single basic program contract should be submitted under one application.

DEPARTMENT: _____ DIVISION OR INSTITUTION: _____ COFRS CODE (if applicable) _

PROGRAM NAME: _____

NUMBER OF CONTRACTS TO BE WAIVED: _____ (Attach list of vendors. If variable, attach explanation, in lieu of list)

DATE OF REQUEST: _____ PREVIOUS WAIVER OF THIS CONTRACT? YES _____ NO _____

CONTRACT ADMINISTRATOR NAME (contact person): _____ PHONE: _____ FAX: _____

ADDRESS: _____

CONTRACT TYPE: _____
(Grant, Purchased Service, Personal Service, Professional Service) (See Guidelines for definitions)

WAIVER REQUESTED

(Mark all that apply by "X". DO NOT request a waiver for a function already fully delegated (e.g., Group II procurement agencies do not need a waiver from State Purchasing. There are no Personnel delegations.).

APPROVING OFFICER	CURRENT DELEGATIONS?	WAIVERS REQUESTED
STATE PERSONNEL	N/A	_____
STATE PURCHASING	_____	_____
ATTORNEY GENERAL	_____*	_____
STATE CONTROLLER	_____	_____

AGENCY APPROVALS

PROGRAM ADMINISTRATOR OR DIVISION DIRECTOR

BY: _____
(Signature)

_____
(Print Name and Title)

DEPARTMENT OF INSTITUTION CONTROLLER OR EQUIVALENT

BY: _____
(Signature)

_____
(Print Name and Title)

WAIVERS GRANTED

APPROVING OFFICIAL	WAIVER APPROVED** (YES/NO)	SPECIAL CONDITIONS*** (YES/NO)	SIGNATURE OF AUTHORIZED REPRESENTATIVE
STATE PERSONNEL	_____	_____	BY: _____
STATE PURCHASING	_____	_____	BY: _____
ATTORNEY GENERAL	_____	_____	BY: _____
STATE CONTROLLER	_____	_____	BY: _____

---

* Answer "YES" if agency or institution employs a Special Assistant AG.
** Reasons for disapproval if applicable, are set forth on a separate page.
*** Special conditions, if any, are attached.

SEND TO: CONTRACT ROUTING WAIVER
1525 SHERMAN ST., RM 250
DENVER, CO 80203
ATTN: PHIL HOLTMANN

Revised 03/14/96

APPLICATION FOR CONTRACT ROUTING WAIVER

PART I

PROGRAM/CONTRACT SPECIFIC INFORMATION

Instructions: Please use a separate word-processed document to respond fully. Re-state each question before each answer. Attach a copy of the contract form(s) and highlight contract text as necessary to answer questions.

A. Legal Authority, History & Purpose

1. Specify the legal authority for the contract, including citations to relevant federal and state law.

2. Identify the specific procurement method and specific solicitation number (if any) used to award all such contracts. Attach a copy of the approved solicitation document. If the award is other than an RFP or Bid, attach a copy of the written methodology approved by the appropriate procurement official.

3. Identify the specific statutory section under § 24-50-501 et seq. C.R.S. (privatization statute) that permits or authorizes the contracts. Complete and submit a Certification of Personal Services form.

4. Provide a narrative description of the program (if applicable) and contract, including its history and purposes. Attach a master list of all contractors by name. For general contracts not attributable to a particular 'program' (e.g., equipment maintenance), please provide details as to how the contract is used, and any history necessary to fully understand the agency need and present use.

5. If there are form variations on the same basic contract, explain the exact differences in contract text and usage. Highlight differing contract provisions. Do riot include scope of work variations.

6. State whether the scope of work or services to be provided will always be identical or precisely how it may change from one contract to the next.

B. Fiscal

1. Identify the source of funding (cite the law) and total dollar amount of all contracts for the applicable fiscal year.

2. Indicate Fund Number and Appropriation Code or G/L Account.

3. If the agency is requesting waiver of individual contract encumbrances, state controller approval is required. The following apply: The agency must be unable to estimate the starting encumbrance for each contract. Obtain, complete and submit the state controller's encumbrance waiver request form. Each contract must include the maximum funding provision set forth in Chapter 4, "State Contract Provisions" of the Fiscal Rules. The dollar amount used must be the maximum appropriated and budgeted amount for the particular group of contracts involved. Where the agency can estimate a starting encumbrance, but also anticipates mid-contract changes to such encumbrances, a simplified, waived amendment form should be included in the contracts to quickly amend individual contracts and encumbrances as subsequently needed. See State of Colorado Contract Procedures and Management Manual for appropriate contract language and simplified amendment form.

