SECTION 5:  
CONTRACT DRAFTING AND  
PROCESSING CHECKLIST

Careful contract drafting ensures that the parties to the contract—the state agencies and contractors—have achieved an understanding and have mutually agreed on the terms of the contract, such as duties, quality of performance, time of performance, and terms of payment. Careful drafting avoids future disputes, which are costly and waste valuable resources.

An ambiguous contract may result in failure to obtain the services the agency assumed were contained in the contract. Agencies may find it difficult to require contractors to perform duties that are not clearly and specifically stated. Ambiguous contracts lead to amendments that are used to clarify items that should have been in the original contract. The written contract is generally the only thing that counts in a dispute over whether the contractor has fulfilled its promises.

In a legal action, ambiguities are often interpreted against the party in the more powerful position. In most cases, this is the agency, so a provision that can be interpreted against the agency most likely will be. Don't take for granted that something you and the contractor have discussed and verbally agreed upon will happen. If it is not written in the contract, it is not readily enforceable.

What is a contract?

Understanding the elements necessary to create a contract will assist you in writing a better contract. First, contracts can be verbal; however, by law the state can only enter into written contracts. No one in the state has the authority to enter into a verbal state contract.

In contract law there are three basic elements required to create a contract: offer, acceptance, and consideration.

An Offer is a proposal to do a thing or pay an amount.

Acceptance is agreeing to the terms of the offer.

Consideration is the inducement of a contract, the impelling influence which induces a contracting party to enter into a contract. In state contracts it is primarily, but not always, the payment of money.

The last step of a contract is performance, where each party lives up to their respective side of the bargain.

To determine if a contractor's performance is complete and acceptable, the terms of the contract must establish clear, unambiguous quantities and types of services and specific standards for the services required under the contract (Section 18 contains more details on monitoring and evaluating vendor
performance). The contract must also specify dates for beginning and completion of performance.

Sound contracting practice requires that details, such as specific answers to who, what, when, where, and how much, are written into the contract.

A **state contract** is a written instrument or electronic document containing the elements of offer, acceptance, and consideration to which an agency is a party, including an amendment to or extension of a contract. The state can ONLY be bound to a contract that has been signed by the contractor, agency head, and the commissioner of Administration, and the state accounting system shows an obligation in an expense budget or encumbrance for the amount of the contract liability (Minn. Stat. § 16C.05, subd. 2).

**Suggestions for clear drafting**

First and foremost you must answer who, what, when, where, and how much. Answering these questions with specific detail is a great start to contract drafting. Thinking through the following list of issues will help you get the most from your contractor.

- List **precisely** what you want to get (contractor's duties) from the services; the qualifications of the person(s) performing; the work; the time of performance; the final product quality.
- List the cost of the service (compensation and reimbursement for expenses) separately.
- Determine how you know when you got what you wanted; determine how you will enforce the provisions of the contract.
- Look at the contractor's past performance if you have contracted with this contractor previously. Will there be problems getting the services or products on time? Or getting the quality desired? Develop specific requirements to deal with anticipated problems.
- Specify contractor's duties simply and in plain English; for example, “The contractor will provide X (service) by X (date).” Strive for clarity – use plain and simple language and try to avoid jargon.
- Don't rely on the contractor's proposal as the list of duties. It is usually unspecific, is not drafted in legally enforceable language. It may contain language that is extraneous, conflicts with your goals, or is contrary to state law.
- Use the same terms consistently throughout the contract; for example, use *contractor* or *vendor* but not both interchangeably.
- Incorporate all attachments to the contract properly; for example, "Contractor will perform
the duties and meet the requirements specified in Attachment B, which is attached and incorporated into this contract."

- Label attachments in the order they are mentioned in the contract; that is, the first attachment mentioned should be Attachment A, the second, Attachment B, etc.
- Attachments must actually be attached to each copy of the contract.
- Lengthy and cumbersome attachments may be incorporated by reference without being attached to the contract IF the contract specifically identifies those items in such a manner that they can be unambiguously identified and their location specifically identified. Such as, "price schedule dated November 15, 1999, and filed with the US Department of Health and Human Services (the place where it is actually officially filed and available)." To incorporate an attachment by reference state in the contract, “see Attachment Q, which is incorporated into this contract by reference. Attachment Q may be located at ____________.” Another example is a lengthy price schedule. You can incorporate this by stating, “see the price schedule dated November 15, 1999, and filed with the US Department of Health and Human Services (the place where it is actually officially filed and available)."

