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TO: Agency Directors

FROM: Roselyn Marcus
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SUBJECT: CONTINGENCY PLANNING FOR STATE AGENCY CONTRACTS

Although we expect that the 2015-17 operating, capital and transportation budgets will be enacted prior to June 30, all state agencies need to prepare for the possibility that the Legislature may not make timely appropriations. Should that occur, agencies should have in place plans to mitigate and/or suspend the state's financial liability regarding active contracts. This memorandum is to assist agencies in charting a course forward.

As a general rule, the Washington State Constitution (Article 8, Section 4) and state law (RCW 43.88.130 and 43.88.290) prohibit expenditures or commitments of state funds in the absence of the appropriation of such funds by the Legislature. Therefore, any state contract funded by state appropriations that is expected to be active on or after July 1, 2015, must be addressed should budgets not be enacted by June 30, 2015.

CONTRACT TERMINATION PROVISIONS

The first step is to review the language in each contract to determine how or whether the contract is constructed to facilitate any suspension or termination of activities and deliverables. The existence of certain clauses in the terms and conditions can assist an agency in deciding how to proceed. Some common clauses and their application and impact to future receipt of goods/services under existing contracts are:

- **Termination Due to Change in Funding/Non-Allocation of Funds**

  Many contracts contain a clause that provides that should the funds relied upon to establish a contract be withdrawn or not continued, the agency may terminate the agreement by providing written notice to the contractor. The clause should have a specified number of days' notice required. A thirty-day notice provision is common for this clause, although some clauses provide that the contract can be terminated immediately. An agency may terminate a contract under this clause if budgets are not enacted by June 30, 2015.

- **Termination for Convenience**

  Most, if not all, state contracts contain a provision that allows agencies to terminate a contract for any reason or no reason at all. This clause should have a specified number of days' notice required. An agency may terminate a contract under this clause if budgets are not enacted by June 30, 2015.

  For both Termination Due to Change in Funding/Non-Allocation of Funds and Termination for Convenience, the agency should reserve the right to cancel the termination if budgets are not enacted prior to midnight on June 30. Further, if the termination is not cancelled, the agency will need to follow the procurement requirements in order to re-procure these same goods/services per state

state contracting law. In other words, the agency will not be able to simply re-sign a new contract with the vendor once budgets are enacted.

- **Contracts Without a Termination for Convenience or Lack of Funds Provision**

  If an agency determines that a termination of the contract is the best course of action but the contract does not contain either a Termination for Convenience or Termination Due to Change in Funding/ Non-Allocation of Funds provision, contracts officers should work with their assigned assistant attorney general in crafting a notification to the contractor encompassing the State Constitution and its provisions which prohibit agencies from incurring liability/costs in the event of no state budgets.

ALTERNATIVE TO CONTRACT TERMINATION IS CONTRACT SUSPENSION

An agency may not want to terminate a contract. For example, if the vendor is in the midst of contract performance, the agency may need the contractor to complete contract performance once the budgets are enacted and the agency has the authority to expend funds. Or an agency may still need the goods and/or services and does not want to go through a new procurement to engage a vendor, but wishes the current vendor to provide the goods/services pursuant to the original contract. If an agency wishes to have the contract continue after funds are appropriated, it may seek to suspend the contract rather than terminate it.

Some contract suspension clauses permit the public entity to suspend the contract at its sole discretion; other suspension clauses require agreement from the contractor. The suspension allows the parties to resume performance once budgets are passed. If there are deliverable dates that are impacted, the parties should renegotiate reasonable extensions to those dates once the contract resumes. If agreement from the contractor is required for a suspension and a contractor is not amenable to the suspension, the contracting officer would need to proceed under a termination clause, making the contractor aware that they will not be guaranteed a contract once budgets are passed and, indeed, the state will need to re-procure the services/goods if termination is not timely cancelled.

TIMING OF NOTIFICATION TO CONTRACTOR

Although budgets may be enacted by July 1, in order to meet notification requirements, notice may need to be sent in order to protect the agency's ability to terminate the contract. Even if an agency wishes to suspend the contract, because the contractor may need to agree to the suspension, the termination notices may still need to be sent to protect the state's right to terminate absent a suspension agreement. Below are the deadlines for notification letters:

- The deadline to send a notice for a 30-day notice period is May 29;
- The deadline to send a notice for a 20-day notice period is June 10;
- The deadline to send a notice for a 10-day notice period is June 19.

In the notices, contract officers should reserve the right to cancel the terminations or suspensions should the budgets be enacted by midnight on June 30.

SAMPLE NOTIFICATION LETTERS

The Office of Financial Management has worked with the Attorney General's Office to develop the attached sample notification letters that contract officers can modify as they plan their approach in face of the possibility of no state budgets on July 1, 2015. Attachment A is for contracts for goods and services and Attachment B is for public works contracts.

If you have general questions, please contact me at (360) 902-0434 or roselyn.marcus@ofm.wa.gov. For specific questions related to your agency contracts, contact your assigned assistant attorney general.