

Independent Contractor – Sole Proprietor Guidance

Department of Personnel & Administration

Background and Purpose of the Bi-Lateral Purchase Order

In FY10-11 a bi-lateral purchase order was created for personal services agreements with a sole proprietor. The bi-lateral purchase order consists of a purchase order and the exhibit for independent contractor provisions (the exhibit is attached to this guidance). DPA created the exhibit to address possible issues with misclassification of workers and specifically, independent contractors claiming and being awarded unemployment compensation after their contract with the State terminated. Misclassification of workers as independent contractors is a serious issue and extends beyond unemployment compensation to payroll taxes, PERA contributions, and benefits. The exhibit is designed to give the State a “rebuttable presumption” that the individual is an independent contractor. This means that if the State uses the exhibit and follows the terms of the exhibit and this guidance, then the individual is “presumed” to be an independent contractor. If the State uses the exhibit, but ignores the terms, then there is no rebuttable presumption. It is important that each agency evaluate its practices and develop policies that independent contracts are treated as such, and the agency follows the terms in the exhibit, this guidance, and IRS guidance.

When to Use the Bi-lateral Purchase Order

As of August 17, 2010, this new bi-lateral purchase order shall be used for all personal services agreements involving a sole proprietor where an official state contract is not utilized. This new exhibit should be used rather than the exhibit sent July 1, 2010. You do not need to replace the exhibit for purchase orders that have been issued. DPA/DHR considers utilization of a state contract for all personal services agreements with sole proprietors a best practice. Personal services agreements with sole proprietors could expose the State to a variety of potential liabilities surrounding worker misclassification and a state contract is preferred as it offers the least amount of exposure.

The Secretary of State defines a sole proprietor as a type of business entity that is owned and run by one individual and where there is no legal distinction between the owner and the business. All profits and all losses accrue to the owner (subject to taxation specific to the business). All assets of the business are owned by the proprietor and all debts of the business are the proprietor’s. This means that the owner has no lesser liability than if he/she was acting as an individual instead of a business. A sole proprietor may do business with a trade name other than his or her legal name and the trade name must register with the Secretary of State Office.

Even with a definition it is often difficult to determine who is a sole proprietor. The best place to look is on the W-9 completed by the individual. If the box “Individual/sole proprietor” is checked, then you shall use the bi-lateral purchase order. If the box “Corporation” or “Limited Liability Corporation” is checked and you are aware that this individual is the only individual in the corporation or limited liability corporation, then you shall use the bi-lateral purchase order. When in doubt, it is best to use the bi-lateral purchase order.

Provisions of the Exhibit in the Bi-Lateral Purchase Order

The exhibit includes nine provisions (letters A through I). **All** of these provisions must be met for the State to obtain a rebuttable presumption that the individual is an independent contractor.

The provisions in the exhibit of the bi-lateral purchase order are only some of the variables that are considered and analyzed in determining independent contractor status. The provisions establish the parties' intent that the requirements of CRS §8-70-115 for obtaining a rebuttable presumption of an independent contractor relationship are met, and that the vendor is, in law and in fact, an independent contractor. None of the bi-lateral purchase order provisions are intended to be a standalone determination; however, not meeting one or more of the provisions on the bi-lateral purchase order could indicate possible misclassification of a worker, as an independent contractor. For example, if a sole proprietor is not a registered entity with the Secretary of State or the Internal Revenue Service, that *could* be a red flag or indicator that the sole proprietor is not an independent contractor, but rather an employee, depending on many other variables (e.g., what services are being rendered, how the State is using the contractor, degree of control). Further explanations for some of the provisions in the bi-lateral purchase order are below.

- A. Statute directs that an individual may choose to work exclusively for the State for a finite period of time specified in a written document. There is no cut-off or period of time indicated in statute, however, it is clear that the period of time the individual will work exclusively for the State must be at the individual's choosing, cannot be required by the State, and the period of time must be documented in the purchase order or contract and signed by both parties.

- C. An independent contractor is usually paid a flat fee for the job being completed and the State pays the independent contractor either by a fixed or contract rate. Example: An independent contractor electrician submits a job estimate for electrical work at \$16 per hour for 400 hours. The contract stipulates that the contractor is to receive \$1,280 every 2 weeks for the next 10 weeks. This example is not considered payment by the hour under point C of the exhibit. Using this same example, if the contractor works more or less than 400 hours to complete the work, the contractor will still receive \$6,400, no more or less based on actual hours worked.

- E. A person who is trained by an experienced state employee, by correspondence, by required attendance at meetings or other methods is not free from control because the training is an indication that the State wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent contractor ordinarily uses his or her own methods and receives no training from the State as purchaser of services. For example, a worker hired for his or her IT expertise should not need to be trained on programming languages, or how to fix computer problems. The State may, however, tell him or her about the architecture of the State's IT system, and, if necessary, how to access state-specific software or hardware programs.

- F. If the State furnishes tools and materials, this evidences control over the worker. If the worker furnishes tools and materials, it indicates lack of control or an independent

contractor relationship. For example, a painter hired by the State would supply his or her own paintbrushes, drop clothes, tape, etc. However, the State may furnish the paint. Similarly, an electrician hired by the State would furnish his or her own electrical tools and equipment to access the electrical systems. Further, a vendor is allowed on state property, as long as the time period is limited, and it is specifically stipulated within the purchase order or contract.