4. If the agency is requesting permission to make advance payments, state controller approval is required. The following apply: Describe the historical use of advance payments in such program or contracts, any applicable federal or state laws authorizing or requiring advance payments, the nature or type of entities receiving advance payments (e.g., public, private, non-profit, for-profit), a description of the standards used in determining when to authorize advance payments, and any other relevant information that may aid the state controller's decision to approve the advance payments request.

C. Miscellaneous

1. State whether the contract involved has been waived in previous fiscal years.

   If "YES", identify all previous years and include a copy of the most recent year's waived contract form. Attach an explanation of exact changes (if any) in the current form submitted for waiver and highlight changed text in the new and old forms.

2. Specify what procedures your agency follows to ensure that each contract will be properly signed by authorized representatives of each contractor, as described in the State of Colorado Contract Procedures and Management Manual.

3. Specify what procedures your agency follows to ensure consistency in the review and final execution of contacts.

CONTRACT DATING POLICY

Despite informal guidance and arrangements in the past, particularly in capital construction contracts, relating to SCO completion of "made dates" on contracts, agencies should date their contracts on the date the agreement is reached between the agency and the contractor. Agencies should continue to use the term "made date" on their contracts, consistent with the prescribed contract form in Fiscal Rule 3-1. In approved capital construction contracts, agencies may fill in the "made date" or "date executed." Completion of these dates does not change the statutory rule that contracts and other commitment documents are not valid until approved by the state controller or his designee. This statutory approval condition appears at paragraph 1 of the Special Conditions and on approved capital construction contract forms. Consequently, contractors are not contractually required to begin performance and incur costs prior to controller approval.

In capital construction contracts, agencies should use the "made date" or "executed date" for bond references to the contract. Agencies must continue, however, to await controller approval and satisfaction of other statutory requirements, e.g., receipt of acceptable bonds, before issuing the notice to proceed.

SETTLEMENT PAYMENT POLICY

Settlement agreements generally arise from a settlement between the state and a claimant, often a state employee, for physical damages, property damages or for personal injury such as emotional distress or economic loss. These agreements provide for payment to a claimant in exchange for the claimant releasing the state from further liability.

It is the policy of the State Controller's Office that any payments required by a settlement agreement shall be paid within 30 days of signing the agreement by all parties. In some circumstances, claimants may ask during settlement negotiations for multiple payments to be made during one or more accounting periods which may include different calendar or state fiscal years. The State Controller's Office will only approve multiple payments on an exception basis and only when all 3 criteria set forth below are met:

- A benefit exists for the state to make multiple payments. The state must secure value in return, such as facilitating resolution of the disagreement or where necessary to expedite resignation of an employee.

- The settlement agreement must provide for payments from current appropriations available at the time of the signing the agreement. Settlement agreements which provide for payments from appropriations requested or appropriations anticipated in future years will not be approved by the State Controller's Office.

- The payments must be allowable by the Internal Revenue Service and applicable regulations.

For general direction regarding settlement agreements, please refer to the *Guide for Tax Reporting and Withholding of Settlement Awards* revised January 1997. Questions concerning this policy should be directed to Phil Holtmann at 866-3809.

INDEX

—A—

advance payments, 1-13, 6-14, 6-58, 7-2
Alternate Dispute Resolution (ADR). *See* Dispute Resolution
Amendments, 6-94
  approval, 1-3
  form, 6-97
  generally, 6-39
  instructions, 6-94
  Sample Settlement Amendment, 10-55
Appropriations, 1-3
Approvals
  advance payments, 1-13
  Attorney General, 1-12
  Attorney General Office policies, 8-6
  Central Services, 1-10
  CLIN tables, 1-11
  Department of Personnel (privatization) policies, 8-2
  Division of Purchasing policies, 8-4
  modifications and amendments, 1-13
  real estate/lease contracts, 1-10
  routing, 1-11
  routing chart, 8-1
  special procurements, 1-10, 2-2
  State Controller's Office policies, 8-8
  State Controller, 1-13
  State Risk Manager, 1-11
  telecommunications contracts, 1-10
Attorney General, 1-12
  routing and review policies and procedures, 8-6
Authority, 2-2. *See* Planning and lead time
  signature. *See* Signature authority
Authority to buy, 1-3
Avoiding Performance Remedies
  Avoiding Contract Interruptions, 10-67

