

Overview of Contracting for Services: Process and Timing

A. Contract for Services

- The General Assembly is not bound by the contracting requirements of the Executive Branch.
- However, the General Assembly closely follows the contract requirements for the Executive Branch for multiple reasons, such as limiting contract use, limiting liability, and reducing costs.
- Generally, State of Vermont employees should be used to perform essential government functions.
- However, there are circumstances that justify use of contractors, rather than employees. Once a determination has been made to enter into a contract for service, applicable State law and the policies and procedures may apply.¹
- Contracts for service are categorized into “personal service” and “non-personal service contracts.”²
- Non-personal service contracts generally have the characteristics of independent contractor relationships, where the State has only the right to control or direct the result of the work and not the details of what and how the work will be done.
 - Examples include individuals such as doctors, lawyers, accountants, construction contractors, or public stenographers who exercise a high degree of independence in performing services and are in an independent trade, business, or profession in which they offer services to the public.
- By contrast, personal service contracts generally have characteristics of an employment relationship and may trigger certain State and federal tax and labor law requirements.

B. Competitive Bidding

- Competition in the procurement process serves both the State and potential bidders by ensuring the procurement process produces an optimal solution at a reasonable price and allowing qualified vendors an opportunity to obtain State business.
- In addition to complying with existing statutory and regulatory requirements, State procurement must comply with the following general principles:
 - Notice: Provide appropriate notice of opportunities to compete for State business;
 - Predictability: Provide a consistent process while conducting the procurement;
 - Transparency: Document the procurement process clearly and consistently; and
 - Cost-effectiveness: Ensure procurement processes are designed to secure optimal solutions at reasonable prices.

¹ Vermont Agency of Administration Bulletin 3.5 – Procurement and Contracting Procedures sets forth the procedures and requirements for Executive Branch contracting, see <https://aoa.vermont.gov/bulletins/3point5>.

² There are additional requirements under 3 V.S.A. ch. 14 for privatization contracts. A privatization contract is a contract for service valued at \$25,000 or more per year that: (i) provides services which are the same, or substantially similar to, and in lieu of services 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. The contemplated contracts likely are not privatization contracts.

C. The Bid Process

- For a contract that is estimated not to exceed \$100,000, the State may choose to follow either a Simplified Bid or a Standard Bid process.³
- For a contract estimated to exceed \$100,000, the State is required to use the standard bid process.
 - A standard bid process requires, among other provisions, the issuance of a request for proposal, a defined time period for submission of bids, defined criteria for bid evaluation and contract award, and public bid opening and award.
- Use of “sole source” or “no-bid” contracts is contrary to the competitive process supported by the State. Sole source contracts should be avoided except when no available alternative exists.
- The General Assembly does not have a policy for use of sole source contracts. Administrative Bulletin 3.5 includes certain justifications for Executive Branch sole source contracts:
 - an unusual and compelling urgency, such as when health or public safety is at stake;
 - situations posing extreme financial consequences to the State;
 - legislatively mandated situations; and,
 - when required by a warranty or proprietary license agreement.
- The General Assembly does approve sole source contracts for under \$10,000, where the above justifications may or may not exist.
- If a sole source contract is expected to exceed \$25,000, Bulletin 3.5 requires approval from an agency head. In the General Assembly, approval is sought from the head of a legislative office, provided that the General Assembly’s use of a sole source contract for over \$25,000 is rare.

D. Simplified Bidding

- A “simplified bid process” may be used if the anticipated contract amount will not exceed \$100,000.
- A simplified bidding process requires the State to develop a scope of work that identifies work to be performed, specific needs to be addressed, or product to be delivered, and that solicits price quotes from at least three potential vendors known to provide the specified services or products.
- The simplified bid process does not require a public bid posting or a public bid opening.

E. General Contract Restrictions

- A Contract shall not:
 - Require the State to indemnify a contractor;
 - Require the State to submit to binding arbitration or waive the State’s right to a jury trial;
 - Establish jurisdiction in any venue other than Civil Division of the Washington Unit;
 - Waive the certifications regarding tax status, child support, use of State funds, or equal opportunity clauses, as are required by State law;

³ If an agency is unsure whether a contract will exceed the \$100,000, to avoid rebidding the work, the use of a standard bid process is recommended.