- H. Independent contractors that do business with the state who do not have an established and registered business entity or trade name *may* not be an independent contractor under the law. Making payments directly to an individual person who doesn't solicit his or her services to the public and does not have a registered trade or business name, is one of the indicators that the person *may* not be an independent contractor. An independent contractor is generally registered as a business, maintains a visible business location, is free to seek out other business opportunities and markets and advertises themselves that he or she are available to work in the relevant market. If a purchasing or contract agreement is with an individual person directly, please contact your HR office or DPA/DHR to assist in determining risk and liability of the agreement as it pertains to possible misclassification of workers.
- I. It is important to note that even though a bi-lateral purchase order or contract is executed and clearly states that a sole proprietor is an independent contractor, it does not by itself, legally establish an independent contractor relationship. The key is how the employer treats the independent contractor. This includes aspects such as control exercised over the contractor. Each situation must be analyzed on the totality of circumstances, as variables change case-by-case. Establishing independent contractor status cannot be concluded based on only one or two variables.

Certification for Personal Services Agreement

The newly revised certification for personal services agreement form also assists with the determination as to whether a vendor is a true independent contractor. New questions were added to assist in determining the degree of control over the vendor by the State, but none of the single questions are intended to be a standalone determination. Through the process of answering the questions on the form, it may be determined that the nature of the services provided, length of time, current vendor status, etc., indicate the service would be better obtained through a human resource action (filling a temporary or permanent position) instead of a procurement action (leased or contract worker). The need for and classification of a worker must be determined on a case-by-case basis in collaboration with involvement and input from human resources, procurement, and contracting professionals.

The questions on the personal services agreement form differ from the nine provisions in the exhibit. This is because the personal services agreement is broader in scope and is based primarily on IRS criteria. In contrast, the provisions in the exhibit are statutory and primarily address the issue of unemployment compensation.

For further guidance on classification of workers, please reference the [Independent Contractor guidance](#); or contact Kirsten Jahn-Elfton at kirsten.jahn@state.co.us or 303-866-4231. For procurement questions, please contact John Utterback at 303-866-6181.

EXHIBIT IC-INDEPENDENT CONTRACTOR PROVISIONS

Part of PO or Contract # _____

1. VENDOR ENGAGEMENT IN INDEPENDENT TRADE, OCCUPATION, PROFESSION OR BUSINESS; FREE FROM, DIRECTION AND CONTROL BY THE STATE PURSUANT TO CRS §8-70-115

The parties intend to create an independent contractor relationship between the State and the Vendor and for the State to obtain a rebuttable presumption of an independent contractor relationship pursuant to §8-70-115 by meeting the nine points below (A through I). Vendor (the term “Vendor” includes Contractors and Grantees) shall perform all of its services and other obligations under the Purchase Order (PO) or Contract (the term “Contract” includes Agreements and Grants) to which this Exhibit is attached, free from the direction and control of the State. Vendor represents that it is customarily engaged in an independent trade, occupation, profession, or business related to the services performed. These are material representations made by Vendor to the State, upon which the State relied in issuing this PO or Contract, and without which, this PO or Contract would not have been issued. In accordance with the foregoing, the State does not and shall not:

- A. Require Vendor to work exclusively for the State; Vendor is free to perform work for other entities, and represents that it does hold itself out to perform work for other entities on a regular, ongoing basis. Vendor may schedule and perform similar work for others any time it wishes, including on the same day it does so for the State;
- B. Establish a quality standard for Vendor; except that the State can provide plans and specifications regarding the work but cannot oversee the actual work or instruct Vendor as to how the work will be performed;
- C. Pay a salary or hourly rate but rather a fixed or contract rate that has been negotiated by the parties;
- D. Terminate the work during the PO or Contract period unless Vendor violates the terms of the PO or fails to produce a result that meets the specifications of the PO or Contract;
- E. Provide training, instruction, briefings, and orientations to Vendor regarding performance of the work, except as specifically stipulated within this PO or Contract’s scope of work. The State shall notify Vendor when Vendor may begin performing the work and its other obligations;
- F. Supply Vendor with State-owned or leased real property, tools, benefits, equipment, supplies, or other property to perform the work, except as specifically stipulated within this PO or Contract’s scope of work. Vendor shall perform and maintain its own real property, tools, or rent or lease tools, equipment, supplies, or other personal property, and/or other items needed for the performance of the work under this PO or Contract and its other obligations hereunder and when applicable;
- G. Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;
- H. Pay Vendor personally but rather makes checks payable to the trade or business name of Vendor; and
- I. Combine the State’s business operations in any way with Vendor’s business, but instead maintain the State’s and Vendor’s operations as separate and distinct.

2. BENEFITS DISCLOSURE

Vendor and its employees and agents are not entitled to unemployment insurance or workers compensation benefits through the State and the State shall

not pay for or otherwise provide such coverage for Vendor or any of its agents or employees. Unemployment insurance benefits shall be available to Vendor and its employees and agents only if such coverage is made available by Vendor or a third party. Vendor shall pay when due all applicable employment taxes and income taxes and local head taxes incurred pursuant to this Contract. Vendor shall (a) provide and keep in force workers' compensation and unemployment compensation insurance in the amounts required by law, (b) provide proof thereof when requested by the State, and (c) be solely responsible for its acts and those of its employees and agents.

3. ENTIRE AGREEMENT

These Provisions together with the attached Purchase Order or Contract, constitute the entire agreement between the parties, and supersedes all prior proposals, agreements or other communications between the parties.

VENDOR

INSERT-Vendor's Business Name

By: INSERT-Name of Authorized Individual
Title: INSERT-Official Title of Authorized Individual

STATE OF COLORADO

Bill Ritter, Jr. GOVERNOR

INSERT-Name of Agency or IHE
INSERT-Name & Title of Head of Agency or IHE

*Signature

Date: _____

By: INSERT-Name & Title of Person Signing for Agency
or IHE

Date: _____

*Persons signing for Vendor hereby swear and affirm that they are authorized to act on Vendor's behalf and acknowledge that the State is relying on their representations to that effect.