Chapter 6 DRAFTING A CONTRACT

This chapter is designed to assist in the task of drafting a state contract. It contains a description of the essential elements of a contract, information and guidance on specific types of contracts, model contract language and provisions, and brief explanations concerning their use.

Personal Liability - An Introductory Caution

In Colorado State Government an obligation for goods or services from a supplier or contractor cannot be incurred without first processing a valid commitment voucher, usually in the form or a contract or State Purchase Order, in accordance with State Statutes. CRS 24-30-202(3) sets forth that "No person shall incur or order or vote for the incurrence of any obligation against the state in excess of or for any expenditure not authorized by appropriation and approved commitment voucher except as expressly authorized by this section. Any such obligation so raised in contravention of this section shall not be binding against the state but shall be null and void *ab initio* [from the beginning] and incapable of ratification by any administrative authority of the state to give effect thereto against the state. But every person incurring or ordering or voting for the incurrence of such obligation and his surety shall be jointly and severally liable therefore." CRS 24-30-202(1) requires "Any state contract involving the payment of money by the state shall not be deemed valid until it has been approved by the controller or such assistant as he may designate." This means that if a contractor is knowingly allowed to perform services for the state, before the contract has been fully executed, there is a risk of personal liability for the cost incurred.

The targeted time for review and approval of a state contract by the Attorney General's Office and State Controller's Office is five days for each office. If reviews and approvals are required by other Central Approvers additional time must be allotted for contract processing. Contracts that are routed with insufficient time to permit final approval in accordance with this policy may require a written explanation as to why the contract is late and may also be designated as statutory violations if the contractor has started working at the agency's request or with the agency's knowledge.

Never allow a contractor to begin performance before the contract has been fully executed. A contractor starting work before the State Controller or a delegate has approved the contract may be acting as a "volunteer."

Commitment Vouchers

This section gives guidance about when to use a state contract, a State Purchase Order, or other form of commitment voucher. State Fiscal Rule 2-2 requires the use of a state contract or a State Purchase Order when acquiring goods or services costing more than

$5,000. State agencies may establish a lower dollar limit for commitment vouchers than required by State Fiscal Rule 2-2.

A contract is the generic name given to any agreement between two or more parties, which may be oral or written. The state does not allow oral contracts and CRS 24-30-202(1) requires that a valid commitment voucher be processed prior to any disbursement of funds for a state liability except for disbursements of petty cash. Commitment vouchers are defined as a State Purchase Order, a state contract, a travel authorization, an advice of employment, or any other form appropriate to the type of transaction as prescribed by the State Controller. Based upon the requirements and limitations set forth in the State Fiscal Rules, it is the responsibility of the agency's procurement professionals, contracts manager and/or legal counsel to determine, on a case-by-case basis, which form of commitment voucher is required to best protect the interests of the state with respect to a particular procurement.

State Fiscal Rule 2-2 allows for small dollar amount purchases, $5,000 or less, to be made without a commitment voucher, but evidence of delivery (i.e., an invoice) is required. A State Purchase Order or state contract may be used for these purchases when the agency's purchasing officer determines that the state's interests cannot be adequately protected without the use of a commitment voucher. State Fiscal Rule 2-2 also allows for the use of a vendor contract in lieu of a State Purchase Order or state contract for purchases not exceeding $5,000. Vendor contracts must clearly describe the service or item being purchased as well as the cost. In addition, vendor contracts may not contain terms that might require the state to: pay more than the cost shown on the document, for example, penalty clauses or liquidated damage provisions; indemnify or hold the vendor harmless; agree to jurisdiction or venue outside Colorado; or modify the agreement without appropriate documentation. If a vendor contract contains any of these problem terms, then the vendor agreement may not be signed (or attached to a purchase order) without eliminating the offending terms.

Some types of routine expenses do not require a commitment voucher and may be paid based on a vendor invoice, a statement, receipt or other such documentation regardless of the amount. These include utilities, telephone bills, conference registration, membership dues, postage, etc. See State Fiscal Rule 2-2 for a complete list of these types of expenses.

State Purchase Orders

A State Purchase Order is a pre-printed form that may be used for any purchase that does not require a state contract. State Purchase Orders differ from state contracts in three respects. First, purchase orders are not required to be signed by the State Controller or delegate and do not require legal review. Second, when signed by an authorized purchasing agent, the statutory obligations to ensure that funds are available and prices are fair and reasonable are fulfilled. Third, they are normally only signed by a state purchasing agent and not by the vendor. This makes the State Purchase Order a

"unilateral contract", meaning that an enforceable agreement arises when the vendor indicates acceptance of the State Purchase Order by complying with the terms of the State Purchase Order.

State Purchase Orders are recognized as a tool for creating a binding contract for the purchase of goods under Article 2 of the Colorado Uniform Commercial Code (the "UCC") (see CRS 4-2-201, 206). UCC Article 2 is an attempt to simplify and lend predictability to commercial transactions for goods by specifying the reasonable expectations, obligations, and rights of parties under common commercial practices. Where the parties to a transaction for the sale of goods intentionally or accidentally fail to address certain issues in a written contract, the UCC usually will supply such terms as a matter of law. These laws supplement virtually every agreement for the purchase or sale of goods. State Purchase Orders are intended to streamline administration by utilizing this body of law and to ensure that every transaction is subject to certain pre-determined terms and conditions that are found on the reverse side of the State Purchase Order document as required by State Fiscal Rule 2-2.

State Purchase Orders should not be used to acquire ongoing services having a significant value over an extended period of time. It is difficult to adequately specify service milestones or periodic deliverables in the State Purchase Order and to provide specific remedies in the event of delay or default by the vendor. However, a State Purchase Order may be used to order one-time repairs, maintenance, or construction services up to the amount permitted by the State Fiscal Rules if the state can be adequately protected. It is important to remember when contemplating using the State Purchase Order for services that there is not a body of law governing service contracts like Article 2 of the Uniform Commercial Code, which governs the purchase of goods. The only protection the state has when using the State Purchase Order for services is what is written on the State Purchase Order. As a general rule for services, if there is any question about whether or not the vendor is an independent contractor, or if what is expected from the vendor cannot be adequately described on the State Purchase Order, a state contract, which is signed by the agency and the vendor, should be used. Remember, State Fiscal Rule 3-1 provides that any questions as to whether or not the State Purchase Order adequately protects the state should be referred to the State Controller's Office or the Attorney General's Office.

State Purchase Orders for services in excess of $50,000 are not permitted by the State Fiscal Rules, with few exceptions. One notable exception is use of the State Purchase Order to order under a statewide price agreement, which is an agreement that is centrally bid by the State Purchasing Office for use by all agencies in acquiring frequently utilized goods or services. Statewide price agreements may be mandatory; i.e., all agencies may be required to order the specified goods or services under the agreement, or permissive; i.e., agencies are free to negotiate separate contracts with the same or other vendors rather than electing to use the statewide price agreement. To determine whether or not a specific type of goods or services has been made available under a statewide price agreement, check the BIDS web site or contact the State Purchasing Office.

State Contracts

State Fiscal Rule 3-1 requires state contracts to be used as the commitment voucher for specific types of state obligations and at certain dollar limits based on the nature of the commitment. A state contract, as defined in State Fiscal Rule 3-1, is:

"A formal legally binding agreement between two state agencies or one state agency and another party or an amendment to such agreement which ultimately results in the disbursement of funds. For the purpose of this State Fiscal Rule State contracts include, but are not limited to Outsource Contracts, Personal Service Contracts, Purchased Service Contracts, and Settlement Agreements. State contracts, as used in this State Fiscal Rule, do not include State Purchase Orders."

There are some standard form state contracts that have been developed and are used for specific commitments; i.e., capital construction, leases, licenses, and inter-agency agreements. In addition there is certain language that is required to be included in all state contracts; i.e., effective dates, term dates, special provisions, and signature blocks, regardless of the nature of the contract. State contracts differ from State Purchase Orders because they require a legal review, are bilateral, authority to sign for the agency granted in writing by the agency's chief executive officer, and the State Controller or his designee must sign the state contract to make it valid.

Agencies have a great amount of flexibility when drafting state contracts, but all state contracts must conform to all of the requirements found in State Fiscal Rule 3-1. There are many important terms and/or provisions in state contracts, such as the statement of work and payment terms that have to be developed by the agency. This is in contrast to the State Purchase Order, which has provisions on its reverse side governing payment, delivery, etc. While agencies have the discretion to include certain provisions and to exclude other provisions when appropriate, it is important that the agency fully understand the meaning of every provision in the contract.

One of the requirements set forth in State Fiscal Rule 3-1 is that a state contract must be used when other commitment vouchers are not considered sufficient to adequately protect the state. This criterion may be difficult to apply. Protecting the interests of the state means ensuring that the risks to the state that arise from the activity involved in the transaction have been fully considered and that the contract documents properly allocate such risks. It is up to the purchasing and contracting professionals in each agency to carefully consider each transaction and make an informed judgment as to whether or not these goals can be achieved in the transaction by the terms and conditions on the reverse of a State Purchase Order, appropriately modified, or whether a state contract is required. These risks may include the economic risks of nonperformance or inadequate performance as well as risks of bodily injury occurring during the performance, or as a result of the work. For example, the State Purchase Order does not specify particular types or amounts of insurance to be provided by the vendor. A vendor, whose duties include the use of vehicles or equipment on state property, or interaction with state employees or members of the public, may injure someone or damage state property

during the course of the work. Sometimes these risks to people or property cannot be adequately addressed without specifically requiring the vendor to produce proof of comprehensive general liability insurance naming the agency and the state as an additional insured. The purchasing and contracting professionals must recognize such risks and insist upon the use of a state contract or additional purchase order terms, to ensure that the risk is properly allocated to the vendor's insurance carrier. In addition, every contract should provide appropriate remedies for breach and create an acceptable level of certainty as to the duties of the parties. These and other factors must be considered when determining whether or not the State Purchase Order is an adequate form of commitment voucher for the transaction.

If, after careful consideration and risk analysis, it is determined that the transaction requires more terms and conditions than can adequately be included in the State Purchase Order to define scope of work, deliverables under the contract, insurance requirements, payment provisions, rights to data and software, confidentiality records maintenance requirements, termination provisions, etc., then a state contract should be negotiated and used.

Competitive Bidding

The Colorado Procurement Code governs how suppliers or contractors are selected to provide goods and services to state agencies. However, there are some exceptions to vendor selection that are outside the Code. Whenever a question arises as to whether or not any materials or services should be let for bids, the agency's Purchasing Director or the State Purchasing Office should be consulted. This requirement is met in some instances by a price agreement, which is an award made after a bidding process by the State Purchasing Office to a vendor providing a particular type of goods or services. A price agreement is a contract with a term of up to five years, which allows all state agencies to order goods and/or services from that specific vendor. When the state agency wishes to purchase goods and/or services from a particular vendor under a price agreement, the ordering document refers to the price agreement by its RFP or award number. If an agency orders goods and/or services using a new contract as the ordering document then the price agreement should be referenced in the contract and be attached as an exhibit to the contract.

Whenever a contract is being issued pursuant to a bidding process specific to that transaction, the specifications and relevant portions of the IFB/RFP and winning bid or proposal must be attached to the contract packet when it is submitted for central approval. In addition, make sure the relevant portions of the proposal or bid are incorporated by reference in the contract and are attached as exhibits. The recital section of the contract should specifically indicate that the matter was let for bids in accordance with the State Procurement Code and identify what type of bidding process was conducted to select the vendor.

Generally, the terms of the contract may not significantly go beyond the matters bid. For instance, if the solicitation called for a one-year term, the contract cannot be for two

years. Similarly, additional goods or services that were not part of the bid may not be contracted for without additional competition where those changes would not have been reasonably contemplated by all vendors. Terms and conditions clarified by negotiation after award, that modify the RFP and Proposal, should be made controlling over those two documents by including the terms in the body of the contract or by a separate exhibit expressly made controlling by an order of precedence clause in case of a conflict. Contracts should always contain an order of precedence clause whenever there are references to the RFP, proposal, and any other exhibits. Generally, the controlling order would be the special provisions, the contract, any negotiated provisions in an exhibit, the RFP and, finally, the proposal. The critical performance elements should be taken out of the proposal and put in the contract, or when describing the scope of work in the contract, make specific reference to the applicable portions of the proposal. In this way, the contract and RFP effectively become controlling as to the offer accepted and the order of precedence leaves the proposal as least controlling in the event of conflicts.

Vendor Contracts

The problem with negotiating with vendors that insist on using their own forms has been around for a long time. This advice appeared in a 1988 version of the Contracts and Procurement Code Manual.

> "The obvious solution to this problem is to utilize your RFP in order to eliminate the vendor's objections to the use of state contract forms and format. The specimen contract must include not only the pre-printed pages, but also the format of the final contract you intend to use, including all boilerplate provisions, scope of work, etc. The invitation to bid shall specify that a condition of the vendor's proposal shall be that the state contract resulting from the award to the successful bidder will be in the form of and as set forth in the said specimen contract. In the event some of the vendor's forms are included as attachments or exhibits in the final contract, care should be taken to compare the language of the attachment to that of the contract and to provide that where there are contradictions or inconsistencies, the terms of the state contract shall always supersede, manage, and control those of any exhibit or attachment. Further, the terms and conditions of the RFP shall also supersede and control those of the proposal or of any exhibits or attachments of the vendor.
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> Where the agency fails to properly provide for the final contract format in the RFP and it is impossible to refuse to allow use of the vendor's forms, or parts of the forms, then extreme care must be taken to insure that none of the terms and conditions contained within the vendor's forms are unacceptable in whole or in part. Any such terms and conditions shall be deleted and the deletions initialed by the contracting parties."

This remains good advice today. If the vendor insists that its forms be used, they must be reviewed word-by-word and any inconsistencies resolved in the language. The forms

may be then included as an attachment to the state contract. If you have attached a vendor form to the state contract, it will likely have many deletions and other edits on the vendor form itself, or perhaps clarifications in the main body of the contract. Do not rely solely on an order of precedence clause to take care of conflicts between the body of the state contract and the attached vendor form.

A vendor agreement is any form provided by vendor containing contractual terms and conditions relating to the goods and/or services to be provided. A vendor agreement may be executed in lieu of a state contract only when value of the transaction is no more than $5,000. The State Controller has promulgated policy guidance on the attachment of vendor forms to a State Purchase Order in State Fiscal Rule 2-2. Read and follow the directions in that rule with respect to incorporating vendor provisions/agreements in state contracts as well.

Vendor agreements can add complexity to the transaction and may be difficult to negotiate successfully. However, the problems are sometimes unavoidable since many vendors and contractors have developed their own contract forms and are reluctant to change them from one transaction to the next. This reluctance, rather than being dismissed as simply a negotiating position, should be understood in light of a number of considerations that are important to the vendor; e.g., the vendor may not want to incur legal fees for review and counsel regarding new or modified contract terms; may be uncertain as to the legal effect of such terms, particularly if the vendor resides in a jurisdiction outside the State of Colorado; may regard the administrative burden of dealing with multiple kinds of contracts as unduly costly to the firm; and may also believe that, by negotiating a different deal with the state, the vendor invites other customers to insist upon similar concessions in the future. Therefore, when a vendor presents the agency's purchasing agent with a preprinted contract on a take it or leave it basis, it is often necessary to work carefully both with the vendor's representatives and with agency constituents to devise a mutually acceptable way to incorporate the provisions that are required for state contracts into the deal while still preserving the goals and values of the vendor to the furthest possible extent.

An Approach to Contract Drafting

Fundamentally, the purpose of any written contract is as a reference document, to record the terms of an agreement to prevent misunderstanding and conflict as to those terms at a later time. Most often, conflicts over contracts arise significantly after the signing of the contract when memories prove to be unreliable. With this in mind, clarity of the terms and completeness of the issues addressed are of primary importance. Contract drafters must know the subject matter and concerns of the parties thoroughly enough to be able to anticipate potential areas of disagreement and specifically address them in the contract. Ideally, once a contract is written and signed (also known as being "made" or "executed") by the parties, the effects of changes in conditions; e.g., assignments, acts of God, etc., have all been agreed to beforehand.

Thoroughness and precision are necessary for another important reason. Contract law usually views the text of a written contract as the entire agreement between the parties, and clauses are often found in contracts to this effect. This view has a double effect. It prevents additional or conflicting terms, which are not in the text from being presented in court as part of the agreement between the parties and, in doing so, forces the terms actually in the text of the contract to be as inclusive as possible. For example, if a contract purports to list all the sites to be covered by a maintenance contract, additional sites not mentioned in the contract cannot be covered without amending the contract to add those sites. If the same contract were to have a list of maintenance sites including, but not necessarily limited to, a list appearing in the contract, then additional sites might not be excluded. This principle is not limited to lists; it actually affects every clause in the contract.

Contracting for the state is an exercise in balancing often-conflicting interests between different entities in the state government, the needs of the contracting agency, fiscal restraints, state law requirements, and the contractor's needs. It is important to remember that as a contract drafter for the state; your primary concern should be the benefit of the state as a whole, or more specifically, the taxpayers of the state and not necessarily the interests of specific project managers, vendor relationships, or even your specific state agency. Although there can be little or no leeway for negotiation on state law requirements, all of the other concerns listed above can be balanced in order to obtain the best contractual situation for the state.