- Restrict the ability of the contractor to hire State employees without the prior written permission of the Department of Human Resources (DHR);
 - Designate a governing law other than the laws of the State of Vermont;
 - Constitute an implied or deemed waiver of the immunities, defenses, rights or actions under the State's sovereign status or under the 11th Amendment to the U.S. Constitution;
 - Limit the time within which a legal action may be brought; or
 - Include a provision for automatic renewal ("evergreen" clause).
- All contracts⁴ must adhere to the Standard State Provisions for Contracts and Grants. (Attached).

F. Timing—Practicality

- If following the simplified bid process, the Committee, or delegates from the Committee, would develop a scope of work and identify three potential contractors from which to solicit bids.
 - Key questions re the scope of work—what will be required and in what timeframe.
- The Committee would solicit bids. Potential contractors who display interest would be interviewed. If interested, the contractors submit bids. This process can take 2 to 5 weeks.
- If there are multiple bids, the Committee or delegates would review and score the bids based on evaluation criteria. This can take a day or two.
- The contract then needs to be negotiated. If the contractor has worked with the State/General Assembly in the past, this can be completed quickly (one or two days). If the contractor does not have experience with the State, it can take longer.
 - Contractors who are inexperienced with State work or who have concerns about provisions in the State Standard Terms and Conditions often ask for revisions to the Standard Terms and Conditions. For example, the requirement for contractors to carry certain types or levels of insurance.
- The contractor performs, hopefully within the designated timeframe and presents the product or information to the Committee.

⁴ While use of the standard Contract form and full Attachment C is preferred, the State Authority may authorize the use of the standard Short Form Contract and Short Form Attachment C ("Short Form") for limited purchases of service not exceeding 12 months and \$24,999.99.

**ATTACHMENT: STANDARD STATE PROVISIONS
FOR CONTRACTS AND GRANTS**

REVISED DECEMBER 15, 2017

1. **Definitions:** For purposes of this Attachment, “Party” shall mean the Contractor, Grantee or Subrecipient, with whom the State of Vermont is executing this Agreement and consistent with the form of the Agreement. “Agreement” shall mean the specific contract or grant to which this form is attached.
2. **Entire Agreement:** This Agreement, whether in the form of a contract, State-funded grant, or Federally-funded grant, represents the entire agreement between the parties on the subject matter. All prior agreements, representations, statements, negotiations, and understandings shall have no effect.
3. **Governing Law, Jurisdiction and Venue; No Waiver of Jury Trial:** This Agreement will be governed by the laws of the State of Vermont. Any action or proceeding brought by either the State or the Party in connection with this Agreement shall be brought and enforced in the Superior Court of the State of Vermont, Civil Division, Washington Unit. The Party irrevocably submits to the jurisdiction of this court for any action or proceeding regarding this Agreement. The Party agrees that it must first exhaust any applicable administrative remedies with respect to any cause of action that it may have against the State with regard to its performance under this Agreement. Party agrees that the State shall not be required to submit to binding arbitration or waive its right to a jury trial.
4. **Sovereign Immunity:** The State reserves all immunities, defenses, rights or actions arising out of the State’s sovereign status or under the Eleventh Amendment to the United States Constitution. No waiver of the State’s immunities, defenses, rights or actions shall be implied or otherwise deemed to exist by reason of the State’s entry into this Agreement.
5. **No Employee Benefits For Party:** The Party understands that the State will not provide any individual retirement benefits, group life insurance, group health and dental insurance, vacation or sick leave, workers compensation or other benefits or services available to State employees, nor will the State withhold any state or Federal taxes except as required under applicable tax laws, which shall be determined in advance of execution of the Agreement. The Party understands that all tax returns required by the Internal Revenue Code and the State of Vermont, including but not limited to income, withholding, sales and use, and rooms and meals, must be filed by the Party, and information as to Agreement income will be provided by the State of Vermont to the Internal Revenue Service and the Vermont Department of Taxes.
6. **Independence:** The Party will act in an independent capacity and not as State officers or employees.
7. **Defense and Indemnity:** The Party shall defend the State and its officers and employees against all third party claims or suits arising in whole or in part from any act or omission of the Party or of any agent of the Party in connection with the performance of this Agreement. The State shall notify the Party in the event of any such claim or suit, and the Party shall immediately retain counsel and otherwise provide a complete defense against the entire claim or suit. The State retains the right to participate at its own expense in the defense of any claim. The State shall have the right to approve all proposed settlements of such claims or suits.

