15.40
Personal Service Contracts – Contract Award, Management, and Monitoring

15.40.05 Purpose of this policy

July 1, 2007

This policy serves as the basis for awarding, managing, and monitoring personal service contracts.

15.40.10 Contract negotiations

July 1, 2007

Part of the process of awarding a personal service contract under a competitive solicitation or a sole source process is to negotiate the specific contract terms. Any discussions, whether formal or informal, that are held with the apparent successful contractor to develop and finalize the contract are considered contract negotiations.

Under a competitive process, negotiations may be held with the apparent successful contractor if more favorable terms are desired than were submitted in the proposal or if the proposal is not sufficiently precise or direct.

Areas in the proposal that may be considered less than satisfactory include: time devoted to the project or phases of the project by the consultant, scheduling related to the items in the scope, pricing, billing terms, etc.

Under a sole source award, price negotiations may be necessary if the consultant costs proposed seem higher than expected.

Negotiations should not substantially change the terms of the original proposal, but should eliminate any ambiguities in the contract and clarify the terms. If the terms offered by a contract are fair and equitable, award may be made without negotiations.

15.40.15 Formalizing personal service contracts

July 26, 2009

15.40.15.a **Written contract.** All personal service contracts, regardless of dollar amount, require a **written** document specifying the agreement between the agency and the contractor.

Required elements in a personal service contract are:

- Identification of all parties to the contract;
- Scope of services that clearly describes the responsibilities and obligations of the parties;
- Maximum compensation: The contract maximum is to include funding to cover contractor expenses if they are to be paid under the contract.
- Period of performance, including start and end dates or a statement, for example, that the end date is two years from the start date;
- Payment mechanism that describes the basis on which the contractor will be paid for services whether an hourly/daily/weekly/monthly rate, by deliverable, completion of a project phase or milestone, achievement of a performance target or outcome, lump sum, etc.; and
- Signatures of all responsible parties.

Numerous other terms are often included in the contract documents to provide additional legal protection to the State. These are often designated as General Terms and Conditions and Special Terms and Conditions. General Terms and Conditions are those terms that have been determined by the Office of the Attorney General to apply to most personal service contracts. The Special Terms and Conditions are the terms specific to a contract and generally include the items listed above as mandatory for a contract, but also may include terms such as billing procedures, filing requirements, insurance, contract management, order of precedence, etc.

Personal service contracts cannot be awarded that do not allow access to data generated under a contract to support a contractor's recommendations or conclusions. Access to the data must be granted to the agency awarding the contract, the Joint Legislative Audit and Review Committee and the State Auditor's Office.

Data in the context of RCW 39.29.080 includes all information that supports the findings, conclusions, and recommendations of the consultant's reports, including computer models and the methodology for those models. This applies when formal recommendations or conclusions are provided to the agency under the contract, not to all personal service contracts.

All work must be performed within the contract period of performance, including deliverables. Contractors can only charge for services and expenses that occur within the contract period of performance.

In some instances, a third party makes the payment to a contractor under a personal service contract. The agency does not pay the contractor directly for the services. When that occurs, the contract must clearly describe the payment approach including how and when the third party will pay the contractor. A maximum dollar amount is still required under the personal service contract based on the agency's calculation of what the maximum amount payable to the contractor by the third party will be.

Amendments to personal service contracts must also be in writing.

A sample personal service contract is available on OFM's Additional Contract Resources website at: http://www.ofm.wa.gov/contracts/resources/default.asp.

15.40.15.b **Contract format.** Agencies may choose a contract format appropriate to the services being acquired, provided that the required elements identified in Subsection 15.40.15.a are included. For example, an agency may wish to use a short-form contract or letter of agreement where the contract is not complex or where the contract consideration is less than $5,000.

15.40.15.c **Approval as to form.** Approval as to form by the Office of the Attorney General (ATG) verifies the legality of the contract instrument, but does not necessarily imply concurrence in or approval of the content. It is a good business practice to have the agency's contract format or template reviewed "as to form" by the ATG prior to usage. As long as the ATG-approved contract format is used, it is not necessary that each contract executed by the agency be approved "as to form" by the ATG.

In addition to approval "as to form," it is advisable to have contracts reviewed by an Assistant Attorney General for "substance and content," whenever additional legal advice is needed prior to finalizing the document. Each agency may determine which contracts they submit to the ATG for review.

15.40.15.d **Available funding.** Agencies shall not execute a personal service contract or amendment that increases funding unless funding is available for the contract services prior to execution of the contract or amendment.

Agencies must identify the source and amount of funds to be used for the contract. If the contract is federally funded, state agency staff must ensure that the appropriate contract language regarding federal requirements is included in the contract. This includes suspension/debarment language, A-133 Single Audit language, and any other federal requirements appropriate for the fund source. Federal rules and regulations may also supersede state rules and regulations, and this should also be clear in the contract.

15.40.15.e **Contract signature.** The contract is fully executed when all authorized parties have signed it. In most instances, contracts must be signed by the parties before work begins (emergency contracts are an exception). Upon execution, signed copies of the contract must be provided to all parties to the contract.