The best contractual situation for the state does not necessarily entail squeezing every advantage out of the vendor as possible. While onerous and unnecessarily harsh contract provisions may be perfectly legal, they could have negative repercussions in the future that could outweigh the initial gains made in such a contract. Vendors or contractors who have had bad experiences in contracting with the state may demand more money on future contracts to do the same work in order to offset the increased risk they would bear under such provisions. They may not be able to obtain acceptable coverage from insurance companies who would perhaps be unwilling to incur increased risk. In addition, stories of unfortunate private contractors who have been wronged by an oppressive state agency make for great drama on the evening news.

The more detail a contract contains about the responsibilities of the parties, the better it is. One of the more frequent problems we have encountered in reviewing contracts is the lack of detail. In drafting a contract care should be taken to provide as much detail as needed to clearly state the intentions of the parties. As simple as this sounds, it is a frequent problem. Those individuals who are intimately involved with a project often become so familiar with what is to be done, that they forget to spell it out. It is sometimes useful to have an expert or someone familiar with the service or supply, but not involved with the contract, to read the contract and identify any significant ambiguities that may need to be clarified. Contracts should, of course, also be carefully reviewed for typographical and other drafting errors. In addition, all of the mathematical calculations should be carefully checked.

Essential Elements of a Contract

Good contracts contain the following essential elements, in the order indicated. Each of these elements must be handled with as much clarity as possible.

Introductory Paragraph

In the introductory paragraph of a contract, the made date of the contract and the parties involved must be identified. These same parties must be bound to the contract by signing the signature page at the end of the contract.

The "made date" is the date that the parties to the contract agree on the terms in the contract and is identified in the first paragraph of the contract. Note that the made date is usually not the effective date in a state contract. The "effective date" is the date the contractor may legally begin providing goods or services as provided in the contract. The contractor may not start prior to receiving the proper approvals, including that of the State Controller or a delegate. State Fiscal Rule 3-1 addresses all required signatures in depth.

Identification of Parties

The preferred method of referring to an agency or institution of the State of Colorado is the "State". Leases are one common exception to this rule, where "lessee" and "lessor" are used uniformly. The preferred term of reference for private parties is "contractor." Frequently other terms are used in standard purchase agreements or printed maintenance agreements. As long as it is made clear that such words as "customer," "client," or "purchaser" are intended to refer to the state, there is no problem. These designations are appropriately set forth in the introductory paragraph of the document. Public entities are often referred to as the "County," "City," or "District." This should present no problem as long as the references are consistent. If different terms are used throughout the contract it may be necessary in that event to identify the contracting party both ways in the introductory paragraph of the document; e.g., XYZ Corporation, hereinafter referred to as "XYZ" or the "Contractor".

Contracts with public agencies should be entered into with the public body itself, not with an administrative division. For example, you should contract with the "City of Aurora" and not with the "Aurora Division of Parks and Recreation." Contracts with counties should be entered into with the Board of Commissioners of the County.

With respect to interagency agreements, there is more flexibility, but State Fiscal Rule 3-1 does require that the parties be clearly identified and comply with other specific requirements. A model interagency agreement can be found on the State Controller's website.

Factual Recitals

These are clauses that describe certain essential facts in existence at the time the contract is drafted. Factual recitals are used to state critical facts upon which the parties relied on

in entering into the contract or to educate the reader (for example a judge) in understanding the intent of the contract. These recitals can be very important tools in a contract. As is evident from the standard forms, state contracts use this portion of the basic contract for representations to those in the approval process that certain minimum requirements have been met; e.g., availability and location of funds, source of legal authority to enter into the particular type of contract, procurement methodology, necessary approvals obtained, etc). This portion of the contract should be used in the same way. That is, to describe any facts, which are considered important to the reader's understanding of the parties frame of mind in entering into the contract. As a matter of form, you may omit the cumbersome legalese "WHEREAS" and utilize the heading "RECITALS" at the beginning of this section of the contract.

Service or Product Provided (Scope of Work)

The scope of the contract is defined as all work that was fairly and reasonably contemplated by the parties at the time the contract was made and is often referred to as Scope of Work or Statement of Work. The Scope of Work or Statement of Work is the portion of the contract that describes the actual work to be done by the contractor by means of the specifications, quantities, performance dates, quality, time of performance, etc. If you conducted a competitive solicitation, this should have already been described in the solicitation, so it will form the basis for the awarded contract. In service contracts you may not exercise day-to-day control over the means and methods of the contractor's work without risking collapse of the independent contractor relationship. Refer to Chapter 2 of this Manual for tips on drafting requirements for the Scope of Work.

Payment Terms

Payment – The amount of money to be paid in return for services provided, including the rate and timing of the payments.

While the term of most state contracts is the same as the fiscal year it is not illegal to have contracts that have terms that cross one or more fiscal years. When a state agency enters into a multi-year contract the payment terms must reflect the amount of the payments to be made in each fiscal year.

Payment provisions consist of three distinct essential elements: the total maximum state financial obligation, the periodic increments when partial payments will be made (monthly, quarterly, etc.), and the rate at which payment is earned; e.g., unit price of goods or labor rate for services. Each of these should be expressly described. Most advance payments require approval of the State Controller’s Office, so payments should usually be made only after delivery of the service or supply. Sometimes a contractor insists on progress payments. Where you are paying for services based on progress and completion of individual milestones, such as design submissions, project planning reports, or other deliverables, consider withholding some portion of the fee or price (5-10%) until delivery is made and the final product inspected and accepted. Consider the risk to the state if the contractor files for bankruptcy or becomes insolvent. Will

sufficient work product be available, and delivered before progress payments, so the state is assured of getting something of value? See Appendix A, Clause A6, for an example of a progress payment provision.

There are four common types of payments required by state contracts: firm, fixed price, or lump sum payments; cost reimbursement payments; time and material, or labor hours payments; and indefinite delivery payments. It is also important to note that cost and price ceilings are required for all state contracts.

Firm, Fixed Price/Lump sum Contracts

The contractor is entitled to payment of the agreed price upon successful delivery and acceptance of the goods or service, regardless of how much the performance costs the contractor.

This is the easiest contract type to administer. There is no need to conduct an audit or require the contractor to account for direct and indirect costs.

Firm, fixed price contracts are of low financial risk to the state, because the amount to be paid is stated in the contract.

The contract manager must know the price, conditions for payment, e.g., delivery and acceptance, and the standard of acceptability for the goods or service provided.

Cost Reimbursement Contracts

The cost reimbursement contract is the most complex to manage and highest cost risk to the state. Cost reimbursement contracts require the state to pay the contractor reasonable or allowable costs.

Allowable costs are those that are "allocable" to goods or services provided under the contract and are not prohibited by the standards governing allowable cost; e.g., the cost of fines and penalties cannot be reimbursed, even if directly related to performance of the work. Allocable means that the cost being claimed was for the purpose of contract performance. It is sometimes difficult to determine allocable costs when dealing with indirect costs (for example overhead) that benefit not only contract performance, but also other cost objectives.

Grant contracts are typically cost reimbursement payments, and the cost accounting rules are contained in the Federal Office of Management and Budget (OMB) circulars.

Chapter 5 of this Manual contains a more complete discussion of these cost accounting rules. The OMB circulars govern cost accounting on grant contracts.

The state rarely uses cost reimbursement payments in any contract other than grant contracts. CRS 24-103-501 requires a written determination that the use of a cost reimbursement contract is likely to be less costly to the state. If this type of payment is used, the standards for cost accounting must be defined. State of Colorado Procurement Rule R-24-107-1-1-01 contains guidance on cost principles.

Contract management is difficult when cost reimbursement payments are used because an audit is the primary tool used to monitor contract costs.

Typically cost reimbursement contracts are used only when contract performance is so difficult to project that the customary contract approaches for breach and termination for default do not work. The state's remedy is to require repeat performance by the contractor and pay for this repeated performance, when satisfactorily accomplished. Payment for costs can be denied where unallowable or where costs are unreasonably high for performance of the work. This is often a difficult burden of proof for the state. See State of Colorado Procurement Rule R-24-107-101-05 (f) for additional information on this subject.

Contracts should set a not-to-exceed ceiling for materials and supplies, and define the scope of reimbursable supplies and materials.

Time and Material/Labor Hour Contracts

Time and material/labor contracts are used where service level is the primary component of the work, or it is difficult to otherwise price the "deliverable."

These contracts should include agreed upon per hour labor rates, which include direct and indirect costs and profit. The contract should also include a ceiling amount that the contractor cannot exceed. Ceilings should be monitored, and the contract should contain a provision making the contractor responsible for reporting when the contract costs have exceeded a percentage of the contract ceiling.

These contracts should also set a not-to-exceed ceiling for goods and services, and define the scope of reimbursable supplies and materials.

Administration of these contracts requires examination of invoices specifying labor hours and materials, some validation that goods were purchased or services were performed, and inspection of services performed to insure compliance with contract requirements. These are considered cost-type contracts and have a higher financial risk for the state.

Indefinite Delivery Contracts

The quantity of goods and services to be provided cannot be determined so the parties must agree on a rate of payment for the units of goods or services as they are delivered.

These are open-ended contracts often priced on a per unit basis where the specific quantity--e.g., hours of computer programming services--is not known.

Estimated Quantities contracts set minimum quantity orders that the state is obligated to purchase. These contracts usually also set maximum quantities and limits on each individual order issued to the contractor. Requirements contracts require the state to satisfy all its requirements for the goods or services under the contract. If the state satisfies the obligation with another contractor, the state may be in breach. The advantage to this type of contract is that it gives the state more favorable prices. The disadvantage is that it requires the state to satisfy its requirements through a single vendor.

An example of this type of contract is a mandatory statewide price agreement with a single vendor.

- Administration of indefinite delivery contracts require the contract manager to:

- Know and order the minimum quantity specified in the contract,

- Limit the quality ordered to the maximum quantity allowed or other ordering limitations,

Ensure that the provision of requirements contracts are upheld that the requirements are not satisfied outside of the contract, such as by buying from another vendor; and

- Inspect goods and services as usual and validate receipt of the goods or services listed as delivered on the invoice.
- Cost and Price Ceilings
- Cost and price ceilings apply to all state contracts. State Fiscal Rules 3-1 requires that all state contracts contain a maximum not to exceed amount.

Firm, fixed price contracts obligate the contractor to complete performance for the specified price. Usually, a cost reimbursement contract is a best efforts contractual obligation with no promise by the contractor that it can complete the work within the estimated cost, or the not to exceed cost. In between these two extremes are labor hours contracts having not to exceed amounts. Contract managers must know whether the not to exceed amount is merely an encumbrance or accounting control mechanism, or a promise by the contractor to complete the work within the amount specified in the contract as the ceiling.

This distinction is important when rejecting performance or giving the contractor other technical direction in order to know whether the contractor may have a claim for additional costs if the contract reaches the ceiling amount.

Performance Period

The performance period is the time period between the effective start date and the ending date of the contract.

State Fiscal rule 3-1 requires every contract to have a made date and the effective starting and ending dates of performance. Per State Controller policy, the made date of a contract is the date that the authorized agency representative signs the contract. The effective date is the date that the State Controller or his designee signs the contract. Per state statute, contracts are not valid until the State Controller or his designee has signed them. The ending date can be an actual date or a sufficiently detailed description of an event from which the contract termination can be determined. The State Controller and Attorney General interpret the Rule to mean that a date certain must be used in all cases unless the nature of the performance is such that it is dependent upon actions or events not under either party's control; i.e., hiring an attorney or expert witness for litigation until the trial or any appeal is concluded.

For contracts governed by the State Procurement Code, performance periods (including options) cannot exceed five years unless approved in writing by the State Purchasing Director (see Procurement Rule R-24-103-503). The Procurement Code states, "Specifications for multi-year contracts shall contain conditions of renewal or extension, if any. Methods used to determine any price escalation/de-escalation shall be part of the original specifications and made a part of the contract. Contracts shall only be renewed or extended if funds are available for the new contract period."

To avoid statutory violations state contracts should contain a standard contract provision which provides that the effective date of a contract is the later of the date stated in the contract or when signed by the State Controller. Consequently, any performance and payment obligations are adjusted proportionately to the date the State Controller signs the contract. Clause A3 in Appendix A contains such a suggested clause.

General Terms and Conditions

Often called boilerplate, these clauses are important because they define the relationship between the state and contractor; i.e., inspection rights, rights in documents and software, default procedures, liquidated damages for delay, termination, etc. In addition to language required by law; e.g., the Special Provisions and language specific to your contract (in federal grants, for example), there are a number of provisions generally advisable in most contracts. These are set forth in the model contract clauses in Appendix A to this chapter. You should familiarize yourself with these provisions and their use so that when you are drafting from scratch or tailoring other forms to your needs, you will be in the habit of thinking about what boilerplate may be useful to improve your contract.

Funding Obligation Authority

If a contract obligates the contractor to provide all or part of the funds needed to perform the contract work; e.g., a match requirement in a grant agreement, and if the state agency will be performing or contracting with a third party to perform the contract work in reliance upon such funding, then prior to the state agency's execution of the contract the agency should request the contractor to take formal action to ensure that the contractor currently has available the total amount of such funds, and has authorized/obligated/set aside such funds exclusively for the contract purpose.

As a practical matter, such action is necessary, regardless of the type of contractor, in order to prevent incomplete performance of the work and to protect the state against claims by the third party contractor, which might result if the contract work had to be terminated prematurely due to lack of such funding.

In addition to the practical concern, such action may also be constitutionally required with certain types of contractors in order to ensure a valid contract.

Article X, Section 20 of the Colorado Constitution (Amendment 1 of the Taxpayers Bill of Rights, TABOR) prohibits any local political subdivision from creating, by contract, a multiple-fiscal year financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years.

If a proposed contract requires funding from such a political subdivision beyond the fiscal year in which the contract was executed then the contract may be void and unenforceable, in violation of Section 4(b) of TABOR, unless the contractor has obligated and set aside up front all of its funding needed for the contract. Such up front action by the contractor will ensure that adequate present cash reserves are pledged irrevocably, consistent with TABOR.

Special Provisions

State Fiscal Rule 3-1 sets the requirements for the use of the Special Provisions in state contracts. There are two different sets of Special Provisions included as appendices to State Fiscal Rule 3-1, one for governmental agencies or political subdivisions and one for all other contractors. The Special Provisions contain terms and conditions that are required by state law.

Contract Signatures

Signature Page

The appropriate state signature page is incorporated into the Special Provisions as the last page. When writing a contract it is important to know the signature authority of the

contractor. Authority differs among entities and businesses. The discussion below represent best practices to insure that the contract is signed by an individual who is authorized to bind the contractor.

Signature Authority

This discussion identifies the applicable requirements concerning the authority of a contractor to contract with the state and describes the source of contract authority for various private and governmental entities.

In order to protect the interest of the state in a contract, the state agency should ensure that: (1) the contractor has authority to enter into the proposed contract; and (2) the individual ("signatory") signing the contract on behalf of the contractor has the authority to legally bind that contractor to the obligations of the contract.

To ensure compliance with such requirements, the state agency needs to identify the legal status of the contractor in the contract, understand who is legally authorized to sign on behalf of the contracting entity, and what documentation is required to indicate that certain individuals have authority to sign the contract on behalf of the contracting entity.

The existence and extent of the contractor's authority to enter into the proposed contract, and whether the authority has been properly delegated to the individual signing the contract, can be determined from several documents or sources including, without limitation: applicable statutes, articles of incorporation, by-laws and resolutions of corporate boards, partnership agreements, charters of home rule local governments, and powers of attorney.

Failure to ensure compliance with such requirements could result in the absence of a valid contract and the lack of any contract enforcement rights by the state, since a contract entered into by a contractor without proper authority may be either completely void or able to be voided by the contractor.

Regarding questions of contract authority, a state agency should be aware that some contractors act through individuals who are "agents," such as an officer of a corporation (president, vice president, treasurer, etc.), a general partner of a partnership, or an official of a local government, and that the authority of such agent to enter a proposed contract on behalf of the contractor may be limited, or non-existent.

Knowledge of both the type of agent (special, general, or universal), and any limitations on the authority of that agent, will help the state agency to determine whether the agent has authority to sign the proposed contract on behalf of the contractor. Generally, the individual/agent/signatory who signs the contract on behalf of the contractor has only the authority that the contractor has expressly delegated to that individual or that is implied based upon their position.

If the contract in question deals with a subject matter that is within the general and usual nature and custom of the business of the contractor--e.g. a contract with an engineering firm for engineering services--then a general agent such as a general manager will likely have the authority to execute the contract. On the other hand, if the type of contract is unusual for that type of contractor--e.g. a contract with an engineering firm to convey real estate--then an agent may not have such authority without express authority from the governing body of the contractor.

Types of Contractors

The state contracts with various types of contractors that have different legal status, including: general and limited partnerships; for-profit and non-profit corporations; joint ventures; special districts; municipal and quasi-municipal corporations; statutory and home rule local governments; and individuals doing business either by trade names or as sole proprietors.

Depending on its legal status, the authority of a particular contractor to enter into a contract, the authority of an individual to sign that contract for the contractor, and the statutes and other documents describing such authority, will vary. The legal status of potential contractors, and the applicable statutes and other documents that describe their respective contract authority and limitations, are described in the following section, along with specific guidance on obtaining signatures from these entities.