After a final judgment or settlement, the Party may request recoupment of specific defense costs and may file suit in Washington Superior Court requesting recoupment. The Party shall be entitled to recoup costs only upon a showing that such costs were entirely unrelated to the defense of any claim arising from an act or omission of the Party in connection with the performance of this Agreement.

The Party shall indemnify the State and its officers and employees if the State, its officers or employees become legally obligated to pay any damages or losses arising from any act or omission of the Party or an agent of the Party in connection with the performance of this Agreement.

Notwithstanding any contrary language anywhere, in no event shall the terms of this Agreement or any document furnished by the Party in connection with its performance under this Agreement obligate the State to (1) defend or indemnify the Party or any third party, or (2) otherwise be liable for the expenses or reimbursement, including attorneys' fees, collection costs or other costs of the Party or any third party.

8. Insurance: Before commencing work on this Agreement the Party must provide certificates of insurance to show that the following minimum coverages are in effect. It is the responsibility of the Party to maintain current certificates of insurance on file with the State through the term of this Agreement. No warranty is made that the coverages and limits listed herein are adequate to cover and protect the interests of the Party for the Party's operations. These are solely minimums that have been established to protect the interests of the State.

Workers Compensation: With respect to all operations performed, the Party shall carry workers' compensation insurance in accordance with the laws of the State of Vermont. Vermont will accept an out-of-state employer's workers' compensation coverage while operating in Vermont provided that the insurance carrier is licensed to write insurance in Vermont and an amendatory endorsement is added to the policy adding Vermont for coverage purposes. Otherwise, the party shall secure a Vermont workers' compensation policy, if necessary to comply with Vermont law.

General Liability and Property Damage: With respect to all operations performed under this Agreement, the Party shall carry general liability insurance having all major divisions of coverage including, but not limited to:

- Premises - Operations
- Products and Completed Operations
- Personal Injury Liability
- Contractual Liability

The policy shall be on an occurrence form and limits shall not be less than:

- \$1,000,000 Each Occurrence
- \$2,000,000 General Aggregate
- \$1,000,000 Products/Completed Operations Aggregate
- \$1,000,000 Personal & Advertising Injury

Automotive Liability: The Party shall carry automotive liability insurance covering all motor vehicles, including hired and non-owned coverage, used in connection with the Agreement. Limits of coverage shall not be less than \$500,000 combined single limit. If performance of this Agreement involves construction, or the transport of persons or hazardous materials, limits of coverage shall not be less than \$1,000,000 combined single limit.

Additional Insured: The General Liability and Property Damage coverages required for performance of this Agreement shall include the State of Vermont and its agencies, departments, officers and employees as Additional Insureds. If performance of this Agreement involves construction, or the transport of persons or hazardous materials, then the required Automotive Liability coverage shall include the State of Vermont and its agencies, departments, officers and employees as Additional Insureds. Coverage shall be primary and non-contributory with any other insurance and self-insurance.

Notice of Cancellation or Change: There shall be no cancellation, change, potential exhaustion of aggregate limits or non-renewal of insurance coverage(s) without thirty (30) days written prior written notice to the State.