15.40.15.f **Structuring contracts.** Agencies shall not structure contracts, especially the dollar amounts, to avoid the competitive procurement or other requirements of the contract policies. It is not appropriate to award contracts in the amounts of $4,999 or $19,999 without budget documentation. These amounts give the appearance of avoiding either informal or formal competition, avoiding filing the contract with OFM, or of advertising it as a sole source.

15.40.15.g **Personal information.** Contract records may occasionally contain personal information about citizens.

Privacy Notice: Safeguarding and disposition of personal information must be consistent with Executive Order 00-03 issued April 25, 2000, and chapter 42.56 RCW and other applicable statutes that protect personal information.

15.40.20 Performance measures and outcomes

July 1, 2007

Contract managers are encouraged to consider whether performance measures and outcomes are applicable to their contract. The purpose of performance measures is to provide a standard or measure for performance of the contracted services. Performance measures may also be used to determine if, and when, the contractor has successfully completed performance, and when and how much the contractor should be paid.

Contract performance measures may:

- Define the standards for measuring contractor performance;
- Provide a means to monitor performance;
- Measure satisfaction with the contractor; or
- Provide data for program evaluation.

Good performance measures are:

- Clearly written;
- Easily understood by contractors, state agencies, and the general public;
- Focused on the performance expected from the contractor;
- Well defined and consider both the quantitative (how much?) and qualitative (how well?) aspects of performance;
- Relevant, timely, verifiable and reportable; and
- Realistic in terms of available resources, funding and timelines, and recognize external factors beyond the control of the system.

Contract managers should check the funding source or statutory authority to determine whether any specific outcomes are mandated. They should also consider:

- How the agency will know the service has actually been provided (other than accepting the contractor's word);

- How the agency will know the *quality* of services has been provided and include a mechanism for measuring quality;
- What specific outcomes the agency is looking for, such as enhanced job retention, reduced recidivism, or improved safety of citizens following a natural disaster; and/or
- Whether payment is contingent on an event, product, or outcome. If so, how the agency will ascertain that the contractor has satisfied the requirement. If the payment points are not clear, consider the benefit of tying payment to an event, product or outcome.

15.40.25 Performance-based contracts

July 1, 2007

15.40.25.a Performance-based contracts have several **characteristics** that distinguish them from more traditional types of service contracting. Those characteristics:

- Emphasize results related to output, quality and outcomes rather than how the work is performed;
- Have an outcome orientation and clearly defined objectives and timeframes;
- Use measurable performance standards and quality assurance plans; and/or
- Provide performance incentives and tie payment to outcomes.

Performance contracting may be used for a variety of types of services, but it is not applicable to or appropriate for all. Its use must be carefully considered since outcomes and performance standards need to be clearly identified in the contract, so that achievement of those outcomes and standards is apparent to all.

15.40.25.b Performance-based contracts offer **benefits**. For example, they:

- Encourage and promote contractors to be innovative and to find cost effective ways to deliver services;
- Result in better prices and performance;

- Give contractors more flexibility in how to achieve results;
- Shift more risk to contractors so they are responsible for achieving the outcomes; and
- Provide incentives to improve contractor performance and tie compensation to achievement.

15.40.25.c **Potential issues** associated with performance-based contracts include:

- Adequate management information systems may not be in place to correctly interpret data;
- Performance outcomes may be contingent on factors outside of the contractor's control;
- Contractors may have limited financial resources and capacity to assume risk;
- Contractors fear a cash flow crisis and financial uncertainty; and/or
- Contractors may have under-developed financial information management systems.

15.40.30 Fiscal considerations and payment methods

July 1, 2007

15.40.30.a **Fiscal principles.** Fiscal principles that apply to personal service contracts include, but are not limited to:

- State agencies must pay reasonable and fair prices for services.
- Payment to the contractor must be made according to the terms of the contract. A clear statement of work should directly correlate to the method of compensation in the contract.
- Contractors must have accounting methods and systems that are describable and auditable, applicable to the circumstances. Contractors must comply with accounting measures and principles appropriate to the contractor's type of entity and as identified in the contract.
- State agencies must use the accounting methods and systems published in this manual.

- Payments made under personal service contracts must be applicable to the services provided and consistent with the rates and fees agreed upon.

- Payments made under personal service contracts must be adequately documented and supported by appropriate accounting records maintained by both the state agency and the contractor.

- Payments should not be made for the same or similar services more than once (no duplicate payments to contractors).

- State agencies are to pay contractors for services in a timely manner (RCW 39.76.010). This is contingent upon the contractor completing work satisfactorily and submitting accurate and complete invoices.

- State agencies should track fund sources to ensure over-payments don't occur in any particular fund.

- State agencies should have a means to recover contract over-payments if discovered.

15.40.30.b **Financial reporting.** Financial reporting provisions may require a contractor to report on or allow access to their financial information at defined intervals during the contract or upon contract completion or termination. The purpose of financial reporting provisions is to aid in monitoring contractor performance and/or verify fiscal accountability, and to allow contract managers to make informed decisions about the contractor's ability to perform or meet contract requirements.