General Requirements for Contract Signatures

Individuals authorized to bind the Contractor to a contractual relationship must sign all contracts and applicable bid documents. Organizations such as corporations having separate legal status from individuals should have a second attesting signature by the corporate secretary or equivalent, certifying that the person who signed for the organization is properly empowered to do so. All signatures must be original ink on all four copies of the contract (no photocopies). The Contractor name on the signature page must match exactly the full legal name on its organizational documents, any application, proposal, or bid documents, the W-9, and the first paragraph of the contract. The name must be expressly consistent throughout, legibly printed or in typewritten form. Real property sales and purchases are special cases where other requirements may apply. See Real Property Contracts below.

Individuals (Sole Proprietorships)

An individual who is the “Contractor” must use his or her name, sign, and indicate position or title as "Sole Proprietor." Individuals using trade names must include any trade name in the "Contractor" name; e.g., “John Doe d/b/a JD Company", but still sign

as sole proprietor. A sole proprietor may use either their own social security number or Federal Employer Identification Number (FEIN) when they sign the contract Use the IRS Form W-9 to verify these numbers.

Corporations

Colorado corporations are governed by the Colorado Corporation Code, CRS 7-101-101 through CRS 7-117-105 (for-profit) and CRS 7-121-101 through CRS 7-137-301 (non-profit). Specific statutory powers and authority include those described in sections CRS 7-108-101 and CRS 7-108-301, and CRS 7-122-102. In addition, the articles of incorporation and by-laws of a corporation may expressly describe the authority of the corporation in particular contract situations.

A corporation's Board of Directors has general authority to contract for and manage the corporate business. The Board acts by resolution. The Board of Directors can delegate this contract authority by resolution to any of the officers of the corporation. Generally, officers of the corporation do not have authority to sign contracts solely by virtue of their office; instead, that authority must be expressly delegated to them by the Board of Directors either in the articles of incorporation, by-laws, or by resolution.

In addition to express authority, there is a presumption that a corporation president has implied authority to sign a contract within the customary and usual course of the corporate business, and that a vice-president also has such implied authority when the president is not available. However, neither the secretary nor a treasurer would have such implied authority.

Corporations must specify the state of incorporation; e.g., "The Petroleum Company, Inc., a Colorado Corporation". Both the president as the binding official and the corporate secretary, attesting to the president's power, must sign the contract. The contract may be executed by another corporate official; e.g., a vice president if allowed by the corporate by-laws. Nonprofit corporations whose chief executive officer is not called a "President" in the by-laws shall use such title as is provided in the by-laws; e.g., "Executive Director". The secretary's attestation is still required. Similarly, the attesting signature may be that of assistant corporate secretary, if allowed by the corporate by-laws. If the corporation possesses a corporate seal, it should be affixed. The corporation's federal employer identification number, as shown on the W-9, must be used as the tax identification number.

Partnerships

The Uniform Partnership Act and the Uniform Limited Partnership Act (CRS 7-60-101 through CRS 7-64-1116) govern general and limited partnerships. In addition to such statutes, there are three other kinds of evidence of authority of a partnership:

The agreement of the partners between themselves;

The course of business of a particular partnership; and the course of business of similar partnerships in the locality.

All general partners are co-owners and have the inherent authority to make contracts, provided that the contracts concern the customary and usual business of the partnership. However, a limited partner does not have authority to contract for the partnership.

Partnerships must specify the state of organization and the type of partnership, general or limited; e.g., “XYZ a Colorado General Partnership”. The contract must be signed by a "general partner," whether it is a general or limited partnership, and the signatory's position or title must be so stated; e.g., “ABC, a Colorado Limited Partnership," by Joe Blow a General Partner. The partnership's federal employer identification number, as shown on the W-9, must be used as the tax identification number.

Limited Liability Companies

The limited liability company, or LLC, is a relatively new kind of business entity, in which the personal assets of the "members" are not liable for the debts of the LLC. Limited liability companies are governed by CRS 7-80-101 through CRS 7-80-1101. Limited liability companies are established by the filing of articles of organization with the Secretary of State. The power to contract on behalf of a LLC is commonly granted to one or more of the LLC "members" known as "managers, no contract or liability can be incurred on behalf of the LLC except by one or more of its managers. As a practical matter, it is wise to insist on seeing a copy of the articles of organization where the agent is not signing as a "manager".

Joint Ventures

A joint venture is a partnership for a specific limited purpose. If the joint venture has a name, a separate taxpayer identification number, and a joint venture agreement establishing authority of one of the partners to execute contracts pertaining to the scope of the joint venture, the contractor name should be the joint venture name and the contract must be signed by the authorized partner; e.g., "Oil Exploration and Storage, a Joint Venture by the Pipeline Corporation, a Colorado corporation, its Managing Partner". If such an agreement exists, agencies should obtain a copy and verify the signature authority and purpose of the joint venture. Without such a name and agreement, the contract must be in the name of all partners; e.g., "Q.R.S. and Oil Company, Inc., a Joint Venture", and must be signed by each partner.

Further, the signature of each partner in any case must follow the same guidelines applicable to the individual entity; e.g., "Q.R.S. and Oil Company, Inc., a Joint Venture, by Q.R.S., a Colorado General Partnership, and by "Oil Company, Inc., a Colorado

corporation". In the example given, Oil Company, Inc. would need the signature of its president and attestation of its corporate secretary, subject to the same exceptions set forth for all corporations. Q.R.S. would need the signature of a General Partner. You are advised to seek legal counsel for any contract involving a joint venture.

Governments and other Public Entities

A municipal corporation, city, county, or district has only the authority that is expressly granted, that which is necessarily implied by the authority that is expressly granted, and that which is otherwise essential to the declared purposes of the corporation. Any reasonable doubt concerning the existence of authority is resolved by the courts against the municipal corporation.

Colorado has both home rule and statutory municipal corporations. The same is true for counties. Home rule municipal corporations are organized by charter under Article XX of the Colorado Constitution, while statutory municipal corporations are organized pursuant to CRS Title 31. Home rule counties are organized by charter under Article XIV, Section 16 of the Colorado Constitution, while statutory counties are organized under CRS Title 30 and have the authority described in CRS 30-11-101.

The home rule charter or the state statutes described above are the sources of all express contract authority of a municipal corporation/county. Whether a municipal corporation or county has implied authority to contract must be determined on a case-by-case basis.

Power to contract generally resides in the legislative body unless such power is legally placed elsewhere by: (1) the organizational document (constitution, charter, etc.); or (2) by legislative act (statute, ordinance, resolution, etc.). Regardless of which individual purports to have authority to sign the contract, all such contracts should be attested by the signature of the county, city, town, or corporate secretary, or equivalent, and the entity's seal should be affixed. All public entities should have a seal. The following describes power to sign for different types of public entities:

Counties

Colorado counties are single branch governments, i.e., legislative and executive powers reside in the county commissioners. Except as otherwise described below, the "Contractor" should be the Board of County Commissioners by the chairperson or vice-chairperson. County contracts must be signed for the Board of County Commissioners. Officials other than county commissioners may sign only when you are provided a current written resolution of the county commissioners appointing such person to sign contracts; e.g., county manager.

"County" or "district" boards of health have authority to contract with the state, pursuant to CRS 25-1-507(1)(f). The power resides in the board of health, and only the president

of the board may sign, unless there exists either by-laws or a current resolution of the board empowering the public health administrator or director to execute contracts. In that case, the public health administrator or director (who may also be secretary to the board) may execute the contract. Attestation may be by any official expressly authorized by the board of health to make attestations.

"County" or "district" boards of social services have authority to contract with the state, pursuant to CRS 26-1-115 and CRS 26-1-116. The power resides in the board of social services, and only the chairperson of the board may sign, unless there exists either by-laws or a current resolution of the board authorizing the county director or the district director of the county department of social services to execute the contract. Attestation may be made by any official expressly authorized by the board to make attestations.

Statutory Cities and Towns (Non-Home-Rule)

Contracts with cities and towns, which do not have home-rule charter status, must be signed for the city or town by the mayor. A city council or town board of trustees may, by current ordinance, authorize some other official to sign, but be careful.

For statutory cities and towns having mayoral form (CRS 31-4-102 and CRS 31-4-302), if the mayor is not a voting member of the council, he has the final veto power over contracts as Chief Executive. It is advisable to have the mayor sign in every case.

For statutory cities having a city manager form, the power to contract always resides in the city council and only current resolution or ordinances of that body may authorize the mayor, the city manager, or someone else to execute contracts. In such municipalities, the city manager is the chief administrative officer and would be the official normally expected to be given such power (CRS 31-4-207.5 and 208).

Home-Rule Cities and Towns

Only the governing body (city council) has the statutory power to contract. Contracts with home rule municipalities must be signed for such municipality by the officials given such powers under the home-rule charter. In most cases, this will be the mayor, but some home-rule municipalities require additional signatures; e.g., Denver City Auditor. If the charter expressly permits, this power may be delegated. Current, formal written action by such official(s) or body is necessary to authorize such a delegation (ordinance, resolution, etc.). Again, it is advisable to have the mayor sign in every case.

Special Districts

Regarding contracts with special districts or other quasi-municipal corporations, a state agency should consult the applicable statutory provisions of CRS 32-1-101 to CRS 32-1-

850, and CRS 32-2-101 through CRS 32-13-114, regarding the nature and extent of their contract authority.

Contracts with special districts or authorities should be in the name of such districts or authorities and signed by the head of the legislative body; e.g., board of directors, commissioners, etc. Current written delegation is required to empower a non-legislative official. Some special purpose authorities, however, may be corporate bodies with separate legislative and executive "branches." Each such case should be handled by examining the statutes creating the authority (powers and duties) and its governing charter, or by-laws, etc., to determine where the power to contract resides. Where clear authority exists, the chief executive officer may sign the contract; e.g., president, executive director, etc.

Other Cases

Any situation not addressed by these instructions should be handled by starting with the basic contract authority principle that authority to contract resides in the legislative body unless law, by-laws, or current delegation of such authority permits otherwise. Look for the ultimate source of authority in any entity and find a clear trail of contract signature authority down to the particular official or person who proposes to sign your contract. Agencies are encouraged to seek legal advice whenever a question of signature authority arises.

Note: The contractor name must be precisely consistent throughout, starting with the documents by which the entity was legally created, then the W-9, the application, proposal, or bid, and, finally, the contract. Entities having trade names should use the true legal name first, followed by the trade name; e.g., "X, Y, Z, Inc. doing business as the X Co.". The vendor file in COFRS should use the true legal name with the taxpayer identification number for that entity. Using the previous example, the COFRS vendor would be "X Y Z, Inc.", using its taxpayer identification number shown on the W-9 form. Any inconsistencies may be cause for disapproval of the contract and can lead to further delay in payment while the correct name is determined and the documents made consistent.

Power of Attorney

A power of attorney is a written instrument, which provides express authority for an individual/agent to act on behalf of a contractor. The agent is called an "attorney-in-fact." A written power of attorney describes the existence, and extent, and any limitations of an agent's authority with respect to contracts. The power of attorney need not be in any particular form, but must carry on its face convincing evidence of its genuineness. If a power of attorney is provided as evidence of authority to contract, legal advice should be sought, either by consulting the agency's assistant Attorney General prior to state execution, or by attaching the document to the final contract for review by

the designated Attorney General. Generally, anyone who is not an officer employed by the contractor requires a power of attorney to sign for the contractor. For sole proprietors, a power of attorney would be required for anyone other than the sole proprietor.

Recommendations

The following should always be considered when writing state contracts:

Prior to contract execution in questionable cases, a state agency should examine applicable statutes and should request (from the contractor) and review other pertinent documents appropriate to the legal status of the contractor, as described above. You would also be well advised to familiarize yourself with statutes governing entities you regularly do business with. Such examination and review will help the state agency to determine: (a) that the particular contractor has authority to enter into the proposed contract; and (b) that the particular signatory has authority to sign the contract on behalf of the contractor.

If, after such review, the agency still has a question concerning the authority of the contractor to enter into the contract, the agency could ask the contractor to submit written evidence of its authority, route the information with the contract during approval, and retain that evidence as part of the contract file.

In cases involving multi-year financial obligations by a political subdivision to repay a State agency (where the contractor is covered by TABOR), Colorado law may require the contractor to get voter approval or to take action to set aside sufficient funds for that particular contract purpose. This typically would be done by its governing board, e.g., a resolution by the Board of Directors of a corporation or by a Board of County Commissioners, and an ordinance by a City Council, etc. In cases where an agency is relying on a multi-year financial commitment by a political subdivision that is governed by TABOR, consult legal counsel to determine what is required to establish the authority to enter into the contract.

To help ensure contractor signature authority the state agency should consider sending a cover letter attached to the contracts advising the contractor in writing that the contract must be signed by an individual/officer/signatory who has express authority to take such action for the contractor, and reminding corporate contractors to complete the attestation (and include a seal if available).

Resolving Signature Issues

The formalities of signature requirements for governments and political subdivisions must be adhered to, because without "actual authority," governments typically are not bound by the actions of their agents. Similarly, in dealing with loan agreements,

contractual advance payments, or transfer of title to real estate -- where the State can be at immediate risk from a claim by a contractor that there was no authority for the transaction – pay particular attention to the authority of the agent who will sign the contract. You can expect more scrutiny in these agreements by the attorney general's office and other approving offices.

Agencies ultimately bear the responsibility for insuring that they are dealing with individuals who have the authority to bind the contractor. But there are some legal principles that help here. In common contracting relationships involving private entities like corporations, even if an employee or agent has no actual authority, a company can be bound by ratifying the contract (e.g. beginning performance) or under the doctrine of "apparent" authority. Where a company or private entity has placed incidents of authority (like letterhead and other company documents) in the hands of its employees, and those documents are used in the course of business, the entity generally loses the no-authority defense under the doctrine of "apparent" authority, unless there was something in the transaction to put the other person on notice about limits of authority. Further, because state contracts traditionally do not (and may not without approval by the State Controller) require payment in advance of performance, it is unlikely that the state will incur any tangible risk of being obligated to pay money before the contractor has ratified the contract by beginning performance.

Consequently, except in the higher risk situations described in this subsection, when contracts have been returned by vendors without technical compliance with the signature practices recommended in this chapter -- such as omission of the corporate attestation of an officer's signature -- the following guidance is intended to avoid unnecessary delay in processing the contracts and still help insure that agencies have a binding agreement. Again, though, this informal means of resolving signature authority issues may not be acceptable where the contractor is a government or political subdivision, or the contract involves transfer of title in real property, loans, or advance payments.

Fax correspondence is generally acceptable in resolving these routine authority issues, unless the attorney general's office or other approver indicates otherwise. Include the following explanatory information/documentation in the contract routing file in questionable cases:

- Route with the contract a prior contract signature page, a copy of the Secretary of State business registration, bylaws, corporate minutes, or any other document that identifies and establishes the authority of the individual who is signing the contract; or

- Ask for a fax on corporate letterhead from the business office, signed by someone other that the contract signatory, that names and affirms the authority of the signatory to bind the entity; or

- If the program has personal knowledge of the signatory's position and authority based on previous contractual relationships with the contractor, put that in writing and route the written memorandum with the contract.

Exhibits

Documents are attached to contracts for a variety of purposes and are referred to by a variety of names, such as, exhibits, or attachments. It is often necessary or appropriate to attach schedules, charts, and forms, as well as documents containing narrative provisions to be incorporated into the contract. For example, if an exhibit contains terms that the parties wish to have incorporated into the agreement, they should say so. If a form is attached as an example or specimen copy of the form to be used in making a report, this should be explained.

However these documents may be designated and for whatever purpose they are used, exhibits should be clearly identified and their use or purpose explained in the body of the agreement, as well as being separately numbered and internally paginated; e.g., Exhibit A, page 1 of 10, page 2 of 10, etc. If you select only portions of a document for inclusion; e.g., the Contractor's proposal, you should repaginate the portions included to make a new, complete document or clearly identify in the contract the portions being incorporated.

Generally, whenever the terms of a document referred to in a contract affect the contract terms and responsibilities of the parties, it should be attached as an exhibit. There are some exceptions to this rule that may be applicable. For instance, a price agreement can be referred to by its RFP or award number. Also, published laws need not be attached, but merely cited; e.g., statutes, rules, regulations, etc. For voluminous policies or manuals, which are not formally published laws, but which the contractor has may be incorporated by reference by citing the title of the document, its date, and other identifying information. Otherwise, they need to be attached and properly labeled.

When the state leases office space and the lease requires adherence to building rules and regulations, they must be attached to the lease, properly identified as an exhibit, and incorporated into the lease.

The provisions of all exhibits should be carefully compared with the language of the contract. Any inconsistencies or ambiguities should be clarified. Do not rely on an Order of Precedence clause to correct inconsistencies. If it is determined that a clause in an exhibit is not applicable, it should be crossed out, with all parties initialing the change. One of the most persistent problems in reviewing state contracts and leases is that of inconsistencies between the body of the contract or lease and exhibits. This occurs most often where vendors or lessors insist you use some or all of their forms or standard conditions. Computer hardware and software contracts are another example of such conflict problems. This problem can be avoided by a careful reading of the documents. State contract provisions should always be expressly controlling over contradictory provisions in exhibits.

Finally, the following convention for identifying and marking exhibits is preferred by the State Controller's Office:

1. Identify all attachments, exhibits, appendices, etc. to the original contract as "Exhibit A, B, C, etc." Be sure to identify the exhibit both in the body of the contract in bold letters and on the first page of the exhibit. When dealing with multiple exhibits, do not vacillate in the description and alpha/numeric scheme used; i.e. if the first document is identified as "Exhibit A," the next document should be "Exhibit B" not "Attachment 1" or some other similar designation.

