



STATE OF WASHINGTON

OFFICE OF FINANCIAL MANAGEMENT

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TO: Agency Directors

FROM: Roselyn Marcus *Roselyn Marcus*
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SUBJECT: CONTINGENCY PLANNING FOR DELAY OF LEASE OR CONTRACT PAYMENTS

Although we expect that the 2017-19 operating and capital budgets will be enacted prior to June 30, 2017, state agencies need to put in place plans to mitigate and/or suspend the state's financial liability regarding contracts and leases that cannot be suspended. This memorandum is to assist agencies in putting forth a plan to deal with contracts and leases that cannot be suspended but for which there will not be the authority to make timely payments.

As you know, as a general rule, the Washington State Constitution (Article 8, Section 4) and state law (RCW 43.88.130 and RCW 43.88.290) prohibit expenditures or commitments of state funds in the absence of appropriations of such funds by the Legislature. Therefore, agencies are addressing what happens to state contracts funded by state appropriations in the operating or capital budgets that are expected to be active on or after July 1, 2017. I previously provided information on terminating and/or suspending affected contracts and templates that should be used to notify vendors of these actions. This memo addresses contracts that cannot be suspended or terminated but for which payments will not be able to be made.

DELAYED OR LATE CONTRACT PAYMENT OPTION

The first step is to determine all contracts that would not be terminated or suspended due to operational necessity. Examples of contracts that could not be suspended or terminated would include leases, software licenses or application services, and software and equipment maintenance contracts. Because those contracts will not be suspended or terminated, agencies will continue to accrue liability for payment under the contract.

Since payment cannot be made until appropriations are enacted into law, payments may be delayed. Therefore, the next step is to determine when the next payment would be due and whether the agency may be in danger of missing that payment.

Third, agencies should determine, for each affected contract, the potential liability for failure to make timely payment. Contract provisions for late payment may trigger interest or other penalty provisions. In addition, failure to make timely payment may be a breach of contract that would provide the contractor the ability to terminate the contract and be entitled to damages.

TIMING OF NOTIFICATION TO CONTRACTORS

For those contracts for which the agency determines that payment may be delayed, to mitigate the potential liability that can result from delayed payments, it is recommended that agencies take the affirmative step to notify affected vendors about the late payment. Whether and when to send the notice is dependent on each agency's specific circumstance.

There are some things to think about when determining the timing of this notification. Although budgets may be enacted by July 1, in order to provide sufficient notice to vendors about a possible delay in payment, notice will need to be sent in advance of this date. In addition, if the agency is not operating on July 1, it will not have the ability to notify vendors of this potential risk. Therefore, we recommend that notices of delayed payment be sent the last week in June.

Finally, for those agencies that have leases executed by the Department of Enterprise Services (DES), lease payments are required to be made by the end of the month of occupancy. As such, timely payment for occupancy in July would only be at risk if payment were not made by the end of July. In support of agencies having DES executed leases, DES will send notifications to lessors on July 17, 2017 to inform them of the potential risk of delayed payment, in the event a budget has not been enacted. If your agency has leases executed by DES and your agency would not be impacted by failure to enact the 2017-19 operating budget, please email [Seth Wallace](#) (Assistant Director, DES Real Estate Services) to request letters not be sent on behalf of your agency.

SAMPLE NOTIFICATION LETTERS

In addition to working with DES, OFM worked with the Attorney General's Office to develop the sample notification letters that contract officers can modify as they plan their approach to this issue. Attached are two templates that can be used for this purpose. One template is specifically for delayed lease payments. The other template is for all other contracts for goods and services.

If you have general questions about this approach, 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.