Key considerations for financial reporting provisions are to:

- Define the type of financial information and documentation required;

- Specify dates or intervals for reports, if any;

- Require access to contractor staff, records, and place of business, as appropriate; and

- Authorize monitoring of financial records.

15.40.30.c **Payment methods.** Contracts must describe the basis upon which the contractor will be paid for services, whether based on an hourly, daily, weekly or monthly rate, per deliverable cost, fixed fee, progress payments, achievement of a performance target or outcome, or other applicable method.

The method, or combination of methods, selected should best ensure delivery of quality services, encourage efficiencies and effectiveness of services, and provide the best value to state agencies. Clearly defining the payment terms will ensure both the contractor and agency have the same understanding about payment and will help mitigate confusion or potential project delays and disputes.

Another type of contract payment method is used with performance-based contracts. Performance-based contracts describe either what the contractor is expected to accomplish or what outcome the contractor is to achieve, but do not specify how the work will be completed. Therefore, contractors provide more strategic input into determining the best method and approach for the services in order to achieve the outcomes desired by the agency.

Performance-based contracts typically tie payments to outcomes or deliverables, not just the number of hours of service provided, but they do state a maximum compensation that may be earned.

15.40.30.d **Payment documentation.** The contract should define the documentation required to authorize payment, to assist the contractor in invoicing correctly so that the contract manager can expedite approval of the invoice for payment.

At a minimum, invoices submitted should include contract number, date(s) service was provided, description of services provided or any goods received, and approval for payment.

The approval for payment can be documented by the initials of the approving staff and date on the contractor's invoice, or by an electronic approval process. For further information, refer to Subsection 85.32.30.

15.40.30.e **Contract overpayment.** If an overpayment to a contractor is discovered, the agency must take appropriate action. Contract managers should consult with their accounting or auditing staff, their internal legal staff, and/or with the Office of the Attorney General for guidance.

15.40.30.f **Federally funded contracts.** Contracts supported with federal funds, whether in whole or in part, are subject to federal requirements. Such requirements may be the result of federal statutory provisions, administrative regulations adopted by federal agencies, administrative guidelines distributed by federal agencies or contract award provisions.

There are basic federal rules that apply to virtually all expenditures of federal awards. Each federal agency and the U.S. Office of Management and Budget (OMB) publish these rules as listed below:

1. **Uniform administrative requirements**:

   a) State and local governments (including recognized Indian entities):
      - Grants Management Common Rule adopted by federal agency Code of Federal Regulation (CFR) (OMB Circular A-102).

   b) Institutions of higher education, hospitals, and nonprofit organizations:
      - Uniform Administrative Requirements adopted by federal agency CFR (OMB Circular A-110).

   c) For-profit organizations:
      - Administrative Requirements adopted by federal agency CFR.

2. **Cost principles requirements**:

   - State and local governments (including recognized Indian entities) (OMB Circular A-87).
   - Educational Institutions (OMB Circular A-21).
   - Nonprofit Organization (OMB Circular A-122).

3. **Audit requirements** for all nonfederal entities:

   - Audit common rule adopted by federal agency CFR.
   - OMB Circular A-133, including Appendix B – Compliance Supplement.

Federal agency regulations including the CFR and OMB Circulars can be accessed on the Internet at: http://www.gpoaccess.gov/cfr/index.html, and http://www.whitehouse.gov/OMB/circulars.

The federal agency regulations and the OMB Circulars are routinely updated. Contract managers of contracts involving federal funds are encouraged to stay abreast of such changes by consulting with fiscal staff or other individuals that follow federal requirement amendments.

15.40.30.g **Sub-recipient or vendor.** When federal funds are involved, a determination should be made before a client service contract is written as to whether the contractor is a sub-recipient or vendor. The administrative and management requirements for each differ significantly. The correct designation ensures compliance with applicable federal regulations and determines whether an audit is required of the contractor.

A **sub-recipient** is a non-federal entity that expends federal funds received from a pass-through entity to carry out a federal program, but does not include an individual that is a beneficiary of such a program.

A **vendor** is a dealer, distributor, merchant or other seller providing goods or services that are required for the conduct of a federal program. Refer to Section 50.30 for further guidance about the sub-recipient/vendor determination and OMB Circular A-133 Audits of States, Local Governments, and Non-Profit Organizations, Subpart B-Audits, 210 Sub-recipient and vendor determinations.

Contracts should be clearly written to support the determination of sub-recipient or vendor status.

A **sub-recipient** may:

- Determine who is eligible to receive federal assistance;
- Have its performance measured against whether the objectives of the federal program are met;
- Have responsibility for programmatic decision-making;
- Have responsibility for adherence to applicable federal program compliance requirements; and
- Use federal funds to carry out an agency's program as compared to providing goods or services.

A **vendor**:

- Provides the goods or services within normal business operations;
- Provides similar goods or services to many different purchasers;
- Operates in a competitive environment;
- Provides goods or services that are ancillary to the operation of the federal program; and
- Is generally not subject to compliance requirements of the federal program.

In some instances, a contractor could be a sub-recipient for one state agency and a vendor for another. A contractor could also be a sub-recipient for one program within an agency, and a vendor for another program within the same agency.