—B—

Bid Information Distribution System (BIDS), 4-1, C-3

—C—

Capital construction, 4-9
CATF. *See* Contract Improvement. *See* Contract Improvement
CCIT. *See* Contract Improvement. *See* Contract Improvement
Central approvers, 8-2
  review policies/procedures, 8-2
Checklists
  Administration of State property, 10-24
  contract pricing considerations, 5-12
  contract review checklist, 9-1
  Defining Need, 10-5
  Dispute Resolution, *10-48*
  Negotiation, *10-48*
  performance remedies, 10-69
  price negotiation considerations, 5-12
  privatization review summary, 3-9
  RFP process, 4-4
  Subcontract Management Considerations, 10-38
  work description considerations, 2-11
Clauses and forms
  acceptance, 6-45
  advance payment, 6-58
  amendment form, 6-97
  amendments, generally, 6-94
  applicable law, 6-61
  assignment and successors, 6-53
  audit, 6-85
  authority, 6-44
  availability of funds, lease-purchase, 6-61
  Caption/whereas clauses, 6-40
  certifications (federal grant), 6-89
  change order letter (grants/subgrants), 6-73
  change order letter (other than grant), 6-70
  changes, 6-54
  changes (grants/subgrants), 6-71
  changes (other than grants), 6-67
  confidentiality of records, 6-60
  conflict of interest (grants), 6-86
  Contractor Name Changes, 10-31
  controller approval adjustment to performance date, 6-42
  cost or price, 6-42
  cost or pricing data, 5-8, 6-58
  cost reimbursement payment, 6-43
  data and document deliverables, 6-59
  data rights, 6-45
  disclaimer of warranties, 6-63
  entire understanding, 6-56
  excusable delay, 6-55
  federal audit provisions, 6-86
  federal examination of records clause, 6-86
  federal funding, 6-84
  force majeure, 6-55
  generally, 6-40
  grant assurances (federal), 6-87
  grant provisions, generally, 6-84
  indefinite quantity, 6-78
  indefinite quantity funding letter, 6-80
  independent contractor, 6-51
  inspection and acceptance, 6-45
  insurance, 6-50
  integration, 6-56

intellectual property indemnification, 6-65
interagency agreement, 6-100
legal authority, 6-44, 6-84
licenses, permits, and responsibilities, 6-61
limitation of liability, 6-64
liquidated damages, 6-65
litigation reporting, 6-66
maintenance of records, 6-85
matching fund requirements, 6-84
modification and amendment, 6-57
Name Changes, 10-31
notice and representative, 6-52
Novation Agreement, 10-31
option exercise letter (additional services/supplies), 6-77
option exercise letter (performance extension), 6-75
options (additional services/supplies), 6-76
options (performance extension), 6-74
order of precedence, 6-41
patent rights (grants), 6-86
payment, 6-43
performance period, 6-42
permits and responsibilities, 6-61
precedence, 6-41
price adjustment, 6-55
price or cost, 6-42
records, 6-85
Release of Claims, 10-56
remedies, 6-46
reporting, 6-58
representatives and notice, 6-52
rights in data and copyright (grants), 6-87
rights in data, documents, and computer software, 6-45
scope of work, 6-41
Settlement Agreement, 10-55
severability, 6-56
software rights, 6-45
sovereign immunity, 6-56
Special Provisions (State), 6-91
State-furnished property, 6-62
stop work orders, 6-64
survival, 6-57
task order letters, 6-83
task orders, 6-81
termination for convenience (long form), 6-47
termination for convenience (short form), 6-47
termination for default (long form), 6-49
termination for default (short form), 6-49
third party beneficiaries, 6-56
venue, 6-67
waiver, 6-56
warranties, 6-63
CLIN and CLI2 tables, 1-11
Commitment vouchers, 1-1
approved forms, 6-2
types, 1-2
competitive sealed bidding, 1-7, 4-3. *See* Contractor selection
competitive sealed proposals, 1-7
auctions, 4-5
BAFOs. *See* best and final offers, this topic
best and final offers, 1-7
best and final offers (BAFOs), 4-6
discussions, 1-7, 4-5
requests for proposals, 4-4
RFP process, 4-4
technical leveling and transfusion, 4-5
Contract Close-Out
Evaluating and Documenting the Results, 10-74
Contract Improvement, 1-14, C-3
CATF, 1-14, C-3
CCIT, 1-14, C-3
user groups, 1-14, C-3
Contract Management, 10-1, 10-25
Bankruptcy, 10-25
Beginning Contract Administration, 10-3
Best Alternative to Negotiated Settlement(BATNA), 10-41
Close-Out, 10-74
Contract Administration File, 10-12
Contract Management Guide, 10-1
Contract Modifications, 10-27
Contract Types, 10-7
Cost and Price Ceilings, 10-12
Cost Reimbursement Contracts, 10-9
Definition, 10-2
Dispute Resolution, 10-39
Financial Administration, 10-26
Firm, Fixed Price Contracts, 10-9
Funding, 10-25
Indefinite Delivery Contracts, 10-11
Introduction, 10-1
Partnering, 10-14
Performance Remedies, 10-58
Pre-Contract, 10-3
Responsibilities, 10-2
Risk Assessment, 10-14
Service Contracts, 10-8
Statement of Work, 10-3
Supply Contracts, 10-7
Time and Material/Labor Hour Contracts, 10-10
Understanding the Contract, 10-5
Contract management and administration, 1-14
Contract Modifications, 10-27
Contract pricing
advance payments, Controller approval, 1-13
allocating costs, 5-7
allowability, grants, 5-2
catalog prices as a basis, 5-3
Checklist of considerations, 5-12
clause requesting cost or pricing data, 5-8
consistency in allocating costs, 5-7
cost or pricing data clause, 6-58
cost or pricing data exceptions, 5-2
cost or pricing data, requesting, 5-8

