SECTION 3:
STATE CONTRACTING DECISION GUIDELINES
AND CANCELING A STATE CONTRACT

There are many critical issues that must be addressed before an agency contracts. Examples of these issues are how an agency (and by extension, the State) makes the decision to enter into a contract, how to evaluate the proposals, the contract’s content, who manages the contract, and who evaluates the final product. Since the state is spending taxpayers’ dollars, the contracting agency is held to a different, and stricter, set of standards and guidelines than the private sector.

Contracting Decision Guidelines

These guidelines will assist you in determining whether you need a contract to accomplish a required task. For each of the guidelines there is a short statement of what the statutes provide as guidance and a series of questions. If you respond to all the points in the positive (that is, yes or true), you should be on strong ground to proceed with a contract. If you respond to any of the points in the negative (that is, no or false), you should seek assistance from your agency contract coordinator before proceeding further.

At any point in the process of determining to develop a contract, you can contact your agency contract coordinator or the Professional/Technical Services Contract Section of the Department of Administration for assistance. Experience suggests that the earlier in your analysis you call for help, the smoother the process goes. This is especially true for contracts over $5,000.

There are times when a decision to contract has been made for an agency. Such as, legislation that specifically directs use of a contractor or outside party; a federal funding requirement that specifically directs use of a contractor or outside party; an appropriation that specifically requires delivery of a service without funding staff to support the service; legislation or an appropriation that says something has to be done in a time frame that the agency has already identified as being impossible to meet; any of these are situations in which the decision has already been made. You should keep a copy of the information with your files on the contract and proceed to the appropriate section of the manual for the type of contract you need.

The following are guidelines; they are questions you should ask yourself when deciding to contract. They are intended to be a checklist that helps you - not a paperwork burden. None of that work will be wasted, it will provide the basis for creating a good contract. You should keep a copy of whatever documentation is created and file it with the agency’s copy of the contract.

This part of this section is divided into two pieces: the first identifies the guidelines to be used in the decision to proceed with a contract, and the second takes these guidelines and expands on them to assist you in making the decision.
Guideline # 1: The nature of the work to be done must be specific

You must know exactly what work you want done. Then the contract can be written with specific detail about what the contractor needs to get done, the responsibilities for accomplishing the work, and a clear concise description of the results. It must be written so that the contractor can be held accountable for the work intended to be completed.

The "make or buy" decision, the decision to use a contractor rather than state employees to deliver service(s) or accomplish a task(s), must be initially based on three elements:

a) A Needs Statement: A needs statement answers two questions: (1) Is there a real need? and (2) What is the most feasible method to meet the need? A needs statement is a clear definition of the issue, need, or problem. An important ingredient is input from the working staff, the people with the hands-on experience, so that the need is very clearly defined.

b) A Statement of Work: A statement of work is performance oriented. Based on the needs, what is it that must be done? A statement of work answers the questions who, what, when, where, why, and how.

c) A Cost/Benefit Analysis: A cost/benefit analysis compares the costs, both short- and long-term, of using a contractor rather than state employees and the benefits on both sides of the "make or buy" decision. The cost/benefit analysis process for your use is outlined later in this manual.

Guideline # 2: No state employees are able or available to perform the work

Determine if a current state agency employee is able and available to perform the services called for in the contract. Contracting is expensive and, where feasible, utilizing a state employee could save money.

State statutes assume that a contract is needed because state employees are not available or lack the expertise to perform the study or produce the product required in a contract. Minn. Stat. §§ 43A.047 and 16C.08, subdivision 2 (1), requires that agencies demonstrate that they cannot use available staff BEFORE hiring outside contractors for services. In addition, state statute requires that if the results of the contract work will be carried out or continued by state employees upon completion of the contract, the contractor is required to include state employees in development and training, to the extent necessary to ensure that after completion of the contract, state employees can perform any ongoing work related to the same function.

Here are some sample questions that may help you assess this guideline.

- Is the workload or funding for the tasks to be undertaken by the contractor likely to vary, so that you cannot justify assigning existing staff or adding staff to accomplish the tasks?
- Have you identified the required qualifications of the individual(s) you are expecting to do the tasks you have outlined for the contractor?
- Are these required qualifications highly specialized skills or levels of expertise that are not routinely used by the agency?
- Have you notified your staff of the need for these services?
- Have you determined that the needed staff is not available within your agency or from another agency (building, area or district/region)?
- Have you identified alternatives you could use to accomplish the tasks required of the contract, if you are not able to sign a contract?
- Have you investigated to determine whether another state agency has previously performed or contracted for a similar study or set of tasks, the results of which could be useful to your agency?