15.40.30.h **Debarment/suspension.** The federal suspended/debarred list identifies contractors who cannot be given federally funded contracts. No federal contracts may be awarded to contractors on the federal suspended/debarred list.

15.40.35 Liability insurance

July 1, 2007

15.40.35.a Before conducting a personal service procurement, the agency should analyze the type of services required and evaluate the State's exposure to legal liability that may result from the contract. State agencies can be financially protected from those who seek legal recourse by requiring contractors to carry insurance. To protect the State's interests on contracts where insurance is appropriate, liability insurance requirements should be included in either the solicitation document as a condition of responsiveness or in the contract document.

Injury or damage to a third party may result in legal liability to the State if it occurs as a result of a contractor's negligence. Liability insurance covers legal liability of an insured. If a contractor provides liability insurance coverage and names the State as an additional insured on the policy, the State will have insurance protection for many types of tort claims that arise out of the contractor's activities.

15.40.35.b The OFM, Risk Management Division (RMD), recommends that agencies include insurance requirements in their contracts, whenever applicable. At a minimum, RMD suggests that contractors be required to purchase general liability/automobile liability and employer's liability insurance and comply with workers compensation laws. For more information on RMD's suggested insurance specifications, refer to *Contracts: Transferring and Financing Risk*. This manual is available in hard copy through RMD or on OFM's RMD website at: http://www.ofm.wa.gov/rmd/default.asp.

If you have further questions, you may contact RMD at (360) 902-7301. Contract managers should contact internal agency staff, who may be knowledgeable about insurance requirements, before contacting RMD.

15.40.40 Industrial insurance

July 1, 2007

15.40.40.a When a state agency enters into a personal service contract, the contractor's employees should be covered by industrial insurance also called workman's compensation. This protects the State's interest if either the contractor or someone employed by the contractor is injured while performing work under the contract.

With few exceptions, Title 51 RCW, Washington State's industrial insurance law, requires that all persons performing work under contract in Washington State be covered by industrial insurance. Contractors are required to provide industrial insurance coverage either through the Department of Labor and Industries (L&I) or as self-insured employers certified by L&I. Agencies can verify a contractor's compliance by contacting L&I, Field Audit Compliance, in Olympia at (360) 902-4752 or 902-4750, or by sending an e-mail to: verifystatecontracts@lni.wa.gov.

Employments excluded from mandatory coverage are listed in RCW 51.12.020 and include sole proprietors, partners, corporate officers, and others.

15.40.40.b Under RCW 51.12.050, the contracting agency is responsible for ensuring that the prime contractor and any subcontractors have industrial insurance coverage as the agency may be liable for unpaid industrial insurance premiums. As appropriate, agencies should incorporate into their personal service contracts a provision stating that the contractor agrees to comply with the industrial insurance requirements of Title 51 RCW and to cover its employees with industrial insurance.

15.40.45 Risk assessment approach to contracting

July 1, 2007

15.40.45.a **Risk assessment approach.** The risk-assessment approach to contracting is intended to assist contract managers in analyzing the contract services and contractor's qualifications in order to better focus their oversight efforts on higher risk contracts. A risk assessment evaluates risk factors to determine how much monitoring and/or auditing should be done to protect the agency's interests.

The risk assessment may be conducted informally or formally depending on the dollar value of the contract, complexity of the services, experience of the contractor, etc. An informal risk assessment is the analysis conducted by the contract manager to make effective contracting decisions and is not required to be in writing. A formal risk assessment is conducted in writing and documents the types of activities and factors considered.

Sample risk assessment checklists are provided on OFM's Additional Contract Resources website at: http://www.ofm.wa.gov/contracts/resources/default.asp.

15.40.45.b **Risk assessment categories.** Risk factors can be broken into two broad categories: 1) risks associated with the services, and 2) risks associated with contractors.

1. **Risks associated with the services.** Examples of factors that may be considered in assessing risk include the following:

   - **Funding** – Is the amount of funding small or large?
   - **Complexity** – Are service requirements simple, complex, or sensitive? Will major public policy issues be impacted?
   - **Payment method –** What type of payment method will be used, e.g., cost reimbursement, fee for service, performance based, etc.? What experience does the state agency have with the method?
   - **Competition –** Will the contract be awarded on a competitive basis with detailed evaluation of the proposal, costs, and contractor qualifications, or will it be awarded as a sole source?

2. **Risks associated with contractors.** Examples of factors that may be considered in assessing risk include:

   - **Funding that the contractor receives from the agency** – Is the amount of funding from the agency small or large? Does the contractor have many or few contracts with the State?

   - **Length of time in business** – Has the contractor been in business for several years or is the business new?

   - **Experience and past performance** – Does the contractor have contracts for similar services with other governmental entities? How extensive is the contractor's experience providing this type of service for the State? What is the contractor's performance history?

   - **Accreditation/licensure** – Is the contractor licensed and insured?

   - **Financial health and practices** – Is the contractor's financial condition good? Does the contractor demonstrate sound financial practices? Is the contractor's financial record keeping system adequate for the number and complexity of funding sources being managed?

