

## PERSONAL SERVICE CONTRACTS – 1/16/2015

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The term “personal services contract” is often confusing, as many vendors, such as utilities, professionals and construction companies, do not consider the work they are generally understood to be performing as “personal services.” All Contracts for Services over \$10,000 are “personal service contracts” for purposes of AGO certification under the law, but the intent of this Bulletin is to explain the numerous types of Contracts for Services which agencies may encounter and to which this Bulletin applies:

### 1. Types of Contracts for Service

**a. Professional Services Contracts:** contracts with individual licensed professionals including but not limited to physicians, nurses, lawyers, engineers, architects, certified public accountants, surveyors, mental health counselors and educators. In addition to the State’s standard insurance requirements, licensed professionals should agree to carry professional liability insurance coverage in an amount not less than \$1 million per occurrence/\$1 million aggregate. Coverage limits will be subject to the approval of the Director of Risk Management.

Deviations from the insurance provisions shall require the approval of the Director of Risk Management. Deviations from the indemnification provisions shall require the approval of the Office of the Attorney General.

**b. Consulting Contracts:** contracts with professional service providers, such as consultants, investment managers and IT project managers, other than licensed professionals. In addition to the State’s standard insurance requirements, all consulting professionals should agree to carry professional liability insurance coverage in an amount not less than \$1 million per occurrence/\$1 million aggregate. Coverage limits will be subject to the approval of the Director of Risk Management.

**c. Information Technology Contracts:** contracts for information technology activities, including hardware and/or software with a services component, system implementation, IT consulting services, license and other end user agreements,

maintenance, and support services, hosting services and service level agreements. Information technology contracts related solely to the license of software, and that have no service component other than patches and upgrades downloaded by the user for no additional cost, should be developed as commodities contracts under this Bulletin by submitting a requisition to the Division of Purchasing and Contract Administration, Department of Buildings and General Services. Further information specific to information technology contracting is found in the IT Handbook attached as **Appendix**. The Handbook covers, among other things, best practices for IT procurements and terms & conditions which may be needed to address issues particular to IT contracts, such as intellectual property ownership, IT Professional Liability and security concerns.

**d. Construction Contracts:** contracts for infrastructure construction, renovation or rehabilitation projects, including such State facilities as State-owned or leased buildings, roads and bridges.

**e. Marketing Contracts:** contracts for advertising (print, radio, TV, and web/internet, but not to include recruiting); collaterals (brochures, fact sheets, folders, etc.); web site design (not to include technical components); trade shows and events; direct mail campaigns; and sponsorships.

**f. Contract Employees:** contracts with sole proprietors, whether incorporated or not, who do not meet any of the A-B-C test requirements, as discussed below. These contracts will be “privatization contracts,” under 3 V.S.A. 341.

**g. Contracts with Retirees/Former Employees:** contracts with State of Vermont Retirees and/or prior State of Vermont Employees.

**h. Other:** contracts with persons or legal entities not included in subsections (a) through (g) above.

## **2. Privatization Contracts**

A privatization contract is a contract for services valued at \$20,000 or more per year that satisfies the criteria below:

- (a) provides for the same, or substantially similar to, and in lieu of services previously provided, in whole or in part, by permanent, classified state employees;

AND

(b) results in a reduction in force of at least one permanent, classified employee, or the elimination of a vacant position of an employee covered by a collective bargaining agreement. For additional information, refer to Section **VII. C. 4.** of this Bulletin.

**Unless otherwise permitted by applicable agency statute, no agency may enter into a privatization contract, unless the procedure set forth at [3 V.S.A. §343](#) is followed.**

### **3. Contractors versus Employees – The “A-B-C Test”**

Generally, State of Vermont Employees should be used to perform essential governmental functions. Contractors should not be used unless the services to be provided would pass the “A-B-C Test.”

There are two primary reasons. First, federal and State tax laws establish stringent rules regarding an agency “contractor” and when said “contractor” must be treated as an “employee” for tax purposes. An agency that is unaware of these tax rules may incur an unexpected tax liability, including penalties, after the contract is completed, or may face an unexpected claim for F.I.C.A and unemployment taxes or workers’ compensation coverage.

The fact that an agency chooses to characterize the relationship as “contractual” rather than as “employment” has little bearing on the matter. An agency’s responsibility for unemployment taxes or workers’ compensation coverage depends on the facts of the relationship and not upon how the relationship is categorized or described. The A-B-C Test is a safe harbor for determining whether a contractor is an employee or a contractor for tax and workers’ compensation purposes.