2. If an exhibit contains an internal attachment, identify the attachment as "Attachment 1, 2, 3, etc., to Exhibit A, B, C, etc." In this manner, if the attachment becomes physically separated from the exhibit, it will be immediately apparent which exhibit the attachment belongs. In addition, the change in the description and alpha/numeric scheme helps identify this document as a nested attachment.

3. If it necessary to attach an exhibit to a contract amendment or some other contract modification document, you must first determine whether the exhibit is intended to modify/supplement/replace an earlier version of the exhibit or is intended to be added to the contract's existing set of exhibits.

If an exhibit is meant to modify, supplement, or replace an earlier version of the exhibit, the new document should be identified using the same description and alpha/numeric scheme as the original exhibit with the addition of a sub alpha/numeric code or "as modified by Amendment ___", or with a date certain. For example, to replace a contract's original Exhibit A with an updated version, the new exhibit should be marked "Exhibit A (1)", "Exhibit A as modified by Amendment 1", or "Exhibit A dated ____". Furthermore, the new exhibit should be drafted so as to completely supercede the original exhibit thus removing any need to revisit the original exhibit. This, of course, may not be practicable when making a small change to a voluminous exhibit, in which case, please clearly indicate the portion of the original exhibit being changed.

If, on the other hand, a new exhibit is not intended to modify, supplement, or replace an earlier exhibit, then it should be identified using the next available letter/number in the original contract's description and alpha/numeric scheme. For example, if the last exhibit identified in the original contract is "Exhibit D", a new exhibit to be added by amendment should be identified as "Exhibit E".

Contract Modifications

In accordance with the authority established by statute (CRS 24-30-202) the State Controller has issued a policy for the use and form of contract modification documents.

This policy can be found on the State Controller's website under "Authoritative Guidance" subheading "Contracting Policies".

Modifications and amendments must be prospective only. That is, the changes made to the original contract are made effective at the time of modification, not dating back to the effective date of the original contract. In rare situations where the circumstances require such a result, however, retroactive amendments may be permitted, as in the case of something erroneously omitted from the original contract, or where there has been a mutual mistake by the contracting parties.

A contract must contain mutual obligations to be valid. So too must contract modifications. Where, for example, something is to be done by a particular date in consideration for the payment of a sum of money, to adjust these original obligations there must be some give and take. For instance, the state cannot agree to pay more money unless additional services are agreed to.

Whenever a contract is to be modified or amended, be sure to submit a copy of the original contract and all prior amendments and modifications for review. The original contract does not need to be identified as an exhibit to the amendment or modification.

Types of Contracts

Supply Verses Service Contracts

Is your purchase for goods or services? The distinction between supplies and services can become important. The State Purchase Order can be used to buy goods in any amount, and services up to $50,000. Contracts and State Purchase Orders for personal services are regulated by CRS. 24-50-501 through CRS 514 (see in particular CRS 503 and CRS 504), and Procurement Code and Rules at CRS 24-101-101 through CRS 24-112-101, and require approval by the Department of Personnel and Administration's Division of Human Resources.

Further, the Uniform Commercial Code (UCC) applies to "transactions in goods," not purchases of services. Therefore, the State Purchase Order Terms and Conditions regarding the application of the UCC will not help protect the state's interests. Statutory warranties under the UCC do not apply to service contracts as a matter of law. Also, the UCC does not apply to transactions involving real estate, livestock, investment securities, and mixed transactions where the primary purpose of the agreement is service and the goods are incidental to the services. Conversely, your contract may not be a services contract where the services are incidental to the purchase of goods; e.g., the purchase of a heating and air conditioning system where the vendor's installation is required for warranty reasons, etc. Purchases of technology, such as software systems, may or may

not be goods and may require the assistance of your assigned Attorney General to correctly identify these purchases.

Additional caution is necessary when using the State Purchase Order to acquire ongoing services having a significant value over an extended period of time. Again, the UCC does not apply to contracts for services, and therefore the state is protected only by what you write into the agreement. Because the space for additional terms is very limited on the State Purchase Order form, ongoing service agreements will almost always require an attached document with supplementary terms, which needs to be incorporated by reference on the face of the State Purchase Order. This attachment may specify service milestones or periodic deliverables, additional termination provisions, insurance, and whatever other provisions you would ordinarily use in a contract for those specific services. It is very important to create a bilateral agreement when using State Purchase Orders for ongoing services by securing the vendor's signature whereby they assent to all of the terms and conditions of the State Purchase Order, including any attachments. Note that your flexibility in modifying the State Purchase Order terms (including adding terms which effectively modify those terms) is regulated by State Fiscal Rule 2-2. Remember, the State Fiscal Rules also provide that any questions as to whether or not the State Purchase Order adequately protects the state should be referred to the State Controller's Office or the Special Assistant Attorney General assigned to your agency.

Personal Service Contracts

Definitions:

Service contracts are contracts that require delivery of personal services by independent contractors that may be one individual or a group of people. Personal services are defined as anything performed by a human being.

Supply contracts are for the purchase of commodities or goods.

Situations Used:

Service contracts are used anytime state agencies need an independent contractor to deliver personal services.

Supply contracts are used anytime state agencies are acquiring commodities or goods.

Mixed procurement contracts can include both the delivery of personal services and the purchase of commodities. See the policy for contracting requirements for mixed procurements on the State Controller's website.

Pre-Approvals Required:

Personal services review and approval is required by the Department of Personnel and Administration for all service contracts unless the state agency has been granted a program waiver for the requested services.

Special Procurement Issues:

If either the price of the commodities or the services exceed the discretionary dollar limit set for commodities or services the solicitation must be placed on the BIDS system.

Contracting Forms:

- Certification for Personal Services Agreements used for original request.
- Modification for Personal Services Agreements used for any modification to a service contract.
- Cost Comparison used when services contracted for are currently performed by state employees.

Additional Routing Requirements:

Agency's internal routing and approval process including signature by agency's human resource administrator. If the agency does not have a program waiver in place for the requested service, service contracts must be routed to the Department of Personnel and Administration.

Information Technology Contracts

Definition:

Informational technology contracts involve the use, purchase, sale, lease, or maintenance of computer software, hardware, and related documentation and equipment.

Situations Used:

Whenever a state department, institution, or agency commits to a transaction that involves the use, purchase, sale, lease, or maintenance, of computer software, hardware and related documentation and equipment.

Pre-Approvals Required:

The State of Colorado Office of Innovation & Technology (OIT) issued a policy letter on July 1, 1999 requiring all non-higher education information technology requests in excess of $25,000 be approved by OIT. Each request will be from the agency information technology official and contain four pieces of information: the vendor's name, total purchase price, short description of the products/services to be procured, and the linkage to the department's IT plan.

Special Procurement Issues:

This chapter includes a discussion on intellectual property. The typical contract requires the attachment of the vendor's software license. State Fiscal Rule 2-2 contains guidance when agreeing to vendor forms. The typical vendor software license generally attempts to shift most of the risk to the licensee. Generally look for limited warranties, limitation of liability, and indemnification issues. Insist upon an intellectual property indemnification clause that will protect the state. Look carefully at what each vendor license covers and the terms used in the license, i.e. workstation, power unit, server, end user, enterprise, affiliates. This will affect the number of licenses you must buy, pricing, and overall cost.

Contracting Forms:

There is no specific contract form for software licenses. The standard State of Colorado contract form is used with the vendor's license agreement as an attachment.

Additional Routing Requirements:

There are no unique requirements in this area.

Purchased Services Contracts

Definitions:

A purchased services contract is a subset of a personal services contract. In a personal services contract, the state agency is the direct beneficiary of the contract because the contractor provides some service to the state agency that directly benefits that state agency.

However, in a purchased service contract, the direct beneficiary is not the state agency that enters into the contract. Rather, the direct beneficiary is a class of people for whom the contractor is paid to deliver or provide some type of service. Purchased services are often delivered by another governmental entity on behalf of a state agency. They can however, be delivered by a nonprofit corporation or a for profit corporation.

Situations Used:

One example of a purchased service contract is where a state agency contracts with county health department to provide immunizations to children within the jurisdictional limits of that county health department. Clearly, the state agency derives no direct benefit from the actions of the county health department. The only benefit the state agency receives is to ensure that children are immunized. The direct beneficiary is that class of children who are immunized by the county health department.

Another example of a purchased service contract is where a state agency contracts with a county employment office to provide employment services to citizens within the jurisdictional limits of that county employment office. Again, the state agency derives no direct benefit from the actions of the county employment office. The only benefit the state agency receives is to ensure that citizens receive employment services. The direct beneficiary is again that class of citizens who receive employment services from the county employment office.

Pre-Approvals Required:

A purchased services contract may or may not require review by the Department of Personnel and Administration. If the contractor is a governmental entity, then review by this office is not required. If, however, the contractor is a nonprofit or a for profit corporation, then review by this office is required.

Special Procurement Issues:

Services purchased from other governmental agencies are not required to be bid regardless of the amount.

Contracting Forms:

- Certification for Personal Services Agreements used for non-profit or for profit entities.

- Modification for Personal Services Agreements used for any modification to a service contract used for non-profit or for profit entities.

- Cost Comparison used when services contracted for are currently performed by state employees.

Additional Routing Requirements:

There are no unique requirements in this area.

Professional Services Contracts

Definition:

Professional Services include the services of architects, engineers, land surveyors, landscape architects and industrial hygienists and are defined in CRS 24-30-1401 through CRS 1408. These professional services are further defined in statute as follows:

- Architects, CRS 12-4-102 (5)
- Engineers, CRS 12-25-102 (10)
- Land Surveyors, CRS 12-25-202 (6)
- Landscape Architects, CRS 24-30-1401 (4)
- Industrial Hygienists, CRS 24-30-1401 (3.5)

Situations Used:

The state's primary use of professional services is for the design of capital construction and controlled maintenance projects, although some studies are undertaken which use professional services, but are not related to construction.

Pre-Approvals Required:

A review by the Privatization Program under CRS 24-50-501 is required when purchasing these services.

The Department of Personal & Administration's State Buildings Programs is responsible for oversight of the selection of all professional services, according to CRS 24-30-1303.

Special Procurement Issues:

The selection of architects, engineers, landscape architects, surveyors and industrial hygienists is exempt from the procurement code per CRS 24-101-105 and Procurement Rule 24- 101-105-01. Their selection is governed by CRS 24-30-1401. This statute allows for qualifications-based selections (QBS) only. Price must not be considered in any manner in the selection of these consultants. The statute calls for a two-step solicitation process. In the first phase, qualifications are reviewed to find the three or more most qualified to perform the work. Secondly, discussions are held with at least three of the top-ranked consultants on more specific project-related issues. After discussions are held, the evaluators rank the firms in order and the principal representative or his/her designee will request a fee proposal from the top-ranked consultant. The principal representative then tries to negotiate a contract with the top-ranked consultant. If contract negotiations are unsuccessful, the principal representative can terminate negotiations and then request a proposal from the second-ranked consultant and try and negotiate a contract.

Part 1404 of the statute requires that contracts for professional services be executed within six months after the date that the appropriation for the project becomes law.

In cases where an emergency exists (CRS 24-30-1408) or where existing drawings, specifications, designs, or other documents will be reused (CRS 24-30-1407), the selection requirement may be waived.

All Requests for Qualifications for professional services (except those discussed below in the As-Needed Professional Services Program) must be advertised on the Colorado BIDS system, under "Colorado Construction and Design Notices". Construction and design notices that are posted on BIDS give summary information about the project and a contact to obtain solicitation documents. This section of BIDS can be accessed for free on the Internet. Selections for projects where the consultant services are expected to exceed $50,000, or the resulting construction costs are expected to be over $500,000 also require advertisement twice in a newspaper of general circulation, at least 15 days before the selection is made.

The "As-Needed" Professional Services Program is a statewide process sponsored by State Buildings Programs for the selection of professional services where the professional fee is estimated to be $50,000 or less and the construction costs are estimated to be $500,000 or less. There is an annual pre-qualification process where participating agencies review the qualifications of interested firms. Qualified firms are placed on the "As-Needed" list and enter into a Base Agreement with the state. Participating agencies can use the "As-Needed" list to select professional services, which qualify under the above listed dollar levels. Three firms from the list must be interviewed, and ranked in order of most qualified. The agency can then request a fee proposal and negotiate with the most qualified firm. Once negotiations are complete, the agency executes a Work Authorization form. See also the State Buildings Program *Policies and Procedures*.

Contract Forms:

State professional services forms are published and maintained by the State Buildings Program, and are mandatory for use.

Routing Requirements:

All professional services contracts must be reviewed as follows:

- Internal department review
- Privatization
- State Buildings review, or review by State Buildings Delegate
- Attorney General
- State Controller

Capital Construction Contracting

Definitions:

Construction is defined in CRS 24-101-301(3) as "the process of building, altering, repairing, improving, or demolishing any public structure or building or any other public improvements of any kind to any public real property…construction includes capital construction and controlled maintenance as defined in section 24-30-1301."

Capital construction is defined as the purchase, construction or demolition of buildings or facilities including remodeling and renovation, site improvements or site development, purchase and installation of fixed and moveable equipment, and instructional or scientific equipment exceeding $50,000 in cost.

Controlled maintenance is defined as the corrective repair or replacement of existing state-owned, general-funded buildings and other physical facilities that are suitable for retention and use for at least five years when the work is not funded in an agency's operating budget.

The difference between capital construction and controlled maintenance projects has also been described by the application of project drivers:

Capital construction is program driven. The projects arise out of the agency's need to create, expand or alter a program due to growth, advances in technology or changes in methods or program delivery.

Controlled maintenance is maintenance driven. The projects arise out of deterioration of a facility's physical and functional condition, including site and infrastructure, and the inability to comply with current codes.

Capital construction and controlled maintenance are defined in CRS 24-30-1301(1) and CRS 24-30-1301(2). Construction contracts are defined in CRS 24-92-102.

Construction is unique in that it involves the purchase of both materials and services to create a structure or an improvement to property.

Situations Used:

Construction contracts are used when the state has need to construct or demolish buildings, remodel or renovate existing buildings or other physical facilities, improve property owned or controlled by the state or conduct controlled maintenance.

State Purchase orders may only be used for construction projects costing less than $50,000. State Fiscal rules require that State Purchase Orders be signed by the Director of State Buildings Programs or a delegate and by the contractor.

Pre-Approvals Required:

Form SC 4.1 *Construction Project Application* must be approved by State Buildings before any funds can be spent on the project. Form SC 6.1 *Authorization to Bid* must be approved before the project can be bid.

A review by the Privatization Program is required when purchasing these services.

The Department of Personnel and Administration, State Buildings Programs is responsible for all construction and controlled maintenance, except for agencies specifically exempted in statute. Some agencies are delegated to act for State Buildings Programs in these areas.

Special Procurement Issues:

The selection of construction contractors is governed by CRS 24-91-101 and CRS 24-92-101. Procurement rules governing construction contracts are R-24-103-202b.

State Buildings Programs provides a step-by-step checklist (Basic Steps Checklist Design/Bid/Build Projects) for construction projects, including policies, procedures and forms on their website.

All Advertisements for Bids and Documented Quotes for construction contracts must be advertised on the Colorado BIDS system, under "Colorado Construction and Design Notices". Notices can be viewed on the Internet for free, by clicking here. The BIDS notice gives summary project descriptions, key dates in the bidding process and contact information where interested bidders can obtain further information. Bids over $150,000 also require two advertisements in *The Daily Journal*, Denver, Colorado and in a newspaper published nearest to the locality where project work will take place, a week apart, at least 14 days before the bid opening. (See CRS 24-92-103 and Procurement Rule R-24-103-202b-04).

Insurance certificates must be submitted for all construction projects.

Construction contracts in excess of $50,000 require bonding. A bid bond must be submitted with the contractor's bid, and the successful bidder must submit a labor and materials payment bond and a performance bond in order to complete the requirements of the contract. (See CRS 24-105-201 through CRS 203)

Statutes (CRS 24-91-103 and CRS 8-26-107) also require the holding of retainage on projects over $80,000, and advertisement prior to final payment.

Contract Forms:

State construction forms are published and maintained by the State Buildings Program, and are mandatory for use. For the State Buildings Programs website, click here.

Routing Requirements:

All construction contracts must be reviewed as follows:

- Internal department review
- Privatization, unless review is waived
- State Buildings, or review by agency State Buildings Delegate
- Attorney General, unless waived
- State Controller, unless delegated

Equipment Maintenance Contracts

Definitions:

An Equipment Maintenance Contract is any contract that requires the vendor to perform maintenance on state-owned or leased property.

Situations Used:

For state owned equipment, equipment maintenance contracts should be considered in any situation where it is not feasible for the state to maintain the equipment or the life of the equipment extends beyond the warranty period. For leased equipment, the vendor is typically responsible for repair but there are situations where it may be advantageous for the state or a third party to maintain the equipment.

Pre Approvals Required:

There are no unique requirements in this area.

Special Procurement issues:

There are no unique requirements in this area.

Contracting Forms:

There are two basic types of maintenance contracts written using a normal state contract form. Term maintenance contracts charge a set price for scheduled maintenance and equipment repair for a specified period of time. As-needed service contracts charge on a time and materials basis. Third party maintenance vendors are independent suppliers of

repair and preventive services. They have no connection to equipment manufacturers and typically offer more competitive rates than equipment manufacturers.

Frequently Asked Questions/Checklist:

Is the equipment still under warranty?