   - **Board of directors** – If the contractor is a nonprofit organization, does the board take an active role in directing the organization, establishing management policies and procedures, and monitoring the organization's financial and programmatic performance? Is the board comprised of individuals who are unrelated? Do employees or former employees of the organization serve as board members?

   - **Subcontracting** – Does the contractor subcontract key activities? Does the contractor have an effective monitoring function to oversee subcontractors?

   - **Organizational changes** – Has there been frequent turnover of contractor management, senior accounting staff or key program personnel? Has the contractor started any new services within the last twelve months? Has the contractor experienced a recent rapid growth or downsizing? Has the contractor experienced reorganization within the last twelve months? Has the contractor changed major subcontractors recently?

- **Management structure** – Is the organization centralized or decentralized? How much control does the organization have over decentralized functions?

- **Legal actions** – Have any lawsuits been filed against the contractor within the last twelve months?

- **Defaulted contracts** – Has the contractor defaulted on any of its contracts within the last five years? If so, what were the circumstances?

Based on the results of the risk assessment, contract managers may decide whether it is advisable to contract for the services. If contracting, the contract manager will decide the level of scope, frequency, and methods of monitoring to be used to ensure oversight is sufficient given the risks involved. Risk assessment results may also be used to devise more stringent controls and tighter contract language, when appropriate, to adequately monitor the use of public funds.

It is also important to note that contract risk is dynamic. Therefore, the risk assessment should be updated periodically to provide a current record of risk factors associated with the contract.

Risk assessments, linked to a monitoring plan, should be documented. Contract managers may choose how to document this. Several examples of risk assessment tools can be found on OFM's Additional Contract Resources website at: http://www.ofm.wa.gov/contracts/resources/default.asp.

15.40.45.c **Transferring risk.** Risk management strategies include transferring risk to the contractor, minimizing or mitigating the risk, eliminating the risk, or sharing the risk with the contractor. Contract managers may:

- Add clauses to the contract to address specific risk factors;

- Require contractors to provide proof of insurance;

- Develop and implement effective monitoring plans and contractor reporting requirements;

- Link payments to deliverables/performance measures; and/or

- Consider payment bonds or liquidated damages clauses.

15.40.50 Contract management principles

July 1, 2007

Contract managers must be mindful of the following:

- In almost all instances, written contracts must be signed by both parties before work can begin under the contract.
- Written contract amendments must be signed prior to the contract expiration date (end date) whenever there is a change to the scope of work, period of performance, or maximum dollar amount (or other financial terms) of the contract.
- When signing a contractor's contract form, provide appropriate review of the contract to ensure adequate protection for the State is included in the contract.
- Services should be performed to the satisfaction of the contract manager before payment is approved.
- All work must be completed within the contract period of performance, including deliverables.

15.40.55 Managing and monitoring contracts

July 26, 2009

15.40.55.a **Proactively manage and monitor.** Once the contract is fully executed by all parties, agency staff must proactively manage and monitor the contract to ensure the quality and quantity of services are received. Effective management and monitoring of personal service contracts are keys to successful contracting results.

15.40.55.b **Managing the contract.** Contract management includes any activity related to contracting for personal services, including the decision to contract, contractor screening, contractor selection, contract preparation, contract monitoring, auditing, and post-contract follow up.

While the contractor has responsibility to perform under the terms of the contract, the state agency has responsibility for reasonable and necessary monitoring of the contractor's performance to ensure compliance with the contract provisions.

Many contracts name a contract manager who serves as the primary point of communication between the agency and the contractor and who provides the principal contract management and monitoring function. More than one individual can be named as having responsibility for various aspects of the contract.

The chief objective of the contract manager, however, is to ensure that the contractor fulfills all contractual obligations in a quality manner within budget and schedule. To accomplish this task, the contract manager should be completely knowledgeable of the terms of the contract and maintain requisite controls throughout.

15.40.55.c **Monitoring the contract.** Monitoring means any planned, ongoing or periodic activity that measures and ensures contractor compliance with the terms and conditions of the contract. The level of monitoring should be based on a risk assessment of the services provided and the contractor's ability to deliver those services. Every communication with a contractor is an opportunity to monitor activity.

The **purpose of monitoring** is to ensure the contractor is:

- Complying with the terms and conditions of the contract and applicable laws and regulations;
- Adhering to the project schedule and making appropriate progress toward the expected results and outcomes;
- Providing the quality of services expected; and
- Identifying and resolving potential problems and providing constructive, timely feedback.

Effective contract monitoring can assist in identifying and reducing fiscal or program risks early in the process, thus protecting public funds.

Monitoring activities may include, but are not limited to, the following:

- **Periodic contractor reporting.** Contractors submit progress reports or other appropriate data or deliverables to report on services being provided, adherence to the contract, and progress being made. Sub-standard performance can also be determined.

- **On-site reviews and observations.** Contract managers may conduct on-site reviews, interview contractor staff to ascertain their understanding of program goals, review key systems and service documentation, review personnel records to ensure staff have appropriate credentials, review fiscal records, and observe operations whenever possible. The results of these reviews should be documented in writing and compared with contract requirements

- **Invoice reviews.** Comparing billings/invoices with contract terms ensures the costs being charged are accurate, consistent with the contract requirements, and within the compensation limits set by the contract. Also, verifying that funds are tracked by fund source will help prevent over-payments by fund.