9. **Reliance by the State on Representations:** All payments by the State under this Agreement will be made in reliance upon the accuracy of all representations made by the Party in accordance with this Agreement, including but not limited to bills, invoices, progress reports and other proofs of work.
10. **False Claims Act:** The Party acknowledges that it is subject to the Vermont False Claims Act as set forth in 32 V.S.A. § 630 *et seq.* If the Party violates the Vermont False Claims Act it shall be liable to the State for civil penalties, treble damages and the costs of the investigation and prosecution of such violation, including attorney's fees, except as the same may be reduced by a court of competent jurisdiction. The Party's liability to the State under the False Claims Act shall not be limited notwithstanding any agreement of the State to otherwise limit Party's liability.
11. **Whistleblower Protections:** The Party shall not discriminate or retaliate against one of its employees or agents for disclosing information concerning a violation of law, fraud, waste, abuse of authority or acts threatening health or safety, including but not limited to allegations concerning the False Claims Act. Further, the Party shall not require such employees or agents to forego monetary awards as a result of such disclosures, nor should they be required to report misconduct to the Party or its agents prior to reporting to any governmental entity and/or the public.
12. **Location of State Data:** No State data received, obtained, or generated by the Party in connection with performance under this Agreement shall be processed, transmitted, stored, or transferred by any means outside the continental United States, except with the express written permission of the State.
13. **Records Available for Audit:** The Party shall maintain all records pertaining to performance under this agreement. "Records" means any written or recorded information, regardless of physical form or characteristics, which is produced or acquired by the Party in the performance of this agreement. Records produced or acquired in a machine readable electronic format shall be maintained in that format. The records described shall be made available at reasonable times during the period of the Agreement and for three years thereafter or for any period required by law for inspection by any authorized representatives of the State or Federal Government. If any litigation, claim, or audit is started before the expiration of the three-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved.
14. **Fair Employment Practices and Americans with Disabilities Act:** Party agrees to comply with the requirement of 21 V.S.A. Chapter 5, Subchapter 6, relating to fair employment practices, to the full extent applicable. Party shall also ensure, to the full extent required by the Americans with Disabilities Act of 1990, as amended, that qualified individuals with disabilities receive equitable access to the services, programs, and activities provided by the Party under this Agreement.
15. **Set Off:** The State may set off any sums which the Party owes the State against any sums due the Party under this Agreement; provided, however, that any set off of amounts due the State of Vermont as taxes shall be in accordance with the procedures more specifically provided hereinafter.
16. **Taxes Due to the State:**
- A.** Party understands and acknowledges responsibility, if applicable, for compliance with State tax laws, including income tax withholding for employees performing services within the State, payment of use tax on property used within the State, corporate and/or personal income tax on income earned within the State.

- B. If applicable, Party certifies under the pains and penalties of perjury that, as of the date this Agreement is signed, the Party is in good standing with respect to, or in full compliance with, a plan to pay any and all taxes due the State of Vermont.
- C. If applicable, Party understands that final payment under this Agreement may be withheld if the Commissioner of Taxes determines that the Party is not in good standing with respect to or in full compliance with a plan to pay any and all taxes due to the State of Vermont.
- D. If applicable, Party also understands the State may set off taxes (and related penalties, interest and fees) due to the State of Vermont, but only if the Party has failed to make an appeal within the time allowed by law, or an appeal has been taken and finally determined and the Party has no further legal recourse to contest the amounts due.

17. Taxation of Purchases: All State purchases must be invoiced tax free. An exemption certificate will be furnished upon request with respect to otherwise taxable items.

18. Sub-Agreements: Party shall not assign, subcontract or subgrant the performance of this Agreement or any portion thereof to any other Party without the prior written approval of the State. Party shall be responsible and liable to the State for all acts or omissions of subcontractors and any other person performing work under this Agreement pursuant to an agreement with Party or any subcontractor.

In the case this Agreement is a contract with a total cost in excess of \$250,000, the Party shall provide to the State a list of all proposed subcontractors and subcontractors' subcontractors, together with the identity of those subcontractors' workers compensation insurance providers, and additional required or requested information, as applicable, in accordance with Section 32 of The Vermont Recovery and Reinvestment Act of 2009 (Act No. 54).

Party shall include the following provisions of this Attachment A in all subcontracts for work performed solely for the State of Vermont and subcontracts for work performed in the State of Vermont: Section 10 ("False Claims Act"); Section 11 ("Whistleblower Protections"); Section 12 ("Location of State Data"); Section 14 ("Fair Employment Practices and Americans with Disabilities Act"); Section 16 ("Taxes Due the State"); Section 18 ("Child Support"); Section 20 ("No Gifts or Gratuities"); Section 22 ("Certification Regarding Debarment"); Section 30 ("State Facilities"); and Section 32.A ("Certification Regarding Use of State Funds").