Does the agency staff have the skills to diagnose problems with the equipment in question? Can they make simple repairs if needed?

How critical is the equipment to agency operations? How long can the agency function without the equipment? Can other equipment temporarily replace the equipment in question when it is not working? How much is the equipment used?

What is the general repair history of the equipment in question? How difficult is the equipment to repair?

How old is the equipment? What is the general reputation of the equipment and how reliable is it? What are the likely costs of repair? Compare this to the cost of replacing the machine and the cost of maintenance contracts.

What is the approximate annual maintenance expense of the equipment in question? How do those costs compare to those associated with an annual maintenance contract?

How much does it cost to replace the equipment compared to the cost of the annual maintenance agreement? Are the improvements in technology such that replacement is a more cost-effective option than repair?

Is the cost of the item so low that replacement is less expensive than repair?

Additional Routing Requirements:

There are no unique requirements in this area.

Grant Contracts

Definition:

A grant contract provides for financial assistance to other governmental entities or nonprofit organizations consistent with the requirements of federal or state programs.

With federal funds the grant recipient is the state and the party contracting with the state is known as the sub recipient or sub grantee. Sub recipients can be other state agencies,

subdivisions of the state, i.e. county governments, school districts, special use districts, or statutory local governments, or private entities.

The terms and conditions and approval requirements are different in these kinds of contracts because they usually contain additional obligations by the grant recipient and/or the sub recipient to use the funds for specific purposes, account for money in accordance with specific cost accounting standards, submit to audits by state and federal authorities; and sometimes match the funds provided by or through the state. Because of these additional obligations, grants are always bilateral and the commitment voucher is always a contract.

Situations Used:

These Grant-type contracts are used when the state agency is providing federal or state funds for grant-funded programs. Federal grant programs might include: Welfare to Work Program, Workforce Investment Act, Colorado Children's Trust, State Tobacco Education and Prevention Partnership (STEPP), Colorado Women's Cancer Control Initiative (CWCCI), homeless programs, and other programs out of the Department of Housing, the Division of Criminal Justice, the Department of Education, Public Health, etc. State funded grants may also be provided to fund programs such as those out of the Department of Local Affairs, the Department of Education, and the Displaced Homemaker Program (among others).

Grants are awarded either by a designated formula and allocated out to governmental subdivisions of the state or are awarded via an application process open to both public and private sector vendors.

Pre-Approvals Required:

A grant contract may or may not require review by the Department of Personnel & Administration. If the sub recipient is a governmental entity, then personal services review is not required. If, however, the sub recipient is a nonprofit or a for profit corporation, then review by this office may be required. Review the Contract Processing Guide Chapter Two.

Special Procurement Issues:

Federally funded grants typically identify the selection process for sub recipients in the grant application and/or the grant award. State funded grants typically indicate the selection process for sub recipients in the legislation that creates the grant funding. In 2003 the Procurement Code was amended to exclude the selection of sub recipients from the requirements of the Procurement Code unless expressly required. However, acquisition of supplies and services by state agencies for the benefit of the state agency using grant funds typically do have to comply with the Procurement Code

Contracting Forms:

Grant contracts must contain the additional obligations required by the granting entity that require the sub recipient to use the funds for specific purposes; account for money in accordance with specific cost accounting standards; submit to audits by state and federal authorities; and sometimes match the funds provided by or through the state in addition to all of the normal general and Special Provisions required.

The State Controller has issued a one step grant application and contract policy which allows state agencies to develop an application which also serves as the contract acceptance by the sub recipient. This policy can be found on the State Controller's web site.

Additional Routing Requirements:

There are no unique requirements in this area.

Loan Contracts

Definitions:

A loan contract is an agreement entered into by two parties, the lender and the borrower, and provides for the making, securing and repayment of a loan. For this discussion, the lender would be a state agency and the borrower would be another governmental entity; e.g., town, district, water enterprise, nonprofit or for-profit corporation; e.g., mutual ditch company, association, cooperative, or an individual; e.g., student.

The terms, conditions and approval requirements for loan contracts differ from most state contracts because they do not involve the state's purchase of goods or services, they require repayment of the funds disbursed by the state, and typically require some form of security to assure repayment of the loan. The terms and conditions of loan contracts vary in accordance with the statutory and legislative requirements and the administrative conditions imposed by the lending agency, and also may vary according to borrower entity type.

A loan may be unsecured or secured by collateral. This characteristic affects the remedies available to the lender in the event the borrower defaults. A loan is unsecured if the lender's only remedy in the event of default is to sue the borrower for the amount owed. The lender can make no claim on any of the borrower's assets. An example of an unsecured loan is a credit card.

A loan is secured if the borrower provides security or collateral as a secondary source of repayment in addition to the promise to pay. Personal property is secured with a security agreement, and real property is secured with a deed of trust. If the borrower defaults on a secured loan, one of the remedies available to the lender is the option of foreclosing on

the collateral. The lender may then sell the foreclosed property to repay the debt or keep it in satisfaction of the debt. If the value of the collateral is less than the outstanding debt, the lender can sue for the remainder of the outstanding amount. An example of a secured loan is a home loan.

The lender's security interest in personal and real property is not protected against a borrower's other creditors unless it has been perfected. A security interest in property secured by a security agreement is perfected when all of the applicable steps required for perfection, such as the filing of a financing statement with the Secretary of State's Office for a corporate borrower or legislative pledge for a governmental borrower, have been taken. A security interest in property secured by a deed of trust is perfected when the deed of trust is recorded in the county where the property is located. These provisions are designed to give notice to others of the secured party's interest in the collateral, and offer the secured party the first chance at seizing should the need to foreclose arise. If the security interest is not perfected, the lender (secured party) loses its secured status.

A promissory note is an attachment to the loan that contains the conditions of repayment of a loan including the amount of principal, the rate of interest, amount of time for repayment, as well as other terms and conditions as agreed to both by the lender and the borrower. The promissory note is considered unsecured or secured. A promissory note is unsecured if the lender is relying on the borrower's promise to pay and no other collateral. A loan is secured if the borrower provides security or collateral as a secondary source of repayment in addition to the promise to pay. The promissory note is a separate document from the loan contract since it must be presented to the County Clerk's Office where the collateral was secured by a deed of trust in order to release the collateral upon complete repayment of the loan, or, upon agreement between the parties to make a partial release or to substitute collateral. The promissory note is written to reference the instrument(s) such as the security agreement or deed of trust that secures the collateral.

Situations Used:

State agencies approve and implement loans in accordance with applicable statutes, rules and regulations, and policies and procedures.

Pre-Approvals Required:

Specific legislative authority is required to provide the statutory authority to make loans and provide the funding for the loans.

Contracting Forms:

Specific terms that include a promise to repay the loan amount (a promissory note) and the identification of the collateral used to secure the loan (security agreement or deed of trust).

Additional Routing Requirements:

There are no unique requirements in this area.

Interagency Agreements

Definition:

An interagency contract is the commitment voucher used when one state agency purchases goods or services from another state agency.

Situations Used:

State agencies are required to use interagency contract in accordance with the directions stipulated in State Fiscal Rule 3-1.

Pre-Approvals Required:

There are no unique requirements in this area.

Special Procurement Issues:

Interagency contracts are exempt from the Procurement Code.

Contracting Forms:

State Fiscal Rule 3-1 identifies the required elements of an interagency contract. See the standard agreement located in Chapter 6, Appendix B. For leases between state agencies, see Real Estate Programs' website for the necessary form.

Additional Routing Requirements:

Attorney General review and personal services review by the Department of Personnel and Administration are not required.

Intergovernmental Contracts

Definitions:

Intergovernmental contracts are contracts between an agency of the State of Colorado and another governmental entity.

Governmental entities include cities, towns, counties, and special districts within the State of Colorado. These entities are sometimes referred to as political subdivisions of the State of Colorado, or local governments, but they are not other state agencies. It also

includes the federal government, other states and political subdivisions within other states.

Situations Used:

When there is a need to disburse funds to another governmental entity for the purchase of goods and/or services.

Pre-Approvals Required:

There are no unique requirements in this area.

Special Procurement Issues:

Intergovernmental contracts are exempt from the Procurement Code.

Contracting Forms:

Intergovernmental contracts should be written very much like a contract with a private entity; e.g., a corporation or LLC, except that you will be using the Special Provisions for governmental contracts. These Special Provisions can be found in Chapter 3-1 of the State Fiscal Rules. No form contract is provided in this Manual for intergovernmental contracts because these agreements tend to require custom drafting on a case-by-case basis.

Additional Routing Requirements:

There are no unique requirements in this area.

Real Estate Contracts

For more specific details on real estate transactions by state agencies and institutions, please refer to the Real Estate Program Policies and Procedures Manual.

Definitions:

A lease is an agreement whereby the owner of real property; i.e., landlord gives the right of possession to another; i.e., tenant for a specified period of time; i.e., term and for a specified consideration; i.e., rent. The right of possession is usually exclusive, but occasionally the agreement can provide for the non-exclusive possession of all or a portion of the real property. A sublease is another form of lease for possession of real property between the tenant; i.e., sublessor and the sublessee. Written permission of the landlord is usually required for the tenant to sublease the property and the tenant remains liable for payment of rent and other lease requirements of the master lease. In general,

subleasing is discouraged unless the agency tenant has a short-term space need. (See definition and discussion of license agreements below.)

Rent charged to lease improved properties, such as office space, is usually based on the rentable square footage of floor area, as opposed to useable floor area. Rentable square footage is the usable square footage plus a percentage (the load factor) of the common areas on the floor, including hallways, bathrooms and telephone closets and sometimes main lobbies. The rent can be fixed throughout the term, can change according to established rates throughout the term (usually escalating), change according to an established index, such as the Consumer Price Index published by the U S Department of Labor, or be determined by a market rent survey at the time of lease extension.

Term is the established dates for the length of the contract. Real Estate Program policy limits the term of any new lease or lease extension to a maximum of five (5) years. If an agency or institution desires a longer-term lease, a written justification must be submitted to the Real Estate Program for approval. In general, a long term lease will be considered when there is a demonstrated long-term institutional or program need at a location, the agency or institution has plans to make valuable leasehold improvements to the property, or to purchase the property.

Leases are usually classified as a gross lease or net lease depending on the level of services provided by the landlord.

A gross lease provides that the landlord shall pay all expenses of the leased property, such as taxes, insurance, maintenance, utilities, etc. A gross lease is the most common lease used by the state for space leased in from the private sector.

A net lease is a lease in which the tenant pays, in addition to rent, certain operating costs associated with a leased property, including property taxes, insurance premiums, repairs, utilities and maintenance. A net lease may also be referred to as a "net-net" (double net) and "net-net-net" (triple net) lease, depending upon the degree to which the tenant is responsible for the operating costs. Landlords use a net lease to transfer certain variable costs to the tenant and to eliminate the risk of fluctuating costs, such as utilities, property insurance and real estate taxes.

An additional rent provision in some leases requires the tenant to pay a portion of the increase in costs to operating the building over a base year operating expenses, usually the first year of the lease, which is associated with the tenant's portion of rentable area in the building.

Tenant finish costs are payments made to finish the lease space to accommodate the tenant's planned use, be it for an office, laboratory or other use. The usual practice is for the landlord to complete the tenant finish and to recover the finish cost in the rent over the term of the lease. The lease also can be prepared with a stated dollar amount available for tenant finish (tenant finish allowance), usually expressed as dollar amount that the landlord is prepared to spend for tenant finish. The landlord will arrange for the

necessary space planning, architectural services, permitting and construction as approved by the tenant. Occasionally, the landlord requires the tenant to pay for tenant finish separate from monthly rent, which will be expressed in a separate lease provision.

A lease extension can assure a tenant continued undisturbed occupancy of the space by entering into a new lease or a lease amendment extending the term. The landlord will normally require an increase in rent to extend the term. The tenant can usually negotiate new carpet, paint and other improvements for entering into a multi-year lease or lease extension.

A hold over provision allows the tenant to remain in the leased space on a month-to-month tenancy at the end of the lease term. It should not be assumed that there is an automatic right on the part of the state tenant agency to remain in the leased space.

The lease agreement may also contain additional contractual rights and obligations of the parties not a part of the standard approved forms, including, but not limited to, preferential right to lease, expansion option, right to extend lease, option to renew lease, or option to purchase. The agency's attorney general representative should review these additional provisions.

A lease may contain an option to purchase provision, which is a provision granted by the landlord to the tenant for consideration, containing an offer to sell the property to the tenant for an establish price for an established period of time period in which the tenant must exercise the option; i.e., accept the offer. The option provision usually contains the normal provisions of a real estate sales contract, including but not limited to provisions for tenant's due diligence, a survey, and for the landlord to deliver an owner's title insurance policy.

A lease-purchase agreement is an installment purchase agreement for the purchase of real property which requires payments during more than one fiscal year, or any agreement for the lease or rental of real property which requires payments during more than one fiscal year and under which the state is entitled to receive title to the property at the end of the term for nominal or no additional consideration. See CRS 24-82-801 (3).

A license with reference to real property is defined as a personal, revocable, and unassignable privilege, conferred either orally or in writing, to do certain acts on real property without possessing any interest therein. Typical uses for licenses include parking, hunting on someone's real property, or use of a conference facility.

An interagency lease is a lease between one department and institution of state government that owns real property and another department or institution desiring to use the property. Agencies can use the approved interagency lease form for such transactions, except for leases with the State Land Board as landlord. An agency shall use the state approved Lease Agreement (either Short or Long form) to lease State Land Board-owned property.

Termination clauses for leases or licenses. All multi-year lease and license agreements requiring the state to pay compensation in multiple years must contain a Fiscal Funding provision providing for the early termination of the lease, with notice by the state tenant to the landlord, in the event the legislature does not appropriate funds for the lease for the next fiscal year. The approved lease form also contains two other provisions that will allow for the state to terminate the lease under certain special circumstances. The Federal Funding provision allows for termination with written notice in the event all or a portion of the lease obligation is paid with federal funds, which are no longer available. The Collocation provision in state leases allow for the termination with written notice in the event the state builds, leases, acquires a building or designates an existing state owned building for the purpose of collocation state agencies in one area.

Most sophisticated landlords require a Termination Consideration provision in the lease, under which the state tenant agrees to request an appropriation for unamortized tenant finish costs, leasing commissions and other specified landlord leasing-related costs as of the date of termination, in the event the tenant terminates the lease under either the fiscal funding, federal funding, or collocation lease provisions.

The policy of the state is not to terminate leases unless absolutely necessary and only under the very limited circumstances provided for in the lease since any termination diminishes the state's reputation as a reliable tenant in the local landlord community. A lease termination by one agency can have various possible undesirable impacts on future leasing by other agencies, including higher lease rates, shorter term leases, and front end funding of tenant finish by state tenant.

Real Estate Programs policy requires that any agency planning to terminate a lease to first consult Real Estate Programs and the agency's Attorney General representative to determine if sufficient grounds exist for termination and whether other options are available, such as subleasing the space to another agency or a negotiated mutual termination agreement.

Situations Used:

A state agency or institution, with the assistance of Real Estate Programs or its contracted state tenant brokers, shall negotiate and process a state contract when leasing or entering into a license involving payment by the state for the use of land, building, office or meeting space or other improvements on land for a term or consecutive terms for more than 30 days.

A lease for state-owned or leased real property also requires Real Estate Programs review and approval. These leases are generally revenue generating.

Pre-approvals Required:

All real estate leases and subleases involving state agencies of state-owned real property and licenses for possession and use of real property require approval by Real Estate

Programs (except leases of vacant land owned by the Division of Wildlife or Parks and Recreation Division of the Department of Natural Resources).

Institutions of Higher Education must receive approval from the Colorado Commission on Higher Education to enter into leases pursuant to the Colorado Commission on Higher Education Leasing Policy.

Real Estate Programs, through its authority under CRS 24-30-1303 and CRS 24-80-102, has contracted with real estate brokers in the six county, Denver metro area, Adams, Arapahoe, Broomfield, Denver, Douglas and Jefferson and in El Paso and Pueblo Counties to be the state's sole source agents for acquiring real estate interests, referred to herein as State Brokers. The contracts with the State Brokers require the executive director of the agency or the president of the institution to execute a tenant authorization letter with the State Brokers before the State Broker is authorized to commence any leasing activity. The agency or institution must represent that funds have been appropriated for the lease to be negotiated. The State Broker leasing services are at no cost to the agency or institution. If an agency or institution wants to be exempted from this requirement, the agency or institution must request a waiver from Real Estate Programs prior to entering into any contacts or negotiation for the lease space.

The contracts with the State Brokers also require them to provide other fee based special real estate services, such as master planning or market research, to an agency or institution, upon request. Prior to commencing these services the agency or institution must initiate a separate contract for the special real estate services.

State statutes specific to a particular agency and governing board or commission rules may require additional approvals before entering into a lease. Agencies and institutions are cautioned to review special legislation and/or governing board or commission rule or policy that may affect their ability to lease real property.

Special Procurement Issues:

The Procurement Code covers goods and services and as such does not cover the leasing of real property.

Contracting Forms:

Real estate Programs policy requires that all leases or license agreements for real property be prepared on state approved forms, unless a waiver is obtained from the State Controller's Office. The current state approved forms include:

- Lease Agreement (Short form)
- Lease Agreement (Long form - contains additional rent provisions)
- Amendment to Lease
- Interagency Lease Agreement
- Interagency Sub-Lease

- Parking License Agreement
- Novation Agreement

The above forms and other useful information is available on the SBREP website.