direct costs, 5-5
fair and reasonable prices/rates, 5-2
federal grants, 5-2
generally, 5-1
grants, pricing, 5-9
historical prices as a basis, 5-4
independent cost estimates as a basis, 5-4
indirect costs, 5-6
life cycle cost, 5-1
OMB cost principles, 5-2
overhead, 5-6
price analysis, 5-3
price negotiation memorandum, 5-4
profit, considerations, 5-9
reasonableness in allocating costs, 5-7
regulated prices as a basis, 5-3
requirement for cost or pricing data, 5-2
rules for adequate competition, 5-3
variable costs, 5-6
Contract review checklist, 9-1
Contract Types
cost reimbursement, 6-7
estimated quantities, 6-8
firm, fixed price, 6-7
indefinite delivery, 6-8
requirements contracts, 6-8
service contracts, 6-6
supply contracts, 6-6
task order contracts, 6-9
time and material/labor hour, 6-7
Contractor selection
BIDS, 4-1, C-3
capital construction, 4-9
competitive bidding, 1-6
competitive sealed bidding, 4-3
competitive sealed proposals, 1-7
documented quotes, 4-3
emergency procurements, 1-9
emergency purchases, 4-7
leases, 4-9
Procurement Code applicability, 4-2
professional services, 4-6
real estate/lease contracts, 1-10
requests for proposals, 4-4
small dollar purchases, 4-3
sole source procurement, 1-9, 4-7
special circumstances procurement, 4-8
state price agreements, 1-10
statements of qualification, 4-6
Contracts
approach to drafting contracts, 6-11
approach to drafting statement of work, 2-7
attachments, exhibits, appendices, 6-15
brand name or equal, 2-10
competition, effect of, 6-17
contract type, 2-8. *See also* Contract Type, this index
Definition, 10-2
delay in approval, adjusting performance time, 6-15
deliverables, 2-10
described, 1-4
description of service/supply, 6-14
design specifications, 2-9
drafting, 6-12
duration or term, 6-14
essential elements, 2-8, 6-10, 6-12
exhibits, appendices, attachments, 6-15
Fiscal Rule requirements, 6-4
in "scope" of competition, 6-16
indemnification, 6-27
indentification of parties, 6-13
independent contractor requirements, 3-7
insurance, 6-18
lessor indemnification by State, 6-27
limitation of liability, 6-27
limitation of liability provisions, 6-28
method specifications, 2-9
monitoring and final acceptance, 2-11
parties, 6-13
payment provisions, 6-14
performance specifications, 2-8
practical differences with purchase orders, 1-4
purchase orders distinguished, 1-4, 6-2
purchase orders vs. contracts, 1-8, 6-2
required by Fiscal Rule, 6-4
scope of competition, 6-16
specifications, types, 2-8
standards, e.g. ANSI, 2-10
statement of work considerations, 2-11
statements of work, 2-7
term or duration, 6-14
use of vendor forms, 6-17
using previous examples/forms, 6-10
vendor forms, use of, 6-17
waived contracts, 6-10
Controller. *See* State Controller
Cost accounting, 5-7, 5-10
audit clause, 6-85
cost reimbursement clause, 6-43
Cost or pricing data. *See* Contract Pricing