- **Audit report reviews.** Contract managers review any required audit reports and audit work papers and ensure the contractor takes appropriate and timely corrective action, if required.

- **Other periodic contact with contractor.** Meetings and other periodic contact with the contractor to review progress facilitates continuous dialog and mitigates problems.

Documentation of monitoring activities must be maintained by the agency to verify that monitoring has been conducted. Contract files should include, for example, copies of letters and e-mail, meeting notes, and record of key phone conversations as evidence that conscientious monitoring has occurred during the contract. This is especially important where there are issues with the contractor's performance.

15.40.60 Executing amendments to existing personal service contracts

July 26, 2009

As work progresses, it may be necessary to make changes to the contract to enhance or improve the deliverables or services. Any written alteration to an existing contract is called a contract amendment. Amendments are executed by all parties to document the changes being agreed upon.

Chapter 39.29 RCW establishes that personal services must be competitively procured, with few exceptions. Amendments are one of the exceptions and are not subject to competition. Agencies must, therefore, carefully analyze whether an amendment is the best approach for the additional services needed as compared to competitively procuring them.

15.40.60.a **Principle terms amended.** The principle areas of contract changes that require amendments are:

- **Scope of work.** This may include adding, modifying or deleting tasks, services or deliverables, or revising specifications. Changes must be within the scope of the original contract.

- **Cost.** If the total amount of the contract is increased, a contract amendment is required. If the contract amount is decreased, it is advisable to execute an amendment to clarify the scope of work and dollar amount being decreased.

- **Period of performance.** An extension to the end date of the contract is the most common change to the period of performance.

Certain amendments are subject to filing with OFM and require a 10-working day waiting period and/or OFM approval before work under the amendment may begin. It is helpful to include an effective date and/or reference to the filing requirements in the amendment in order to be clear when services under the amendment are to begin.

Administrative amendments are those that result in minor changes to the contract. They do not materially affect the scope of work, do not change the total dollar amount, or do not change the period of performance.

Administrative amendments do not require a formal amendment, but are required to be documented in writing by the parties and retained in the contract file. Examples are address changes, staff name changes, budget line item adjustments that do not revise the total contract cost, deliverable due date changes within the period of performance, etc.

Administrative amendments are not required to be filed with or reported to OFM.

15.40.60.b **Within the scope of work.** Changes to contracts may be awarded as amendments, rather than as new contracts, if the changes are **within** the general scope of work of the original contract. Work that would be considered within the general scope of the original contract is that which would be fairly and reasonably within the contemplation and intent of the parties when the contract was awarded.

If the amendment provides for services that are essentially the same as those in the original contract, the amendment would likely be within the general scope of the contract.

Changes that are outside the general scope of the contract are **not** appropriate to award through contract amendment. Such changes would have the effect of making the work performed substantially different from the work the parties bargained for at the time the original contract was awarded.

If a contract has expired, it is generally not appropriate to amend it; rather it is more appropriate to award a new contract.

15.40.60.c **Amendment is in the best interest of the state.** The agency must determine that a proposed amendment is in the best interest of the state of Washington, considering such factors as project continuity, time savings, cost effectiveness, and the learning curve for a new contractor.

By their nature, contract amendments allow contractors to obtain additional work without having to compete. In view of the State's policy of open competition in the award of personal service contracts, agency staff must carefully and cautiously examine the nature, extent, and cost of the additional services and justify the decision to award an amendment in lieu of conducting a competitive process. The justification submitted to OFM as part of filing the amendment (if the amendment is subject to filing) satisfies this requirement. This does not apply to contracts that add time only and are not authorizing additional work or dollars.

When adding funding to a contract, agencies should generally include in the amendment both the dollar amount of the additional funding and the revised contract maximum (the amendment amount added to the current contract maximum). In addition, agencies should consider specifying what additional services are being provided under the amendment and include any new deliverable dates resulting from the additional dollars being authorized.

15.40.60.d **New contract option.** If an amendment is not **clearly** determined to be the best choice, the agency must execute a new contract. A new contract is generally appropriate where there is a substantial change in the scope of work, duration, nature of work, or cost, or where there is a logical break in service. When awarding a new contract, competitive requirements must be followed, unless an exception or exemption applies.

15.40.60.e **Amendments to sole source and emergency contracts.** Amendments to sole source and emergency contracts are appropriate only when the circumstances surrounding the original award still exist and, therefore, warrant continued use of sole source or emergency services.

15.40.65 Corrective action

July 1, 2007

Contract problems must be addressed as soon as they are discovered to prevent them from becoming recurring or serious. Corrective action is suggested when direct negotiation and other less formal means have failed. Corrective action means action initiated by the agency and taken by the contractor that corrects identified deficiencies, produces recommended improvements, or demonstrates that deficiencies or findings are either invalid or do not warrant action.

Contract problems that warrant corrective action include:

- Failure to produce or submit key deliverables;
- Monitoring or audit findings;
- Poor quality of key deliverables;
- Inferior quality of services;
- Failure to perform all or part of the contract;
- Ongoing late performance;
- Inadequate, unclear or excessive billing; and
- Late submission of reports on a recurring basis.