Additional Routing Requirements:

All leases are to be first executed by the landlord, taking care to determine that the party executing the lease is authorized to sign on behalf of the landlord. Four lease originals with exhibits must be executed, but the parties may execute additional originals. All state leases and licenses must be reviewed by Real Estate Programs, except for those that are statutorily exempted from this review.

Miscellaneous:

Real Estate Programs has published space standards for agency tenants in office lease space. Agencies and institutions should develop their space-planning program to be compatible with the Real Estate Programs space standards. The standards are also utilized by OSPB and the Joint Budget Committee in developing recommended appropriations. If the planned lease space exceeds the space standards, written justification must be provided to Real Estate Programs by the Division Director or Executive Director of the agency or the President of the institution.

When the landlord sell, conveys or otherwise transfers the property or the right to receive tenant rent, the state tenant must ensure the rent is properly paid to prevent default. The current Real Estate Programs and State Controller approved lease forms contains a provision entitled Conveyance, Attornment, and Non-Disturbance that requires the landlord to notify the tenant within ten days of any conveyance and provide evidence of the conveyance, such as a deed to the property. Pursuant to this provision, the new owner agrees to execute a state approved Non-Disturbance and Attornment Agreement, which the agency tenant should forward to the new landlord upon notice of the conveyance. If the lease does not contain this provision, the agency tenant is required to have the old and new landlord execute a state-approved Novation Agreement.

Many lease agreements provide for the tenant to execute and return within 10-days of receipt from the landlord a tenant Estoppel Certificate. If the lease does not so provide, Real Estate Programs policy is for the state tenant to honor the request. Real Estate Programs policy requires all state tenants to provide Real Estate Programs a copy of the draft certificate upon receipt by the state tenant. Care must be exercised to ensure that the certificate contains only representation of facts and not additional contractual provisions, which would require a Lease Amendment.

Easements

Definitions:

An easement is a right to use the property of another created by grant, reservation, agreement, prescription or necessary implication. It is either for the benefit of land, "appurtenant," such as the right to cross A to get to B, or "in gross," such as a public utility easement. A grant of a right-of-way from A to B over and across A's property for road purposes creates an easement for a road. The terms easement and right-of-way are treated the same in statutory provisions referenced herein.

Pursuant to CRS 24-30-1303 (as amended), Real Estate Programs (through the Department of Personnel & Administration) shall negotiate and approve easements and rights-of-way across non-state land on behalf of the state government and, as provided in CRS 24-82-202 (as amended), negotiate and approve easements, and rights-of-way across land owned by the state or its institutions, departments or agencies. Additional authority regarding Real Estate Programs' involvement in review and approval of easements may be found in the State's Fiscal Rules (Rule 3-1) that are promulgated by the State Controller.

All state institutions, departments and other state agencies have the authority under CRS 24-82-201 to give and to grant easements or rights-of-way across land owned and controlled by the state entity for the construction and maintenance of public utilities, streets, highways, and public services, including sanitary sewer lines, water lines, gas lines, telephone lines, electric power lines, or other services and controlled by a political subdivision or public corporation of the state or the United States. Real Estate Programs involvement and authority in real estate specifically excludes: Rights-of-way acquisition by the Department of Transportation and certain easements and rights-of way by the Division of Wildlife or the Parks and Recreation Division of the Department of Natural Resources.

Situations Used:

The typical situation where a state agency or institution grants an easement includes:

- Easements granted to local utility to bring gas, electric, water, sewer and other public services to the agency's facilities. In this situation, the utility typically requires the agency to execute the utility's easement form, which is part of the state PUC's tariff.

- Easement granted to local utility for public services serving the general public.

- Easement (right-of-way) to the state department of transportation or local government for a public road.

- Easement to water or sewer district for impoundment and/or facilities to store and supply water to the state and/or the general public.

- Easement to an adjacent property owner for access.

There may also be situations where the state agency or institution is the grantee of an easement from another party for access or other uses.

Pre-Approvals Required:

For an easement across state land to be valid, CRS 24-82-202 requires the approval of the commission or board, if any, of the institution, department or agency across the premises of which the easement is granted, the chief executive officer, i.e., executive director of department or institution president, the Executive Director of the Department of Personnel & Administration (delegated to Real Estate Programs).

Special Procurement Issues:

The Procurement Code covers goods and services and as such does not cover the granting of easements for real property.

Contracting Forms:

Real Estate Programs policy requires all easements across state land be prepared on the approved easement form for the state as grantor. Real Estate Programs also has an approved form where the state will be the grantee. These forms as well as other useful information is available on the Real Estate Program website.

Additional Routing Requirements:

For easements granted to Public Service Company for utility service to state facilities, Real Estate Programs and XCEL Energy have approved an Addendum to the Public Service Company standard easement form. Please contact Real Estate Programs if you need a copy of the Addendum.

At least four easement originals with exhibits must be executed, but the parties may execute additional originals.

The grantee of an easement is responsible for the recording the easement with the Clerk and Recorder in the county where the property is located.

Real Estate Purchases and Exchanges

Definitions:

A land purchase contract provides for the transfer of the ownership in the land or other interest in real property from the seller to the buyer when the buyer fulfills the contract conditions and pays the seller the contract consideration.

A contract to exchange real property involves the transfer of two or more real property parcels between two or more parties that usually requires one party paying cash as part of the required consideration.

Situations Used:

Contracts for the purchase or exchange of real property are used when the state desires to acquire real property.

Pre-Approvals Required:

A state agency must have statutory authority to purchase real estate.

State Buildings and Real Estate Programs, through its authority under CRS 24-30-1303 and CRS 24-80-102, has contracted with real estate brokers in the six county Denver metro area, Adams, Arapahoe, Broomfield, Denver, Douglas, and Jefferson and in El Paso and Pueblo Counties to be the state's sole source agents for acquiring real estate interests, referred to herein as State Broker(s). The state Broker's services are at no cost to the agency or institution. If an agency or institution wants to be exempted from this requirement, the agency or institution must request a waiver from Real Estate Programs prior to entering into any contacts or negotiation for acquisition of real property.

If an agency or institution desires to enter into a real estate purchase contract, prior to executing the contract, the agency must procure an appraisal of the property pursuant to CRS 24-30-203 (5)(b). The agency or institution will also be expected to request a State Buildings Program controlled maintenance review of any improvements on the property, since the property will not be eligible for any controlled maintenance funding for 15-years after purchase, provide a copy of the most recent Environmental Phase I report on the property, if available, and undertake other investigations and actions as may be appropriate and consistent with Real Estate Programs policies for the acquisition of real property.

If an agency or institution desires to enter into a lease with an option to purchase, no appraisal will be required before entering into the lease-option agreement. The lease must contain a provision restricting the exercise of the option by the state agency until an appraisal is obtained and the necessary approvals are obtained.

Special Procurement Issues:

The Procurement Code covers goods and services and as such does not cover the acquisition of real property.

Contracting Forms:

There are presently no standard approved forms for use by state agencies in acquiring real property. Real Estate Programs has sample forms available for reference by state agencies and will assist agency legal and contract representatives in drafting a contract.

Additional Routing Requirements:

Four originals with exhibits must be executed, but the parties may execute additional originals.

Revenue Generating Contracts

Definition:

A revenue-generating contract is a contract that requires another party to pay a state agency for goods, services, or the use of state property.

Situations Used:

A revenue-generating contract is used when a state agency wants to formally document the terms and conditions that require another party to pay the state agency.

Pre-approvals Required:

There are no unique requirements in this area.

Special Procurement Issues:

The Procurement Code does not apply to contracts that are not publicly funded.

Contracting Forms:

There are no unique requirements in this area.

Additional Routing Requirements:

Revenue generating contracts do not require the signature of the State Controller.

Settlement Agreements with State Employees

Definition:

Contracts used to settle employment disputes with state employees or to define the considerations given to state employees when they waive retention and employment rights.

Situations Used:

Can be used at any time to settle any disputes between a state agency and an employee and are often entered into prior to Personnel Board Hearings or the start of a court case.

Pre-Approvals Needed:

The Attorney General's Office must always be involved in the drafting of the contract. Risk Management may be involved if they are responsible for any payment agreed to in the contract. Review by the State Controller's Office to ensure that final version of contract can be signed by the State Controller or his designee.

Special Procurement Issues:

The Procurement Code is not applicable to these types of contracts.

Contracting Forms:

Forms exist for voluntary separation contracts but not for employment disputes. The Assistant Attorney General assigned to the case will create the settlement contract based on the nature of the case, requirements of law, and certain provisions required by the State Controller.

Additional Routing Requirements:

Employee settlement agreements are always signed by the employee and their attorney, if they have hired one, an individual authorized to sign contracts for the agency, the Assistant Attorney General assigned to the case, the Department of Personnel & Administration if Risk Management is responsible for any part of the payment to the employee, and the State Controller or a designee authorized to sign settlement agreements.

Settlement Contracts

Definition:

Contracts used to settle a dispute between a state agency and another party.

Situations Used:

Settlement contracts are used to revolve any disputes that the agency and the Attorney General's Office believe does not warrant litigation.

Pre-Approvals Required:

Attorney General's Office must always be involved in the drafting of the contract. Risk Management may be involved if they are responsible for any payment agreed to in the contract. Review by the State Controller's Office to ensure that final version of contract can be signed by the State Controller or his designee.

Special Procurement Issues:

The Procurement Code is not applicable to these types of contracts.

Contracting Forms:

The Assistant Attorney General assigned to the case will create the settlement contract based on the nature of the case, requirements of law, and certain provisions required by the State Controller.

Additional Routing Requirements:

Settlement contracts are always signed by all parties involved in the dispute, including an individual authorized to sign contracts for the agency, the Assistant Attorney General assigned to the case, the Department of Personnel & Administration if Risk Management is responsible for any part of the payment, and the State Controller or a designee authorized to sign settlement agreements.

Novation Contracts

Definition:

A contract that transfers the responsibilities of performance under a contract from the original contracting entity to another entity.

Situations Used:

When property being leased by the state is sold by the lessor to another party, or when a contract is acquired by a new entity by assignment or because they have purchased the original contracting entity.

Pre-Approvals Required:

There are no special requirements in this area.

Special Procurement Issues:

Written consent of the procurement officer in accordance with Procurement Rules.

Contracting Forms:

There are no special requirements in this area.

Additional Routing Requirements:

There are no special requirements in this area.

Multi-Party Contracts

Definition:

A multi-party contract is a contract involving more than two parties; at least one of the parties must be a state agency. Although at least two individuals or entities are necessary to the making of a contract, any number greater than two may participate in and be bound to multiple other parties by a single document signed by all the participants.

Situations Used:

When it is desirable to have all the parties participating in a project sign a single contract that addresses each of the parities' responsibilities, contractual rights, and obligations.

Pre-approvals required:

The type of contract that the parties are entering into determines the required pre-approvals.

Special Procurement Issues:

There are no unique requirements in this area.

Contracting Forms:

The signature page of the contract must contain signature blocks for all of the parties. Once all the parties have agreed on the terms and language for their multi-party agreement, the document must be signed by an authorized representative of each party. This may be accomplished by circulating the contract to the parties one after another. Depending on the number of the parties, the process of routing the contract among all parties can take some time.

As an alternative, each party may execute a separate copy of the contract on agreement by all parties to recognize such execution as binding. Language along the following lines accommodates this approach:

> This Contract may be executed in one or more counterparts, each of which shall be deemed an original, but all of which taken together constitute one agreement. In addition, the Parties agree to recognize signatures to this Contract transmitted by telecopy as if they were original signatures.

Each party affixes all its own required signatures and approvals to a copy of the contract and then faxes it to all other parties. Each party ends up with a copy of the contract with the various faxed executed signature pages from all other parties. Each party is deemed to have a valid enforceable copy of the contract. They may instead, of course, agree to exchange original (rather than faxed) signature pages if original signatures are desired.

The standard Special Provisions language addresses the situation where a state agency is contracting with one "Contractor." In a multi-party contract, the contract may need to define the term "Contractor" as used in the Special Provisions to include more than one party or the Special Provisions may need to be customized to indicate there is more than one Contractor, which Contractors are indemnifying the state, etc. Any modification of the standard Special Provisions language requires a prior approval of the State Controller.

Additional Routing Requirements:

There are no unique requirements in this area.

Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. Sections 1320d – 1320d-8 (2003), and its implementing regulations, 45 C.F.R. Parts 160 and 164 ("HIPAA Privacy Rule"), is a federal law that was enacted in part, to establish a national floor for the protection of certain personal health information. HIPAA's health information disclosure rules apply to "covered entities", a term defined to only include a health plan, a health care clearinghouse, and a health care provider who transmits

protected health information in electronic form in connection with a covered transaction.

HIPAA applies to covered entities of State and local governments, but does not apply to aspects of State government that do not meet the technical definition of a covered entity. Medicaid and the Child Health Plan Plus are specifically named as covered entities. State nursing homes, mental health institutes and regional treatment centers are covered health care providers. Employers and workers compensation are specifically excluded from HIPAA's definition of covered entities. The State employee group health plan, flexible spending account plan and CSEAP plans are also covered health plans under HIPAA. Whether a State agency is a covered entity is a complicated matter dependent upon the facts and circumstances. Check with the State agency or department to determine if the contracting State agency is a covered entity under HIPAA. Each State covered entity should have a designated privacy officer that can be found on their website and HIPAA Notice of Privacy Practices.

Not all confidential medical information is protected by the HIPAA Privacy Rule. The HIPAA Privacy Rule only restricts disclosure of protected health information ("PHI") which is defined as individually identifiable health information that is transmitted or received in any medium by a covered entity, excluding certain educational and employment records. 45 C.F.R. § 164.501. As a general rule, the HIPAA Privacy Rule forbids a covered entity from using or disclosing a patient's protected health information without written authorization from the patient, except for treatment, payment, and health care operations. 45 C.F.R. § 164.506(a). Certain public interest disclosures are also permitted under section 512 of the HIPAA Privacy Rule.

If a covered entity uses an outside entity to perform covered functions on its behalf, and that outside entity has access to protected health information, that outside entity is considered a "business associate" under HIPAA. Covered functions means those activities that make a covered entity perform as a health plan, health care provider or health care clearinghouse and include: actuarial services, legal services, claims processing, collection, billing, and case management. A health oversight agency, such as the State Medical Board and Division of Insurance, is not a business associate under HIPAA. HIPAA requires that the covered entity obtain written assurances from its business associates that they will use and safeguard PHI in accordance with the HIPAA Privacy Rule. A Business Associate agreement, or addendum to a contract, is required between any State Covered Entity and its business associates. There are two important exceptions to the requirement for a HIPAA Business Associate agreement. No agreement is required between covered health care providers to exchange PHI for treatment. No agreement is required between a health plan and providers where the only relationship between the parties is that providers are billing the plan for payment. Hence, a HIPAA Business Associate agreement is not required between Medicaid and every health care provider that bills Medicaid. Other data use, trading partner or provider agreements may be required for the exchange of confidential medical information between Medicaid and providers.

Contracts in place prior to October 15, 2002 that are not renewed or modified prior to April 14, 2003 were required to have HIPAA business associate agreement in place by the earlier of the contract renewal or amendment date, or April 14, 2004. Most State contracts were renewed effective July 1, 2003 and were amended to include a HIPAA business associate addendum in the July 1, 2003 renewals. New contracts between State covered entities and their business associates entered into on and after April 14, 2003 were required to have a HIPAA business associate addendum on the date of the contract.

Business associates are required to take certain precautions, adopt policies and procedures and implement safeguards for their use and handling of the covered entity's PHI. The requirements for a business associate are found in the HIPAA Privacy Rule at 45 C.F.R. 164.504(e). In addition, all HIPAA business associate agreements must comply with the State's contract and fiscal rules. Many private sector vendors and providers do not understand that the State of Colorado has requirements in addition to the HIPAA business associate agreement requirements. For example, the HIPAA Privacy Rule does not require that business associates have insurance or indemnify the covered entity, however, the State of Colorado Fiscal rules require that all vendors have insurance and indemnify the State. No changes are permitted to the State Model HIPAA business associate addendum.

Indemnification And Limitation Of Liability

If a contractor insists on negotiating indemnification provisions, or otherwise excluding damages, limiting damages, or disclaiming warranties, be aware there are limitations on your authority to do so.

When you promise anything other than timely payment of money available and encumbered for the purpose, you are potentially promising something the state may not do. Provisions requiring the state to indemnify or hold harmless the other party are the best example of this type. It is not possible in this context to detail every such problem. However, a single, guiding principle will help you avoid falling into this trap:

You may not promise anything on behalf of the state, which may create a claim against funds held by the state unless you have an appropriation to pay for it.

This principle springs primarily from the Colorado Constitution at Article V, Section 33 and at Article XI, Section 1. Promising in-kind performance or any consequence for the state's failure to pay or perform must be carefully evaluated. If a contractor requires that the state promise to do or pay something for which you have no money, do not execute such a contract without consulting legal counsel. In such cases, you should always use a funding out contingency (Special Provision 2), even for in-kind performance. Although the state is not directly promising money to the particular contractor, the funding to provide in-kind performance by state employees or with state-owned materials is still dependent upon general operating appropriations in future years.