—D—

Department Accounting Procedures
Controller review duties, 7-1
Department of Personnel, 1-5
annual reporting, 3-7
exceptions from review requirement, 1-5, 3-3
forms, 3-2, 3-7
grounds for approval, 3-5
independent contractors, 3-7
limitation on use of State temporary employees, 3-7
pre-approval, 3-2, 3-6
privatization review, generally, 1-5, 3-1
waivers (program waivers), 3-4

Departmental Accounting Procedures
advance payments, 6-58, 7-2
CLIN and CLI2, 7-3
encumbrance, 7-1
internal routing suggestions, 7-3
responsibilities, 7-1, 7-2
Dispute Resolution
ADR. *See* Dispute Resolution
ADR Considerations, 10-52
Alternative Dispute Resolution. *See* Dispute Resolution
Arbitration, 10-46
Checklist of Considerations, 10-48
Contract Adjustments, 10-47
Contract Interpretation Principles, 10-53
Generally, 10-39
Mediation, 10-45
Mini-Trials, 10-45
Negotiation, 10-41
Negotiation Memoranda, 10-47
Other Techniques, 10-44
Releases, 10-47
Responsibilities, 10-40
Sample Settlement Amendment, 10-55
Settlement Amendments, 10-46
Division of Central Services, 1-10
Division of Purchasing, 1-6
routing and review policies and procedures, 8-4

—F—

Funds availability, 2-2

—G—

Grants
cost analysis, 5-9
generally, 6-6
matching requirements, 5-11
OMB cost principles, 5-2
pricing, 5-2, 5-9
procurement standards, 5-11
The Common Rule, 5-2

—I—

Indefinite delivery contracts
generally, 6-8
Indemnification, 6-27
lessor indemnification by State, 6-27
Risk Management Office approval, 6-27
Independent contractor
importance, 1-5
Insurance
generally, 6-18
Interagency agreement
form, 6-100
Interpretation of Contracts
Principles, 10-53
Introduction to state contracting, 1-1

—L—

Late contracts, 6-1
Controller 7 day policy, 6-1
ratification distinguished, 6-1
Lead time information, 2-4
proposed table of lead times, 2-6
Leases, 4-9
indemnification by State, 6-27
Limitation of Liability
restrictions, 6-27, 6-28
Liquidated Damages, 10-62

—M—

Modifications and Remedial Clauses
|Task Orders, 10-30
amendments, 6-94
Bilateral Change Orders, 10-29
Options, 10-30
Other Types Generally, 10-29
State Furnished Property, 10-29

—N—

Name Changes by Contractor, 10-31
Negotiation, 10-41

—O—

Options and Renewals, 10-30
Generally, 10-75
Option Explained, 10-75
Renewals Distinguished, 10-75
Scope Issues, 10-76
Use of Contract Amendments, 10-75

—P—

Partnering, 10-14
Payment provisions
advance payment, 6-14
advance payment and Controller approval, 1-13
ceilings on cost, 6-9
cost and price ceilings, 6-9
Performance Remedies
Beneficial Occupancy, 10-63
checklist for managers, 10-69
Contracts for Goods, 10-58
Cover by Seller, 10-59
Damages, 10-65
Excess Costs Liability, 10-65
Excusable Delay, 10-65
Force Majeure, 10-63
Inspection Right, 10-59
Liquidated Damages, 10-62
Rejection, 10-59