A first step in corrective action would typically be to communicate in writing to the contractor describing where performance is deficient. Corrective action activities should be coordinated with the agency's management, in-house counsel and/or Assistant Attorney General, as applicable, to avoid waiving any rights that might be available to the State.

All corrective action initiated by the agency must be documented in writing. If the corrective action is successful in resolving problems, the contractor should be notified in writing that resolution has been achieved and the documentation retained in the contract file.

If corrective action is unsuccessful at first, state agency staff may continue to work with the contractor until deficiencies are resolved, or they may proceed with a dispute process or take other appropriate courses of action.

15.40.70 Contract disputes

July 1, 2007

A contract dispute is typically the result of a serious difference of opinion between the agency and contractor about contract terms, conditions or performance. The contract disputes process generally follows a corrective action process that has reached an impasse. The contract should contain a disputes clause setting forth the process to be followed. Invoking the disputes clause is an option available to either party, but is not required. If the dispute process is elected, the process must be followed as described in the contract.

Disputes provisions may take different approaches. One approach is for the disputing party to submit a written statement of the issues to the other party at a higher level within the organization. If that does not resolve the issue(s), a neutral third party can be appointed to review the position of both parties and submit a written decision. Another approach is to convene a dispute panel with each party to the contract appointing one member and a mutually agreed upon third panel member being appointed with the majority prevailing. Other appropriate disputes approaches may also be utilized, as agreed upon.

Dispute activities should be coordinated with the agency's Assistant Attorney General. Unless otherwise directed by the Office of the Attorney General, dispute processes are to precede any court action.

15.40.75 Contract remedies and sanctions

July 1, 2007

After efforts to resolve issues through either or both the corrective action and/or dispute processes have failed, a contractor who is deemed to be noncompliant with the terms and conditions of the contract may be determined to be subject to remedies or sanctions, such as:

- Withholding payment;
- Collection of liquidated damages per the contract terms;
- Federal debarment of suspension of the right to contract with an agency or agencies, if federal funds are involved;
- Suspension of the contract; or
- Termination of the contract.

15.40.85 Contract termination

July 1, 2007

Contracts may be terminated prior to the completion date of the contract either for convenience of the parties or for cause as provided under the contract terms.

15.40.80.a **Termination for convenience.** The termination for convenience clause is intended to handle changed conditions under the contract, particularly when the expectations of the parties have been subjected to substantial change.

Termination for lack of funding, referenced under the "Savings" clause of the model contract, is processed as a "Termination for Convenience." It is intended to handle the situation when funding from federal, state or other sources is no longer available to the agency or not allocated for the purpose of meeting the agency's contractual obligation.

The Attorney General's Office may be contacted when an agency is considering invoking the termination for convenience clause.

15.40.80.b **Termination for default.** To terminate a contract based upon the contractor's default, the agency asserting default must demonstrate that the contractor has not performed according to the contract. This step follows the validated corrective action and/or disputes processes. By invoking the termination for default clause, the agency is generally in a position to claim damages due to the other party's breach of the contract. Again, either the agency's in-house legal counsel or Assistant Attorney General should be consulted whenever an agency is considering invoking this clause.

15.40.85 Review and implement contractor's final product

July 1, 2007

When the contract is almost complete, contract managers are responsible to:

- Assess whether all services have been provided and contract objectives and outcomes met;
- Determine the agency's next steps based on the contractor's work;
- Ensure contractor has accounted for any state property or equipment used for the contract, has turned in building access cards, etc.; and
- Ensure all invoices are received and authorize final payment, when appropriate, to the contractor.

15.40.85.a **Final written report.** As part of completing contract work under the terms of the contract, the contractor may be required to submit a final written report. Not all contracts will require such a report, but when they do, the final written product should address, at a minimum, the following areas as appropriate to the type of service provided:

- Statement of the problem investigated or need addressed;
- Description of the methodology used;
- Alternative solutions or approaches available;
- Selected solution or approach and reasons for selection;
- Benefits or results to be realized; Recommendations for further improvements; and/or
- Other matters that should receive management emphasis or attention.

Generally, the final report is submitted before final payment is made to the contractor.

15.40.85.b **Implementation.** Once a contractor's results or recommendations have been accepted, an agency is responsible to correct identified problems and/or to implement the recommendations, as appropriate. Follow-through by agency management on work done by the contractor is critical to the success of the overall project. The final written report should be thoroughly reviewed with the contractor to ensure that all conclusions, supporting logic, and related information are understood by the agency.

When the contractor's final report is accepted by an agency, the contract manager should determine the best approach to implement the recommendations. Factors to consider include:

- Which recommendations are to be implemented?
- What agency resources are required to proceed with implementation?
- Is staff sufficiently trained or prepared to proceed with any changes required?
- What tasks are required to implement each recommendation?
- Whose responsibility is it to complete each task?
- How and when will implementation be accomplished?