The Internal Revenue Service lists a number of considerations which may be balanced to determine whether an individual may be considered an employee or a contractor. These factors are set forth in **Appendix VIII** to this Bulletin.

Appointing Authorities should be familiar with these considerations.

Second, a Contract for Services will be determined to be contrary to the spirit and intent of the classification plan and merit system and standards if it fails to meet the A-B-C Test requirements and will not be certified by the Office of the Attorney General under 3 V.S.A. § 311(a)(10).

**3A.** The A-B-C Test has two parts. You must first if determine all three Part 1 criteria apply to your contract. If the contract meets ONE or TWO, but not all three of the above criteria, proceed to Part 2 of the A-B-C Test. (See also 3 V.S.A. 342)

### **Part 1 - The A-B-C Test**

The A-B-C TEST is applied on an agency-by-agency basis. Therefore, the TEST only applies to **YOUR** agency and not to the State as a whole. For example, DII may be staffed with IT Project Managers; when DII contracts for an IT Project Manager this would not pass the A-B-C Test. However, if **YOUR** agency is not staffed with IT Project Managers and were to contract for one, **YOUR** agency may not have an issue with the A-B-C Test.

First, a contract will be reviewed to determine if ALL of the following three requirements are met:

(1) The agency will not supervise the daily activities or methods and means by which the contractor provides services, other than supervision necessary to ensure the contractor meets contractual performance expectations and standards;

**AND**

(2) The services provided are not the same as those provided by classified state employees within the agency;

**AND**

(3) The contractor customarily engages in an independently established trade, occupation, profession or business.

## **Part - 2- A-B-C Test**

*If the proposed contract does not meet **ALL THREE** of the above Part 1 A-B-C Test criterias, then **YOUR** agency must consider whether the contract meets **ANY ONE** of the following exceptions:*

- (A) The services are not available within the agency or are of such a highly specialized or technical nature that the necessary knowledge, skills or expertise is not available within the agency.
- (B) The services are incidental to a contract for purchase or lease of real or personal property.
- (C) There is a demonstrated need for an independent audit, review or investigation; or independent management of a facility is needed as a result of, or in response to, an emergency such as licensure loss or criminal activity.
- (D) The state is not able to provide equipment, materials, facilities or support services in the location where the services are to be performed in a cost-effective manner.
- (E) The contract is for professional services, such as legal, engineering, or architectural services, that are typically rendered on a case-by-case or project-by-project basis, and the services are for a period limited to the duration of the project, normally not to exceed two years or provided on an intermittent basis for the duration of the contract.
- (F) The need for services is urgent, temporary or occasional, such that the time necessary to hire and train employees would render obtaining the services from state employees imprudent. Such contract shall be limited to 90 days' duration, with any extension subject to review and approval by the secretary of administration.
- (G) Contracts for the type of services covered by the contract are specifically authorized by law.
- (H) Efforts to recruit state employees to perform work, authorized by law, have failed in that no applicant meeting the minimum qualifications has applied for the job.
- (I) The cost of obtaining the services by contract is lower than the cost of obtaining the same services by utilizing state employees. When comparing costs, the provisions of section 343 of this title shall apply.

### ***3B. Other Exceptions to the A-B-C Test***

However, an agency may enter into a Contract for Services in the following cases:

- a. When a statute, other legislative authorization, or executive order explicitly directs that an agency may use contractors. An example would be highway construction and planning (19 V.S.A. § 10(1)). Such contracts, however, are not exempt from the procedures in this Bulletin.
- b. For clerical or secretarial services provided by an established company that normally provides such services when necessary to replace a vacationing or otherwise absent employee.
- c. “Contracting out” may be specifically approved by the Secretary if: (1) significant savings are likely in program cost and the contractor will not be asked to exercise sovereign powers, such as police power or eminent domain; (2) to establish state policy; or (3) to represent government policies to the public, in accordance with 3 V.S.A. § 342.

### **B. Alternatives to Contracting for Services**

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

1. Permanent classified or exempt positions shall only be authorized by the Legislature.
2. Limited service positions may be authorized by the Joint Fiscal Committee in connection with a grant or by the Legislature itself.
3. Temporary employees may only be hired with approval of the Commissioner of Human Resources in accordance with 3 V.S.A. § 331. A temporary employee shall not work for more than 1,280 hours per calendar year without approval is from the Commissioner of Human Resources.

[END EXCERPT 3.5]