Revocation of Acceptance, 10-59
Right to Rescind, 10-58
Substantial Breach, 10-65
Substantial Breach in Service Contracts, 10-60
Substantial Completion, 10-63
Termination for Convenience, 10-66
Termination for Default, 10-64
Waiver of Delivery Dates, 10-63
Warranties, 10-61
Withholding Payments, 10-60
Performance Remedies
Contracts for Services, 10-59
Personal services contracts. *See* Department of Personnel
Department of Personnel review, 1-5
Planning and lead time, 2-4. *See* Checklists for abbreviated planning considerations
approach, 2-1
authority, 2-2
availability of funds, 2-2
cost estimates, 2-3
Defining Need, 10-5
funds availability, 2-2
initial statement of need, 2-1
interagency coordination, 2-2. *See* also Special procurements
personal services (privatization), 2-3
procurement method, 2-4
proposed table of lead times, 2-6
statements of work, 2-7
time lines, 2-7
Price agreements, 4-2
Pricing. *See* Contract Pricing
Pricing Changes and Modifications, 10-30
privatization, 1-5. *See* Department of Personnel
Procurement. *See* Contractor selection. *See* Contractor selection
Contractor Selection, 10-5
Property. *See* State Property
Purchase orders
contracts distinguished, 1-3
contracts preferred, 6-3
contracts vs. purchase orders, 1-8
contracts vs. purchase orders?, 6-2
defined, 1-3
limits, 6-3
practical differences with contracts, 1-4, 6-2
Purchasing and Procurement, 1-6. *See also* Special Procurements. *See also* Contractor Selection
delegated authority, 1-8
differences between public and private purchasing, 1-6
Division of Purchasing, 1-6
Group I and II agencies, 1-6, 1-8

—R—

Ratification, 6-1
References, 1-16
Renewals. *See* Options and Renewals
Requests for Proposal. *See* competitive sealed proposals
Resolicitation, 10-76
Routing chart, 8-1

—S—

Scope Issues
Modifications and Remedial Clauses, 10-76
Signature authority (contractor)
acknowledgment, 6-38
attestation, 6-38
generally, 6-29
power of attorney, 6-37
real property contracts, 6-36
Small purchases, 4-3
sole source procurement, 4-7
Special procurements
agency approval required, 1-10, 2-2
Central Services, 1-10, 2-2
interagency coordination, 2-2
printing, 1-10, 2-2
professional services, 4-6
real estate/lease contracts, 1-10
state price agreements, 1-10, 4-2
telecommunications contracts, 1-10
vehicles, 1-10
Specifications
brand name or equal, 2-10
method specifications, 2-9
performance specifications, 2-9
standards, e.g. ANSI, 2-10
State Contracts. *See* Contracts
State Controller, 1-2, 1-13
advance payments, 1-13, 6-14, 6-58, 7-2
commitment vouchers, 1-2
Controller's Statute, 7-1
duties during review of contract, 7-1
responsibilities, 7-1
review policies and procedures, 8-8
State Property
clause, 6-62
State Acquired Property, 10-24
State Furnished Property, 10-24
State Risk Manager, 1-11
Statement of Work, 10-3
Statements of work. *See also* Contracts
deliverables, 2-10
essential elements, 2-8
generally, 2-7
method specifications, 2-9
monitoring and final acceptance, 2-11
performance specifications, 2-8
specifications, types, 2-8
standards, e.g. ANSI, 2-10
statement of work considerations, 2-11
Subcontracts
Administration, Generally, 10-35

Assignments, 10-37
Checklist of Management Considerations, 10-38
Directing, 10-36
Directing Selection of Subcontractors, 10-36
“Flow-Down" of State Clauses, 10-36
State Approval, 10-35
State Relationship with, 10-36

—T—

Task order contracts
generally, 6-9
Task Orders, 10-30
Termination for Cause/Default, 10-64
Termination for Convenience, 10-66
Types of contracts. *See* Contract Types

—U—

Uniform Commercial Code, 10-58
Inspection Right, 10-60
Remedies for Breach, 10-59

—V—

Vendor selection. *See* Contractor selection. *See* Contractor selection

—W—

Waived contracts, 6-10
privatization review waiver, 3-4
Waiver of Contract Requirements, 10-63
Warranties, 10-61
Disclaimers, 10-62
example of disclaimer of warranties, 6-63
example of express warranty, 6-63
Express, 10-61
Implied Warranty of Fitness for Particular Purpose, 10-61
Implied Warranty of Merchantability, 10-61
Service Contracts, 10-62
Writing the contract. *See* Contracts
generally, 6-1