19. No Gifts or Gratuities: Party shall not give title or possession of anything of substantial value (including property, currency, travel and/or education programs) to any officer or employee of the State during the term of this Agreement.

20. Copies: Party shall use reasonable best efforts to ensure that all written reports prepared under this Agreement are printed using both sides of the paper.

21. Certification Regarding Debarment: Party certifies under pains and penalties of perjury that, as of the date that this Agreement is signed, neither Party nor Party's principals (officers, directors, owners, or partners) are presently debarred, suspended, proposed for debarment, declared ineligible or excluded from participation in Federal programs, or programs supported in whole or in part by Federal funds.

Party further certifies under pains and penalties of perjury that, as of the date that this Agreement is signed, Party is not presently debarred, suspended, nor named on the State's debarment list at: <http://bgs.vermont.gov/purchasing/debarment>

22. Conflict of Interest: Party shall fully disclose, in writing, any conflicts of interest or potential conflicts of interest.

23. Confidentiality: Party acknowledges and agrees that this Agreement and any and all information obtained by the State from the Party in connection with this Agreement are subject to the State of Vermont Access to Public Records Act, 1 V.S.A. § 315 et seq.
24. Force Majeure: Neither the State nor the Party shall be liable to the other for any failure or delay of performance of any obligations under this Agreement to the extent such failure or delay shall have been wholly or principally caused by acts or events beyond its reasonable control rendering performance illegal or impossible (excluding strikes or lock-outs) (“Force Majeure”). Where Force Majeure is asserted, the nonperforming Party must prove that it made all reasonable efforts to remove, eliminate or minimize such cause of delay or damages, diligently pursued performance of its obligations under this Agreement, substantially fulfilled all non-excused obligations, and timely notified the other Party of the likelihood or actual occurrence of an event described in this paragraph.
25. Marketing: Party shall not refer to the State in any publicity materials, information pamphlets, press releases, research reports, advertising, sales promotions, trade shows, or marketing materials or similar communications to third parties except with the prior written consent of the State.
26. Termination:
- i. Non-Appropriation: If this Agreement extends into more than one fiscal year of the State (July 1 to June 30), and if appropriations are insufficient to support this Agreement, the State may cancel at the end of the fiscal year, or otherwise upon the expiration of existing appropriation authority. In the case that this Agreement is a Grant that is funded in whole or in part by Federal funds, and in the event Federal funds become unavailable or reduced, the State may suspend or cancel this Grant immediately, and the State shall have no obligation to pay Subrecipient from State revenues.
 - ii. Termination for Cause: Either Party may terminate this Agreement if a Party materially breaches its obligations under this Agreement and such breach is not cured within thirty (30) days after delivery of the non-breaching Party’s notice or such longer time as the non-breaching party may specify in the notice.
 - iii. Termination Assistance: Upon nearing the end of the final term or termination of this Agreement, without respect to cause, the Party shall take all reasonable and prudent measures to facilitate any transition required by the State. All State property, tangible and intangible, shall be returned to the State upon demand at no additional cost to the State in a format acceptable to the State.
27. Continuity of Performance: In the event of a dispute between the Party and the State, each Party will continue to perform its obligations under this Agreement during the resolution of the dispute until this Agreement is terminated in accordance with its terms.
28. No Implied Waiver of Remedies: Either Party’s delay or failure to exercise any right, power or remedy under this Agreement shall not impair any such right, power or remedy, or be construed as a waiver of any such right, power or remedy. All waivers must be in writing.
29. State Facilities: If the State makes space available to the Party in any State facility during the term of this Agreement for purposes of the Party’s performance under this Agreement, the Party shall only use the space in accordance with all policies and procedures governing access to and use of State facilities which shall be made available upon request. State facilities will be made available to Party on an “AS IS, WHERE IS” basis, with no warranties whatsoever.

(End of Standard Provisions)