15.40.90 Evaluate contractor's performance

July 1, 2007

Upon contract completion, the agency contract manager may want to prepare a contractor evaluation. This evaluation will be useful if agency management wants an analysis of consultant performance and if other agencies inquire about the consultant.

The evaluation may address the following:

- Timely completion of work;
- Quality of work performed;
- Quantity of work;
- Professional manner and conduct;
- Working relationship with agency staff; and/or
- Quality of project management.

Contract managers should share with other state agency staff information gained from administering the contract so that those responsible for future contracts can gain from these experiences.

15.40.95 Documenting the contract file

July 26, 2009

Agencies are required to maintain adequate documentation regarding the contract and services provided by the contractor. Agencies may maintain contract documentation in more than one location as well as by multiple media. Contract payment documentation may be maintained in the fiscal office, while the contract manager may maintain a monitoring file in his/her location and the contract office may maintain the procurement files. The information may be available in electronic or hard copy format.

15.40.95.a **Documentation.** Documentation in the contract file, at a minimum, must include the executed contract and all attachments and exhibits incorporated into the contract. Information related to a formal competitive procurement, as set forth in Subsection 15.20.30.n, must also be retained.

For informal competition, the documents stated in Subsection 15.20.20.d must be retained.

For sole source contracts of $5,000 or more, an explanation of the basis for the sole source decision must be retained as well as documentation of the posting/advertisement.

The justification submitted to OFM as part of a sole source filing satisfies this requirement.

Monitoring activities conducted under the contract such as meeting minutes, copies of reports submitted, fund tracking records, etc., are all examples of the types of documentation that may be part of a contract file and must be maintained somewhere in the agency.

15.40.95.b **Records retention.** Records retention of personal service contracts must follow the requirements published by the Office of the Secretary of State in the General Records Retention Schedule for Agencies of Washington State Government at: http://www.secstate.wa.gov/archives/gs.aspx.

15.40.98 Auditing contracts

July 1, 2007

15.40.98.a **Auditing.** Auditing is broadly defined as the independent examination of an entity's records or actions in order to evaluate compliance with financial, legal, contractual, or policy requirements.

Several types of audits are performed, including:

- **State audits** – As with all expenditures made by agencies, personal service contract expenditures are subject to audit by the State Auditor's Office.

- **Federal audits** – When agencies award federally funded personal service contracts, the agency needs to determine whether the contract constituted a sub-recipient or vendor relationship with the contractor. If the contract constituted a sub-recipient relationship, an OMB Circular A-133 audit may be required of the sub-recipient. If the contract established a vendor relationship, in general, vendors are not required to have an OMB Circular A-133 audit. Determining whether a contractor is a vendor of the agency or an agency's sub-recipient can be difficult. Guidance is available in Subsection 50.30.60 and at: www.whitehouse.gov/omb/circulars/a133/a133.html.

Audits initiated by the agency or contractor: State agencies should use a risk assessment to consider whether an audit of the contractor is needed. When an audit is deemed appropriate and necessary, the expectations for the audit scope, methodology, and due date should be included in the written contract.

An audit can be designed to accomplish one or more of the following:

- Provide reasonable assurance as to the accuracy of the financial information reported by or obtained from the contractor;
- Assess the financial condition of a contractor;
- Assess the internal control system of a contractor;
- Assess the performance of a contractor; and
- Assess compliance with applicable laws and contract regulations.

While an audit can be an effective monitoring tool, it carries a cost. Therefore, care should be exercised in calling for audits. Regardless of whether an audit is performed, the agency still must monitor its contracts to ensure it receives the services for which it paid.

15.40.98.b **Audit resolution.** State agencies should evaluate appropriate resolution to the audits where findings and/or questioned costs have been identified. If federal funds are involved, OMB Circular A-133 Section 315 requires follow up and corrective action on all federal findings.

Normally, if a finding exists in a published audit report, whether issued by Federal auditors (Office of Inspector General), an independent audit firm, the State Auditor's Office, or a state agency's internal audit staff, resolution of audit findings is warranted.

15.40.98.c **Questioned costs.** Questioned costs are normally those costs identified as the result of an audit that may have inappropriately been paid to the contractor. The agency should investigate further and determine whether costs should be recovered.

Methods for recovering questioned costs may include:

- Billing the contractor;
- Adjusting future payments until the questioned costs have been recovered; and/or
- Deducting the questioned costs from the final payment.

There may also be good reasons not to pursue recovery of the questioned costs, such as when the costs to recover a small dollar amount are more than the over-payment. While this is an option, sufficient reasons, generally based on Assistant Attorney General guidance, are required to exercise this option.

Contracts using federal funds may require different processes, as prescribed by the federal government.

15.40.98.d **Performance audits.** In 2005, Initiative 900 gave the State Auditor's Office authority to conduct performance audits of state and local governments. The State Auditor developed the following definition of a performance audit:

An objective and systematic assessment of the performance and management of an entity, program, activity, or function in order to:

- Provide information to improve performance and operations;
- Facilitate decision-making by parties with responsibility to oversee or initiate corrective action; and
- Improve accountability to the public.

Performance audits conducted will cover broad areas but will include those of the greatest public interest, matters that affect all agencies, and other identified recurring challenges.

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