Guideline # 3: **Agency must retain control**

The agency must retain the capability to prescribe, monitor, and evaluate the work of the contractor. The institutional memory (product of the work and how it was done) must reside with the agency, not with the contractor. Policy decisions must always be made by agency officials. Contractors may not represent a state agency in legislative matters.

Specific guidelines include:

1. an agency must retain the ability to develop, consider, and implement options other than those proposed by the contractor--the contractor cannot be the sole owner of the power to determine the outcomes of a contract.

2. an agency must retain the skills/techniques/understanding of how the contractor did what it did, so that agency staff could accomplish the task(s) in the contract in the future (institutional memory)--agency staff should learn the hows and the whys of the processes used to complete a contract.

3. agency staff must make all decisions related to the contract and its performance--in short, the contractor works for the agency, not the agency for the contractor.

4. contractors should not lobby the Minnesota Legislature for agency programs, projects, or legislation.

5. the contractor should not represent the agency before the Minnesota Legislature or be involved in lobbying for the agency.

6. include, as part of the contract when appropriate, detailed requirements for the contractor to train agency staff in the task(s) being performed.

7. identify, when appropriate, staff to be trained by the contractor and develop plans and provide
resources that allow these staff to take maximum advantage of the training opportunity provided by the contract.

(8) only agency staff must apply discretion and make value judgments throughout the contract.

**Guideline # 4: Time limit on contracts**

The anticipated need for the contract should be for a fixed period of time, not to exceed two years; although, a contract may include language that permits extension of the contract to five years. Nonprofessional/technical contracts (except service contracts) may exceed the five year statutory limit, with written authorization of the commissioner of Administration. However, in no event may a professional/technical contract exceed the five year limit. NOTE: By statute, an exception to the time limitations for contracts exists when the commissioner of Administration, in consultation with the commissioner of Finance, determines in part that the contractor will incur up-front costs under the contract that cannot be recovered within a two-year period. Under these circumstances, as described in Minn. Stat. § 16C.06, subd. 3b(c), the term of a contract may be extended up to a total term of ten years.

**Guideline # 5: Do not limit competition**

The decision to contract must not limit competition at the time of the initial award, and when follow up needs are being considered, they must not create any conflicts of interest or result in an unfair competitive advantage to that contractor.

The statutes assume that fair, open, public competition between potential contractors is the best means of getting the most for the taxpayers' dollar. There is also inherent in the statutes the assumption that the state should not commit itself to using processes/systems/applications that are proprietary--that belong exclusively to a contractor--and are not "open" to modification/use by other processes/systems/applications.

The decision to proceed with a contract should allow all qualified potential contractors to be treated as equals in the award of the contract. The contract should not commit the agency to use a proprietary process/system/application that will prohibit or limit the agency's alternatives in the future. No plans should be made or discussions entered into that suggest, as a result of the proposed contract, that the contractor would be considered a SINGLE SOURCE for future contracts.

**Guideline # 6: Contract will not create an employer-employee relationship**

State statutes prohibit establishing an employer–employee relationship between the state or the agency and anyone performing under a professional/technical services contract.

There are several types of "employees." For our purposes the critical ones are 1) contractual employees and 2) common law employees.
Contractual employees are state employees, individuals employed under one of the state's bargaining agreements or plans.

Common law employees are individuals who meet the tests outlined at the end of this section and are determined by the Internal Revenue Service.

In the “Professional/Technical Service Contracts” section of this manual are the rules and questions used by the Internal Revenue Service in determining whether an employer-employee relationship exists for common law employees. You should review them carefully BEFORE you decide to contract for a service.

**Guideline # 7: No State Agency Employee Can Engage in the Performance of a Contract**

Entering into a professional/technical services contract with current state employees is prohibited. There are several mechanisms available for agencies to utilize state employees’ services. If you want to use an individual state employee, you should contact your human resources office for more information. If you want to use another agency’s services, you should use an interagency agreement.

**Guideline # 8: Privatization**

Others (a contractor) could reasonably be expected to match or surpass the value and service levels which the state agency and its employees provide, based on a detailed cost benefit analysis.

MMD recommends that the agency work directly with the Departments of Administration and Employee Relations when this situation is identified.

**CANCELING A STATE CONTRACT**

In the event you need to cancel a state contract, for any reason, contact your Assistant Attorney General.