

Excerpt from AoA Bulletin 3.5 Draft for Agency/Department Comments – For Discussion Purposes Only (pages 10 – 16)

IV. CONTRACTS FOR SERVICE: PERSONAL SERVICE; INDEPENDENT CONTRACTORS AND PRIVATIZATION

A. Contracts for Services

Generally, State of Vermont Employees should be used to perform essential governmental functions. However, there are circumstances which justify the use of contractors to complete certain tasks, rather than employees, which may be determined in the discretion of the Appointing Authorities. Once the determination has been made to enter into a Contract for Services, applicable State law and the policies and procedures set forth in this Bulletin will apply, regardless of amount.

Contracts for Service are further categorized into Personal Service and Non-Personal Service (Independent Contractor). Both Contracts for Service and Non-Personal Service Contracts may be determined to be Privatization Contracts in accordance with [3 V.S.A. 341 \(3\)](#). The determination process as to whether a Contract for Service is to be categorized as Personal Service or Non-Personal Service and as Privatization is must be done in a specific order and must be in compliance with federal and State laws. The process is graphically represented on page [4](#).

There are various types of services which may be contracted, including the following examples:

- 1. Professional Services Contracts:** contracts with professionals such as physicians, nurses, lawyers, engineers, architects, certified public accountants, surveyors, mental health counselors, educators, consultants, investment managers and IT project managers. In addition to the State's standard insurance requirements, professionals must 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 (see Insurance Coverage Limit section [Error! Reference source not found.](#))
- 2. Information Technology (IT) Contracts:** contracts for Information Security and 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 (SLA). Further information specific to information technology contracting is located in the IT Guideline, located on the Agency of Administration website at: <http://aoa.vermont.gov/bulletins/3point5>. The IT Guideline covers, among other things, best practices for IT procurements and terms and conditions which may be needed to address issues particular to IT contracts, such as, licensing, intellectual property, data ownership, and security concerns.
- 3. Construction Contracts:** contracts for infrastructure construction, renovation or rehabilitation projects, including such State facilities as State-owned or leased buildings, roads and bridges.
- 4. 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.

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5. **Financial Transaction Contracts:** Contract with bank or other entity to handle in-bank or on-line financial transactions.
6. **Other Contracts for Services:** contracts with persons or legal entities not included in subsections (A) through (F) above.

B. Personal Services Contracts

1. Description.

Contracts for Services can be either Personal Services Contracts or Non-Personal Services Contracts (Independent Contractors). There are important differences between employment and contractual relationships, even though paid services are being performed in both cases. Federal and State tax and labor laws recognize, however, that some contracts for service are so closely akin to an employment relationship, based on criteria similar to those listed below, that they trigger certain requirements under Federal and State taxation and labor laws, such as the requirement to withhold FICA, and provide unemployment and worker's compensation coverage. If a Contract for Services meets any of the criteria listed in subsection (2) below, it is presumptively a Personal Services Contract. Contracts for Services that do not meet any of the criteria below are Non-Personal Services contracts. Personal Services Contracts do not create an actual employer-employee relationship for the purposes of determining whether a person is a State employee, but do result in additional tax and labor law requirements.

2. Determination Process.

Appointing Authorities must determine whether proposed contracts for services meet any of the criteria below:

- a. The agency will supervise the daily activities or methods and means by which the contractor provides services;
- b. The services provided are the same as those provided by classified state employees within the agency; or
- c. The contractor does not customarily engage in an independently established trade, occupation, profession or business.

If a contract for services meets ANY one of these criteria, it is presumptively determined to be a Personal Services Contract. The fact that an Agency chooses to characterize the relationship as “contractual” rather than as “employment” has little bearing on the matter. Consultation with Agency counsel or the Office of the Attorney General (AGO) is recommended. All Personal Services Contracts must be carefully structured to ensure compliance will all federal and state requirements, and the contracted person must be paid through the State employee payroll system.

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NOTE: *All Personal Services Contracts must be paid through the State VTHR payroll system.*

C. Non-Personal Services Contracts

Individuals such as (but not limited to) doctors, dentists, veterinarians, lawyers, accountants, construction contractors and subcontractors, public stenographers, or auctioneers who are in an independent trade, business, or profession in which they offer their services to the general public are retained under non-personal services contracts and are generally have the characteristics of independent contractors.

D. Privatization Contracts

A privatization contract is a contract for services valued at \$25,000 or more per year that satisfies the criteria below:

(i) 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

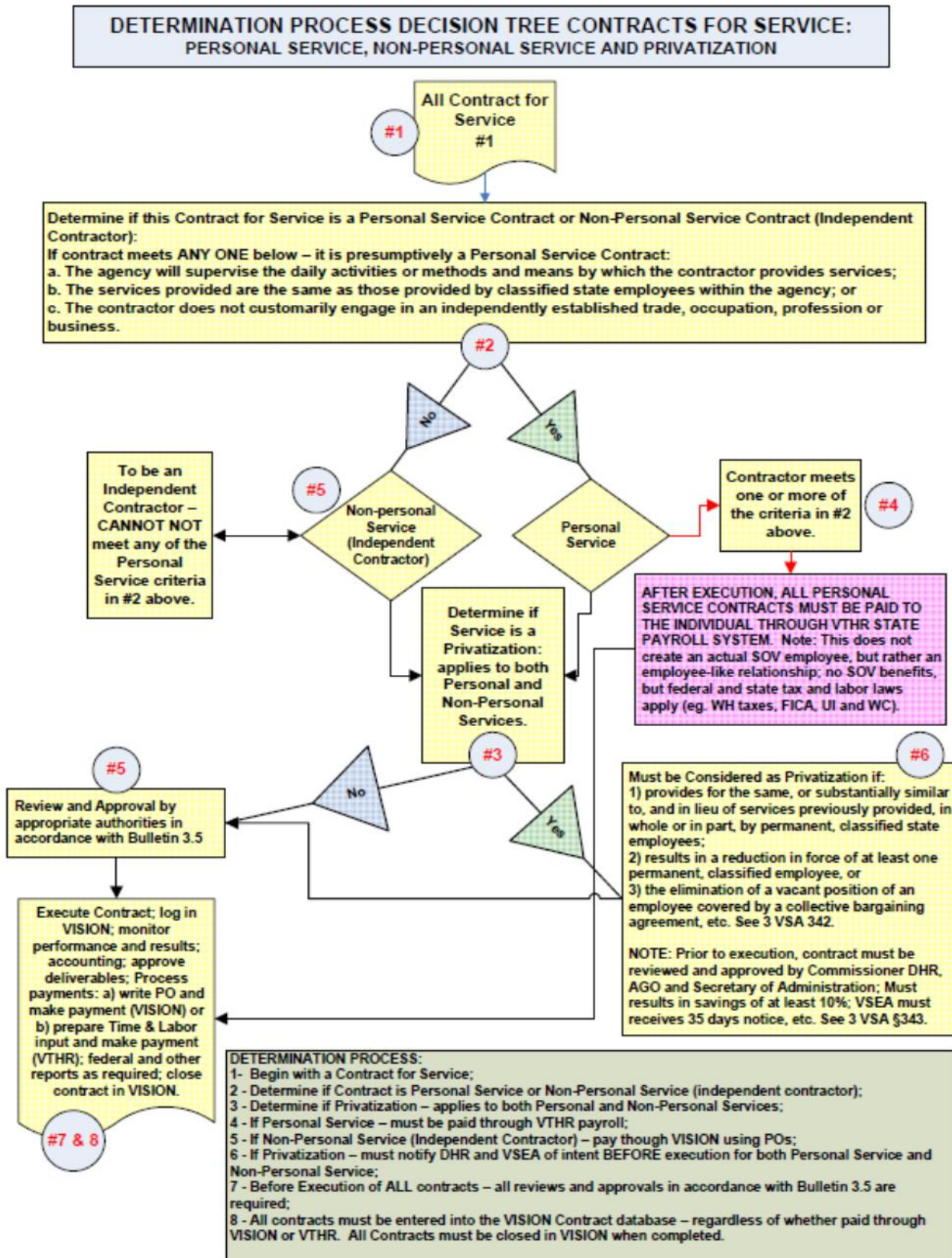
(ii) results in a reduction in force of at least one permanent, classified employee, or the elimination of a vacant position of an employee covered by a collective bargaining agreement. For additional information, refer to Section V.D.2. and 3.a. of this Bulletin.



NOTE: *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.*

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E. Contract for Service Determination Process Graphic



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V. AGO Certification for Bargaining Agreement(s) Compliance

The AGO must determine whether a Contract for Services is contrary to the spirit and intent of the classification plan and merit system and standards under [3 V.S.A. § 311\(a\)\(10\)](#).

The AGO Certification has two parts. First, determine if all three Part 1 criteria apply to the contract. If the contract meets ONE or TWO, but not ALL THREE of the criteria below, proceed to Part 2 of the AGO Compliance Certification. (See also [3 V.S.A. § 342](#))

A. Part 1 – AGO Certification

The AGO Compliance Certification 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, if DII is staffed with IT Project Managers, a DII contract for an IT Project Manager would not pass the AGO Certification. 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 AGO Certification.

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.

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B. Part 2- AGO Certification

*If the proposed contract does not meet **ALL THREE** of the above Part 1 criteria, 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 [3 V.S.A. §343](#) shall apply.

C. Other Exceptions to the AGO Certification

An agency may enter into a Contract for Services in the following cases:

- i. 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.
- ii. 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.
- iii. “Contracting out” may be specifically approved by the Secretary: (1) if significant savings are likely in program cost and the contractor will not be asked to exercise sovereign powers, such as police

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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](#).

D. 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:

- Permanent classified or exempt positions shall only be authorized by the Legislature.
- Limited service positions may be authorized by the Joint Fiscal Committee in connection with a grant or by the Legislature itself.
- Temporary employees may only be hired with approval of the Commissioner of Human Resources in accordance with [3 V.S.A. § 331](#). Please consult with the Human Resources Representative for your Agency, to ensure hiring a temporary employee is in accordance with the statutory limitations.

End Excerpt