When the state leases property for certain uses, there is a limited exception to the general prohibition on indemnification. Statutory authority exists to indemnify lessors under limited circumstances. See CRS 24-30-1510(3)(e) and (4), as amended. This should only be done when absolutely necessary to reach agreement. The following lease provision is the only acceptable way to accomplish this result:

> The Lessee shall defend and hold harmless the Lessor against claims arising from the alleged negligent acts or omissions of the Lessee's public employees, which occurred or are alleged to have occurred during the performance of their duties and within the scope of their employment, unless such acts or omissions are, or are alleged to be, willful and wanton. Such claims shall be subject to the limitations of the Colorado Governmental Immunity Act, CRS 24-10-101 to CRS 24-10-120, as now or hereafter amended.

This provision is commonly called a "Senate Bill 64 hold harmless." Use of this provision in a lease means the State Risk Manager must approve the lease. Route the lease to the Risk Management Office after Real Estate Services, with a written direction to the State Risk Manager specifying where to find the SB 64 provision.

Whenever a contractor wants the state to include a provision spelling out what happens if the state does not timely or properly do something, consult legal counsel. You may, of course, agree to pay interest on late payments, but such provisions should be expressly subject to CRS 24-30-202(24) and State Fiscal Rule 2-5 (1% per month interest from 45 days after payment due, but no liability for interest arises if a good faith dispute exists as to the state's obligation to pay all or a portion of the account). The term for timely payment and the rate of interest may be modified in accordance with State Fiscal Rule 2-5. In any event, always include the statutory caveat that interest is not owed during any period where a good faith dispute exists.

Contractors commonly want the state to sign limitations of liability or exclusion of damages. You can negotiate limits to contract "breach" damages for failure to perform up to the standards required in the contract, but per State Fiscal Rule 2-2 you cannot eliminate a contractor's liability for death, bodily injury, and damage to tangible property. State Fiscal Rule 2-2 contains current policy on the scope of permissible limitation of liability provisions.

You are strongly encouraged to seek the assistance of legal counsel when faced with a request by a contractor that your agency agrees to limit liability or exclude damages.

Insurance Requirements

Introduction

As a matter of policy, the State requires that its contractors maintain certain minimum types and levels of insurance. This policy stems from procurement requirements to select responsible vendors and fiscal policy to adequately protect the State. The standard types of insurance a State contractor/vendor should have are as follows:

- Commercial General Liability (CGL)
- Automobile Liability
- Workers' Compensation

Additionally, depending on the nature of contract performance, the contractor/vendor may be required to have:

- Umbrella Liability
- Professional Liability
- Environmental Impairment Liability
- Employee Dishonesty/Crime (where the contractor has control of State funds)

Each of these is discussed below. For unique operations, such as those involving the use of aircraft or watercraft, liability insurance will also need to be requested for those exposures. Because of the numerous types of risk specific insurance coverage, it is difficult to enumerate all of them in this document. If you are involved in a contract, which has exposures outside of the standard insurance provisions, please contact the Office of Risk Management for assistance in determining whether additional insurance coverage should be required.

It is important to note that the laws of the State of Colorado require workers' compensation and auto liability insurance. The State requires compliance with these laws as a condition of receiving public funds where employees or automobiles are used during contract performance.

Liability insurance is requested by the State in an effort to ensure that the contractor has the minimum financial capability to defend the State from lawsuits and to pay claims where liability exists while continuing to effectively perform services for the State. The additional insured status requested by the State on contractor's CGL and auto liability policies enables the State to be protected by the contractor's insurance policies when the State is sued in conjunction with the contractor for something that is the contractor's responsibility. The State has its own liability coverage for claims alleging the State is at fault. State liability insurance and additional insured status are also discussed in the following information.

Insurance Coverage Overview

The following will provide a brief description of the types of insurance coverage normally requested in State contracts. For specific questions, please contact the State Risk Management Office.

Liability Insurance

Liability insurance pays on behalf of insured parties for loss arising out of the insured's legal obligation to pay a monetary award for injury or damage caused by a negligent or a statutorily prohibited (non-criminal) action. It is written to cover a variety of risks likely to be encountered in the insured's operations. The insurance company will defend the insured against lawsuits, and pay damages to those who successfully make a claim against the insured, up to the policy's limit of liability. For example, if a contractor injured a person while on state property, caused damage to a landlord's premises, or had an automobile accident while traveling between agency locations during a consulting engagement, the State might be sued. Insurance provides a way for the State to be defended for the contractor's actions and payment for any ultimate liability.

Commercial General Liability

Commercial General Liability ("CGL") is the standard insurance policy issued to business organizations to protect them against liability claims for bodily injury and property damage arising out of premises operations, products and completed operations; advertising; and personal injury liability. Personal Injury includes: false arrest; detention or imprisonment; malicious prosecution; wrongful eviction; slander; libel; and invasion of privacy.

Automobile Liability

Automobile Liability coverage protects an Insured against financial loss because of legal liability arising from automobile-related injuries to others or damage to their property by the auto. Unless you are confident that the use of an automobile will not be required incident to contract performance, require automobile insurance coverage using the standard state provision. Even limited use of a contractor's automobile to "run errands" during performance of services could implicate the State in any action if an accident occurs, so automobile insurance should be required.

Umbrella Liability

An umbrella liability policy is designed to provide protection against catastrophic losses. It is normally written to cover damages in excess of primary policies such as CGL, auto liability and the employer's liability section of a workers' compensation policy. It provides increased limits of liability when the limits of the underlying policies are exhausted by the payment of claims and in some circumstances can drop down and become primary coverage when the aggregate limit of an underlying policy is exhausted by the payment of claims.

Professional Liability

This insurance is designed to protect traditional professionals (e.g. physicians, attorneys, architects, engineers, accountants, etc.) and quasi-professionals (computer programmers, real estate brokers, insurance agents, etc.) against liability incurred as a result of errors and omissions in performing professional services. Most professional liability policies cover economic losses suffered by others. For certain professions such as physicians, architects, and engineers, policies can also cover bodily injury and property damage risks. For most other professionals, bodily injury and property damage losses are covered under a general liability policy.

Environmental Impairment Liability

Liability for the contamination of the environment by pollutants is normally excluded to some degree by the CGL, auto and umbrella liability policies. Environmental liability insurance is a specialized policy that covers liability and sometimes cleanup costs associated with pollution incidents. If you have these kinds of risks, you are advised to consult with legal counsel and/or the Risk Management Office about the nature of liability risk and advisable insurance.

Occurrence and Claims Made Policies Forms

Liability insurance may be written on an "occurrence" or "claims made" basis. Occurrence based liability insurance pays when the loss occurs during the policy period, regardless of when the claim is reported to the insurance company. Most general liability policies are written on occurrence forms. In special circumstances, a general liability policy may be written on a claims made form. This can occur for higher risk operations such as asbestos abatement contractors. While occurrence based general liability policies are preferable, in these unusual cases exceptions can be made. If you have questions, consult the Risk Management Office.

Claims made liability insurance pays when the claim is both made against the insured and reported to the carrier during the policy term. Depending on the structure of the policy, the circumstance causing the claim could have occurred prior to the inception of the policy. Claims made policies are commonly used for professional and environmental liability risks. A key provision of a claims made policy is that coverage ends with the policy expires. To ensure that your agency has coverage for claims arising out of the services performed by the contractor for the State that manifest after the expiration of the policy, you will need to request that an "extended reporting provision" (also know as a "tail") be included on the policy. This means that the policy has to be kept in force after contract termination or expiration for a period equal to the applicable statute of limitations on law suits, normally two years. As an alternative, you can also request that similar coverage, with a "prior acts" provision be kept in place for a period also equal to the statute of limitation after the end of the contract. You may want to discuss the extended reporting period or continuation of coverage period with the Risk Management Office to make sure that the period specified in the contract is adequate to protect the State from probable claims that may be filed under your contact.

Workers' Compensation Insurance

Required by state statute, workers' compensation is a system by which no-fault statutory benefits are provided by an employer to an employee (or the employee's family) due to a job-related injury (including death) resulting from an accident or occupational disease. In most circumstances, employers who provide the required insurance are exempt from liability actions by their employees or the employees' families for loss arising out of a work related accident. However, in the event that an employee (or an employee's family) does file a liability suit, workers' compensation policies also provide employer's liability coverage. This coverage will defend the employer and pay any applicable judgments.

Crime Insurance

Crime Insurance can include coverage for losses arising from employee dishonesty, theft of money or securities, safe burglary, forgery robbery, computer fraud and funds transfer fraud of an Contractor's employee. This coverage should be requested when a contractor will have control of or access to the State's funds or other negotiable instruments. You should request that the State be added as a Loss Payee on the contractor's policy to ensure that the State has a right to file a claim directly with the insurance company in the event of a loss. You may contact the Risk Management Office for assistance with this coverage.

Standard State Insurance Requirements

The standard State of Colorado insurance requirements for inclusion in procurement solicitations are shown in Clause A15 in Appendix A.

The required liability limits are derived from the State's maximum liability exposure under the Colorado Governmental Immunity Act Section 24-10-101 *et. seq.*, CRS as amended. The $1,000,000 thresholds cover most potential state liability and are consistent with the limits of commercially available policies.

As a matter of policy, the standard limits of liability are the minimum amounts to be required in a contract, unless a compelling case can be made for an exception. For contacts with greater potential exposures to loss, such as a large construction projects, agencies should consider asking for higher limits of liability. It is important to assess the appropriate insurance requirements for the operation involved. To ensure that the contract insurance requirements protect the interests of the State, while still being competitive in the marketplace, consult the Risk Management Office as necessary before modifying these insurance provisions. Agencies are responsible for assuring that any changes to the basic insurance provisions are warranted considering the nature of the risk associated with contract performance.

Governments or "Political Subdivisions" as Contractors

For cities, towns, or counties, which object to the standard insurance requirements, it is acceptable to use the following:

If the Contractor is a "public entity" within the meaning of the Colorado Governmental Immunity Act, CRS 24-10-101, et seq., as amended ("Act"), the Contractor shall at all times during the term of this Contract maintain such liability insurance, by commercial policy or self-insurance, as is necessary to meet its liabilities under the Act. Upon request by the State, the Contractor shall show proof of such insurance

This may also be added to standard insurance requirements sections in a form contract where the agency has both public and private contractors in the same program and a single contract form is desired.

"Public entities", as defined in CRS 24-10-101, et seq., applies only to agencies and political subdivisions created under the law and/or Constitution of the State of Colorado. It does not apply to agencies or political subdivisions created by the federal government or other states. However, other public entities (federal or in other states) may have their own governmental immunity statutes, self insurance, or other alternatives to insurance that may be be cited by those entities as reasons to not comply with standard Colorado insurance requirements. Further, the prospect of the State of Colorado being liable for the actions of the federal government or other states' entities is remote. In general, elimination of the insurance clause in these types of contracts (federal or other state governments and their political subdivisions) may be acceptable. Consult legal counsel or the Risk Management Office if you have questions.

MARSH

CERTIFICATE OF INSURANCE

CERTIFICATE NUMBER: SEA-000821688-06

PRODUCER
MARSH USA INC.
1225 17TH STREET, SUITE 2100
DENVER, CO 80202-5534

86100 -01245-CAS-01/02

INSURED
X, Y, Z, INC.
105 PLEASANT STREET
ANYWHERE, CO 80000

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER OTHER THAN THOSE PROVIDED IN THE POLICY. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES DESCRIBED HEREIN.

COMPANIES AFFORDING COVERAGE

COMPANY A: ROYAL INDEMNITY COMPANY
COMPANY B: FIREMANS FUND INSURANCE CO.
COMPANY C: PINNACOL ASSURANCE
COMPANY D: LEXINGTON INSURANCE COMPANY

COVERAGES This certificate supersedes and replaces any previously issued certificate for the policy period noted below. 6

THIS IS TO CERTIFY THAT POLICIES OF INSURANCE DESCRIBED HEREIN HAVE BEEN ISSUED TO THE INSURED NAMED HEREIN FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THE CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, CONDITIONS AND EXCLUSIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A	**GENERAL LIABILITY** [X] COMMERCIAL GENERAL LIABILITY [ ] CLAIMS MADE [X] OCCUR [ ] OWNER'S & CONTRACTOR'S PROT [ ] _____	1234	07/01/01	07/01/02	GENERAL AGGREGATE PRODUCTS - COMP/OP AGG PERSONAL & ADV INJURY EACH OCCURRENCE FIRE DAMAGE (Any one fire) MED EXP (Any one person)	$ 1,000,000 $ 1,000,000 $ 1,000,000 $ 1,000,000 $ 50,000 $ 5,000
B	**AUTOMOBILE LIABILITY** [X] ANY AUTO [ ] ALL OWNED AUTOS [ ] SCHEDULED AUTOS [ ] HIRED AUTOS [ ] NON-OWNED AUTOS [ ] _____	1234	07/01/01	07/01/02	COMBINED SINGLE LIMIT BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE	$ 1,000,000 $ $ $
	GARAGE LIABILITY [ ] ANY AUTO [ ] _____				AUTO ONLY - EA ACCIDENT OTHER THAN AUTO ONLY: EACH ACCIDENT AGGREGATE	$ $ $
	EXCESS LIABILITY [ ] UMBRELLA FORM [ ] OTHER THAN UMBRELLA FORM				EACH OCCURRENCE AGGREGATE 	$ $ $
C	**WORKERS COMPENSATION AND EMPLOYERS' LIABILITY** THE PROPRIETOR/ PARTNERS/EXECUTIVE OFFICERS ARE: [ ] INCL [ ] EXCL	1234	07/01/01	07/01/02	[X] WC STATU-TORY LIMITS [ ] OTH-ER EL EACH ACCIDENT EL DISEASE-POLICY LIMIT EL DISEASE-EACH EMPLOYEE	 $ 100,000 $ 100,000 $ 100,000
D	**OTHER** PROFESSIONAL LIABILITY	1234	07/01/01	07/01/02	EACH CLAIM $1,000,000 DEDUCTIBLE _____	

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS

CERTIFICATE HOLDER IS NAMED AS ADDITIONAL INSURED. ABOVE POLICIES SHALL BE PRIMARY AND INCLUDES A WAIVER OF SUBROGATION IN FAVOR OF THE STATE OF COLORADO, ITS OFFICERS, AGENTS, EMPLOYEES AND VOLUNTEERS.

CERTIFICATE HOLDER

COLORADO DEPARTMENT OF _____
DIVISION OF _____
(ADDRESS)

CANCELLATION

SHOULD ANY OF THE POLICIES DESCRIBED HEREIN BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE INSURER AFFORDING COVERAGE WILL ENDEAVOR TO MAIL 45 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED HEREIN, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER AFFORDING COVERAGE, ITS AGENTS OR REPRESENTATIVES, OR THE ISSUER OF THIS CERTIFICATE.

MARSH USA INC.
BY:

MM1(3/02) **VALID AS OF:** 11/16/04

Certificates of Insurance: Overview and Instruction

The following discussion accompanies the sample Certificate of Insurance in this Chapter. Before getting into particular coverage types and limits of liability, you must first examine the Certificate to make sure the following items are included:

- Name, address, and telephone number of issuing insurance agent;
- Correct complete name and address of the insured (your contractor);
- Insurance companies should be listed and the corresponding "Company Letter" should appear beside each type of coverage so that it is clear which company is providing each coverage;
- Policy effective dates; and
- Signature of the issuing agent

Always check the "insured" name at the top of any Certificate of Insurance to make sure it is your contractor and not a parent or subsidiary of the contractor that is actually doing the work.

Limits of Liability

The standard form Certificate of Insurance shows a section entitled "Limits." In this section, there are several different terms with dollar amounts next to them. The terms and recommended minimum limits are outlined in the following sections.

Commercial General Liability

Each Occurrence

Each Occurrence means the maximum amount payable for loss or judgment arising out of a single bodily injury or property damage liability claim. For a standard contract, the minimum required per occurrence limit is $1,000,000. Commercial General Liability policies are normally written with a $1,000,000 each occurrence limit.

Personal and Advertising Injury

The minimum Personal and Advertising Injury limit required should be $1,000,000. As with the per occurrence limit, the insurance industry standard limit is $1,000,000.

General Aggregate Limit

The General Aggregate limit should be at least $1 million. This is the maximum amount the insurance company will pay during the policy period (the dates shown just to the left) for all CGL claims covered by the policy, except Products & Completed Operations. Thus, if the contractor is successfully sued during that period, the total amount of CGL

insurance available for a claim involving the State's contract would be reduced accordingly.

Products and Completed Operations Aggregate

The Products-Completed Operations Aggregate limit should be at least $1 million. An example of completed operations liability would be a fire after the completion of the work caused by an electrician's improperly wiring an office area. The aggregate limit is the maximum dollar amount available during the policy period for injuries caused by the contractor's product or work (including materials, parts and equipment furnished in connection with the work) after the work has been completed and put to its intended use. This covers bodily injury and property damage caused by the contractor' products and completed operations. If nothing is shown in the Products/Completed Operations Aggregate section of the Certificate, it normally means that the coverage is not provided. The insurance company will not pay more than the specified dollar limit for all such injuries during the policy period, so normally the coverage would either be shown as "included" or a specified aggregate amount stated if the coverage is provided. Specifically request this coverage when an exposure to this type of loss exists, as it is not always automatically included in the policy.

Aggregate Limits in Policies

It is recommended that all State contracts contain a provision requiring that if general aggregate limits are reduced by claims paid or made during the contract period, the contractor shall immediately obtain additional insurance to restore the full aggregate limit. The standard insurance clause in Appendix 6A has this provision.

Fire Damage

Fire Damage pays for property damage by a fire caused by the insured. The minimum amount normally provided by a CGL policy is $50,000 for any one fire. If the contractor is leasing space from the State or has a higher exposure, limits requested can be increased to as much as $1 million.

Automobile Liability Insurance

State law requires all automobile owners to carry a minimum amount of liability insurance for injuries or damage they may cause to others while operating a motor vehicle. The limits required by statute are $25,000 per person/$50,000 per accident for bodily injury and $15,000 for property damage. These limits are not adequate to protect the State's interest when utilizing a contractor that will be using or requiring its employee to use a vehicle(s) in the completion of the project. The State will, therefore, normally require its contractors to carry a minimum of $1,000,000 combined single limit for bodily injury and property damage per accident, as this is a better approximation of the maximum risk to the State under the Governmental Immunity Act. For higher risk exposures, such as transporters of groups of individuals, or contractors with a significant

numbers of vehicles utilized to support the contract (i.e. major construction projects) larger limits of liability should be considered.

Sole proprietors or professionals using a single vehicle of their own and not transporting others under the contract may use their own Automobile Liability Insurance with a lower limit. However, it should always be at least $300,000 combined single limit per accident.

The types of autos covered are noted on the left hand column of the Certificate. The box marked will depend on the business exposure of the contract. For example a large construction contractor's coverage will normally apply to "Any Auto". A smaller contractor may have "Scheduled Autos", "Hired Autos" and "Non-Owned Autos" checked. On occasion a very small business or non-profit entity may have only "Hired Autos" and "Non-Owned Autos". All of these are acceptable means of providing coverage. For questions on which coverage is appropriate for your contract, please contact the Office of Risk Management.

Umbrella Liability (Excess Liability)

For a standard contract, this coverage will usually not be completed on a Certificates of Insurance. However, if we request limits in addition to $1 million per occurrence/$2 million aggregate on the CGL and $1 million combined single limit on the Auto Liability coverage, the additional limits required will normally be provided through an excess or umbrella liability policy. Since this is not standardized, appropriate limits should be discussed with the Risk Management Office.

Workers' Compensation

Workers' Compensation limits of insurance are normally statutory. For the vast majority of contractors that section of the Certificate of Insurance will be checked. A few very large self-insured employers may purchase insurance with limits less that the statutory requirements and retain the risk for any loss in excess of the insurance carried. With respect to Employers' Liability (Each Accident, Disease Policy Limit and Disease Each Employee) the required limit of liability is a minimum of $300,000 for each area.

Please note that an individual operating as a sole proprietor, and not using other employees during the course of contract performance, would not be required by law to obtain Workers' Compensation Insurance. The same rule applies to performance of services by the named partners of a partnership that has no other employees. Consequently, in cases where the contractor is exempt from the requirements, there is no need to require that this coverage be included on the Certificate.

Corporate officers or members of limited liability companies (LLCs) may elect to reject workers' compensation coverage. If this is the case, it will be noted on the left hand side of the Certificate under Type of Insurance. This is acceptable.

Special Items

Regardless of limits requested, the State should always be named an additional insured on a contractor's Commercial General Liability (CGL) Insurance and Auto Liability Insurance policies. This enables the State to request the protection of the contractor's insurance policy when both the State and contractor are sued for the contractor's actions. The important thing to remember is that this requires an amendment to the insurance policy and you must get written evidence on the Certificate that this has been accomplished.

In conjunction with the Additional Insured information, the Description spaces should also contain a statement that coverage required of the contractor will be primary over any insurance or self-insurance program carried by the State of Colorado.

Note: The State cannot be added as an Additional Insured on a contractor's workers' compensation/employers' liability policy. It is also very rare that the State can be an additional insured on professional liability insurance coverage. For unique liability exposures such as environmental liability, aircraft liability, or watercraft liability, to name a few, the Additional Insured provision can be added. If there is any confusion about the additional insured endorsement, consult the Risk Management Office.

Finally, the Description area of the Certificate should also confirm that a Waiver of Subrogation Provision is in place on the requested coverages. This is an agreement with the contractor that is intended to prevent its insurer(s) from pursuing recovery of any paid claims from the State. It can be requested on all coverages but Crime and Professional Liability.

Certificate Holder

Insurance Certificates provide no legal rights. Notice the disclaimer in bold type at the upper right hand corner. Being a Certificate holder simply means the insurance company, through its agent, has your agency name on file and will attempt to provide the agency notice of cancellation. The contractor is independently required by the solicitation/contract to provide notice of cancellation to the State, usually 45 days. See the standard requirements in Clause A l5, Appendix A.

State of Colorado Property and Liability Insurance

Property Casualty Insurance

The State has a commercial insurance policy covering damage to its property on an "all risk" basis, subject to specific exclusions. If your agency is asked to carry insurance on leased property or property purchased on an installment plan, you should contact the Risk

Management Office to make arrangements to have such property listed on the State's policy. DO NOT wait until after delivery of the goods or property to do this.

State General Liability Insurance

The State of Colorado self-insures the majority of its liability exposures, meaning that the State provides its own defense and pays the ultimate liability in most cases from the Risk Management Fund. The Risk Management Office administers the self-insurance program. The Risk Management Office will, upon request by a contractor, issue a certificate showing State CGL coverage. The Risk Management Fund covers only the liability of State agencies and employees. No one else may be named an additional insured. Further, the State may not promise to use self-insurance to contractually meet any liability except in property leases. So, for example, the Risk Management Fund would not pay a contractual liability arising from an indemnification clause in the contract where that liability is not otherwise payable under a waiver of governmental immunity.

Intellectual Property Issues

There is a collection of subjects that are embraced under the concept of "Intellectual Property". Intellectual Property embraces tangible and intangible objects. Some of the most valuable aspects of goods and services are not the actual supply, software, report, or other deliverable, but the right to possess, use, copy, publish, display, transfer, and prepare derivative works in regards to the good or service. These ownership rights also include the ability to allow others to also exercise certain designated rights over the good or service through the licensing process.

Practice: One common problem in the procurement and contracting process is the lack of any identification of intellectual property rights (proprietary/confidential) by the contractor. The state has model clauses (Data and Document Deliverables; Confidentiality of Records) that defines the duties and rights to the data and documents delivered or produced as a result of the contracting process.

Practice: Do not forget that the contract has to specify what documentation, e.g. software documentation, must be delivered. The standard clause that says the state "owns" all rights in documentation delivered under the contract means little if the contract never requires delivery of software documentation.

The following discussion describes the various types of intellectual property.

Patents

A patent is a right created under federal law, granting the inventor, for a limited period of time, the exclusive right to exclude all others from making, using, selling and/or importing the patented process or article in the United States. No other company or individual may then use that patented invention without permission, usually granted through a "license" or assignment of the right to the invention. While the Federal Government, through the U.S. Patent and Trademark Office, is willing to grant the patent owner protection for twenty years, the privilege may be lost under various patent misuse and anti-trust laws.

Comment: In transactions in goods governed by the Uniform Commercial Code (Title 4, Colorado Revised Statutes), a sale includes an implied warranty; i.e. promise that seller has the necessary title to the goods, and that the goods will be delivered free of the claim of any third party by way of infringement or the like. (CRS 4-2-312)

Federal courts have allowed computer software programs to be patented, providing that the applicant can meet the requirements of the Patent Act (35 U.S.C. 101).

Practice: If a holder of a patent sued the purchaser for infringing its patent by using the purchased product, the purchaser can sue the seller under the implied warranty of title and against infringement. Consequently, be careful about disclaimers of warranties; do not permit a vendor to disclaim the warranty of title and against infringement.

Copyright

Copyright protection applies to "original works of authorship" rather than inventions and does not protect the "idea," only the expression of the idea. The Copyright Act (17 U.S.C. 101) protects certain defined category of works. The rights of copyright reserves to the maker of the work the right to copy, distribute, prepare derivative works; i.e., modify, and publicly display the work. A copyright exists upon creation of a work, although the copyright owner can obtain federal registration, which grants certain procedural advantages in an infringement lawsuit. Copyrights like patents are created by federal law.

Federal Courts have classified computer software as a literary work under the Copyright Act. In Apple Computer, Inc. v Franklin Computer Co., 714 F.2d 1240, 1249 (3d Cir. 1983), the Court stated that both the source code and object code is protected by copyright.

The issue of original work arises with databases. The database is usually a compilation of data that raises the issue of original authorship, i.e. what creative effort went into arranging or selecting the database contents. Copyright protection has been extended to

the selection and arrangement of the data in the database, not the contents or the discrete facts.

Comment: There is a limited exception, known as the "fair use" doctrine, to the prohibition on copying copyrighted works without permission. For example, teachers generally can make limited copies of recently published literary materials for one-time use during class. Even they, however, cannot incorporate published materials into instructor supplements routinely sold to the students; that would probably not be a "fair use."

Another recognized exception is for Public Domain material, which includes works where the copyright has expired, works created before January 1, 1976 published without copyright notice, and works created by an employee of the federal government.

The "Work Made for Hire" doctrine applies to those instances whereby the employee has produced the work within the scope of his or her employment. In this case, the employer owns the copyright.

Where an independent contractor created the work, the copyright is owned by the independent contractor absent a written agreement to the contrary.

Practice: One issue for state contracts is where contractor-developed materials, e.g. training materials, will be furnished in limited numbers to the state. Whether the state then can just reproduce additional copies when it needs them is not entirely clear in the law -- because the "fair use" doctrine is very limited -- and should be addressed in the contract.

Trademarks

Trademarks identify and distinguish goods or services in the marketplace as originating from a single source. The trademark for a product links that product owner's goodwill to the customer. Companies, like Coca Cola, spend millions of dollars protecting its trademark. A trademark or service mark grants the owner the exclusive right to use the mark to identify goods or services. Protections for trademarks and service marks exist under state, federal, and common laws.

A trademark for federal registration purposes is defined as any word, name, symbol, or device used in commerce by a person to identify and distinguish his goods from those manufactured or sold by others and to indicate the source of those goods. Thus, Nike's swoosh, McDonald's golden arches, and the Olympic's five interlocking rings are classic trademarks.

Comment: The National Science Foundation contracted with Network Solutions, Inc to be the sole Registrar of Internet Domain Names. Domain name trademark infringement lawsuits have grown exponentially.

Trade Secrets

Trade secrets are categories of information that are afforded protection under state law. Over 40 states have adopted versions of the Uniform Trade Secrets Act (UTSA). In Colorado, a trade secret is defined as "the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses or telephone numbers, or other information relating to any business or profession which is secret and of value." (CRS 7-74-102)

Comment: Examples of Trade Secrets include manufacturing techniques, software programs, cost and pricing data, marketing techniques, pricing policies, customer lists, names of customer's key decision makers, recipes for food products, etc.

The advantage to trade secrets is their scope: protections are granted to a broader category of information than might be available under patents (available only for "new and useful" inventions) or copyright law (protections granted only to "works").

The downside of trade secrets is that once the secret is lost through lawful disclosure, there are no additional protections. Companies typically use nondisclosure clauses in contracts to restrict dissemination of information they consider to be trade secrets. A state agency's failure to comply with the nondisclosure terms could subject it to substantial liability, and potentially large attorney fees.

Comment: Companies take a variety of steps to protect the secrecy of their trade secrets. Physical security, non-disclosure clauses in contracts and employee agreements, and covenants not to compete are used routinely to protect a company's trade secrets.

Practice: Contracts must clearly identify the trade secrets (or confidential and proprietary information) when contractors want nondisclosure provisions. A clear marking requirement should be included so contractors have the responsibility for marking any information they consider subject to the nondisclosure provision. Further, contractors should be advised that the Colorado Open Records Act (CRS 24-72-101) might limit the ability of the state agency to reach binding agreements on categories of material that may not be disclosed. Clause B5B in Appendix A of this Manual has these essential elements. A typical contractor non-disclosure contract clause may appear as follows:

> By virtue of this Agreement, the parties may have access to information that is confidential to one another. Confidential information shall be limited to the Programs, the terms and pricing under this Agreement, and all information clearly identified as confidential.
>
> A party's Confidential information shall not include information that: (a) is or becomes a part of the public domain through no act or omission of

> the other party; (b) was in the other party's lawful possession prior to the disclosure and had not been obtained by the other party either directly or indirectly from the disclosing party; (c) is lawfully disclosed to the other party by a third party without restriction or disclosure; or (d) is independently developed by the other party. Customer shall not disclose the results of any benchmark tests of the Programs to any third party without our prior written approval.
>
> The parties agree to hold each other's confidential information in confidence during the term of this Agreement and for a period of two years after termination of this Agreement. The parties agree, unless required by law, not to make each other's confidential information available in any form to any third party for any purpose other than the implementation of this Agreement. Each party agrees to take all reasonable steps to ensure that confidential information is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement. Notwithstanding the foregoing, the parties acknowledge that the customer is subject to the Colorado Open Records Act, CRS 24-72-101; et.seq, and that the customer's obligation therein supersedes its obligations under this Agreement.

Intellectual Property Rights in Software

The state must decide whether to develop the software in-house, contract to develop the software, or buy a license to use software that has already been developed. When developed in-house or contracting to develop the software, the state typically retains ownership rights to the software and documentation. Clause A8 in Appendix A is the starting point for specifying rights in data, documents, and computer software. That clause gives the state ownership rights, which include the rights to copy, publish, display, transfer, prepare derivative rights, and otherwise use the works. The contractor must deliver all materials to the state at termination of the contract. The contractor cannot use any of the materials outside the performance of the state's contract without permission from the state.

Practice: Do not forget to specify the document/data/software documentation deliverables. Clause B4 is a model provision for specifying these deliverables. The clause is designed to be used with an exhibit that has more detail concerning the nature, content, and formats for the data and documents. The clause has a simplified definition of software documentation and its adequacy. This clause is designed to be a starting point for contract drafters who, in conjunction with their information technology professionals, can better define the specific documentation requirements on any given project. Some complex software projects may require detailed definition of source code requirements, for example, that are better defined using national or industry standards for software documentation.

The most common practice for the state is to purchase "commercial off the shelf" (COTS) software. In general, while the vendor retains "ownership rights" in its previously developed software, the state must retain adequate license rights at a reasonable price to permit subsequent use and maintenance of the software. A typical license may appear as follows:

> The Customer is granted a non-exclusive license to use the designated programs specified in the Agreement for the following purposes: (i) to use the programs solely for the customer's operations on the designated systems or on a backup system if the designated system is inoperative, consistent with the use limitations specified in this Agreement. Customer may not re-license, rent, or lease the programs or use the programs for third-party training, commercial time-sharing or service bureau use; (ii) to use the documentation provided with the programs in support of the customer's authorized use of the programs; (iii) to copy the programs for archival or backup purposes. All titles, trademarks, and copyright and restricted rights notices shall be reproduced in such copies; (iv) to modify the programs and combine them with other software products; and (v) to allow third parties to use the programs for customers operations so long as the customer ensures that use of the programs is in accordance with the terms of this Agreement.
>
> The Customer shall not copy or use the programs, including documentation, except as specified in this Agreement. The Customer shall have no right to use any other software program that may be delivered with the ordered programs. The Customer agrees not to cause or permit the reverse engineering, disassembly or recompilation of the programs. The Customer does not acquire any rights, express, or implied, in the programs, other than those specified in this Agreement.

Practice: The vendor's license should be compared with the following clause which gives the state the minimum required rights.

> The state is granted an irrevocable, nontransferable, nonexclusive, paid-up, perpetual license to display publicly, perform copy, reproduce, prepare derivative works, and distribute any works, drawings, documents, data, or software delivered under this contract. For purposes of this license, the "State" includes any other person or entity-performing services for the state to the extent required for use, modification, or maintenance of the works, drawings, documents, data, or software delivered under this contract.

At the very least, the license provisions in the contract should clearly identify:

A. the term of the license, usually perpetual;

B. the cost of the license;
C. that other entities on behalf of the state can modify and use the licensed software; and
D. all of the rights that the state needs to retain, usually including the right make archival copies and to modify at least the portion customized for state use.

Independent Contractor and Intellectual Property Rights

In patent law, there is a "shop right" granted to the employer, permitting the employer to use a patented invention royalty-free where it was conceived or "reduced to practice" using the employer's time or resources. In copyrights, there is a "work for hire" doctrine that grants ownership rights in the copyright to the employer where creation of the work was specifically commissioned as part of the employment.

However, these doctrines generally apply only to employer/employee relationships. In an independent contractor situation, the state does not automatically get ownership or use rights to the intellectual property, other than as necessary for use of the product delivered under the contract. Consequently, if the state intends to reserve the right to transfer, modify, or expand the uses of a software product beyond what was intended in the original contract, such a right would have to be included in the contract. This is particularly important if the state intends to modify or maintain the software after delivery. Specify the terms of any ownership or license rights in the contract.

Comment: The state model clause, Rights in Data, Documents, and Computer Software, gives ownership rights to the state for any software, research, reports, studies, data, photographs, negatives or other documents, drawings or materials prepared by the contractor in the performance of its obligations under the contract. The contractor is allowed to keep a copy for its personal files and to use non-confidential writings in pursuit of work. Any other use requires permission by the state. When public monies are expended the state should retain at a minimum a paid-up license to use and copy.

Practice: Should a state agency desire to give the contractor ownership rights in those contract deliverables, the state should issue a license that specifies specific rights and consideration. Consideration may take the form as a royalty paid to the state, a public purpose, or a reduction in the contract price that approximates the value of the right(s) conveyed.