**Standard Contract Requirements**

**Human rights compliance.** (This language is not required for grant contracts.) All state contracts in excess of $100,000 must contain the following provision dealing with human rights compliance:

**For contracts in excess of $100,000.00 the Contractor certifies that it is in compliance with** Minn. Stat. §363A.36.

**Workers with Disability.** All state contracts, including grants, in excess of $100,000 must contain the following provision, pursuant to Minn. R. 5000.3550:

The Contractor must comply with the following Affirmative Action requirements for disabled workers:

A. The Contractor must not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The Contractor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified disabled persons without discrimination based upon their physical or mental disability in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment,
advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

B. The Contractor will comply with the rules and relevant orders of the Minnesota Department of Human Rights issued pursuant to the Minnesota Human Rights Act.

C. In the event of the Contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with Minn. Stat. § 363A.36, and the rules and relevant orders of the Minnesota Department of Human Rights issued pursuant to the Minnesota Human Rights Act.

D. The Contractor will post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the commissioner of the Minnesota Department of Human Rights. Such notices must state the Contractor's obligation under the law to take affirmative action to employ and advance in employment qualified disabled employees and applicants for employment, and the rights of applicants and employees.

E. The Contractor must notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the Contractor is bound by the terms of Minn. Stat. § 363A.36, of the Minnesota Human Rights Act and is committed to take affirmative action to employ and advance in employment physically and mentally disabled persons.

Data Disclosure. All state contracts that pay out state money must contain the following clause. It is used as a Tennessen warning to the contractors.

Under Minn. Stat. § 270C.65, Subd. 3 and other applicable law, the Contractor consents to disclosure of its social security number, federal employer tax identification number, and/or Minnesota tax identification number, already provided to the State, to federal and state agencies and state personnel involved in the payment of state obligations. These identification numbers may be used in the enforcement of federal and state laws which could result in action requiring the Contractor to file state tax returns, pay delinquent state tax liabilities, if any, or pay other state liabilities.

Audit clause. All state contracts, including pass-through disbursements of public funds, grants, must include an audit clause that provides that “the books, records, documents, and accounting procedures and practices of the contractor or other party, relevant to the contract or transaction, are subject to examination by the contracting agency, and either the legislative auditor or the state auditor as appropriate, for a minimum of six years [from the end of the contract].” Minn. Stat. §16C.05, subd. 5. The exception to this requirement is found in the last sentence of Minn. Stat. §16C.05, subd. 5, and states, “An agency contract made for purchase, lease, or license of software and data from the state is not required to contain this audit clause.”

Voter registration clause The commissioner or chief administrative officer of any community-
Based public agency or nonprofit corporation that contracts with a state agency to carry out obligations of that agency must provide voter registration services for employees and the public. Minn. Stat. § 201.162.

**Effective date.** *Under no circumstances should an agency permit a contractor to start work, and therefore create an obligation on the part of the state, until the contract has been fully executed and copies are in the possession of both the agency and the contractor.* If it appears that the effective date specified in the contract will pass before the contract will be approved by the commissioner of administration, the agency must certify to the commissioner of administration in writing that no services will begin until the contract has been executed. If this is not the case, and services have begun, the agency must complete a Minn. Stat. § 16A.15/16C Violation Memo.

**Data practices.** If a contractor is to have access to data maintained by the state, the contractor must agree to comply with all the requirements of the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13.

**Unilateral termination.** A professional/technical services contract must by its terms permit the commissioner of Administration to unilaterally terminate the contract prior to completion, upon payment of just compensation, if the agency determines that further performance under the contract would not serve agency purposes (Minn. Stat. § 16C.08, subd. 2(9)).

**Contracts with ANY organization or entity governed by a board.** If a contract is with any organization governed by a board, a tribal organization, a political subdivision, or a nonprofit/not for profit organization they must provide a copy of a current resolution or ordinance that either approves the particular contract or authorizes the board's resolution of signature authorization to the individual to sign contracts. This resolution or ordinance should be attached to the signed contract. In the case of a tribal organization, the resolution of signature authorization needs to specify "contracts with the State of Minnesota." Contracts with “boards” can represent severe timing problems, especially for smaller entities. Some of these boards meet irregularly or only quarterly. You need to understand this as you are putting together the contract, and especially the timing of the work.

**Commodities in professional/technical services contracts** If the product of the contract includes multiple copies of a document, the agency must consider the cost of reproducing the documents as a separate issue from the overall cost of the contract. Reproduction costs are often "hidden" in overhead charges or reflect considerably higher per unit costs than can be obtained by the state on a separate printing contract. Also, Minn. Stat. §§ 16B.122 and 16B.124 add specific requirements which your contractor may not be able to meet in his/her normal business process. You must specifically justify to your agency contract coordinator, and/or the commissioner of administration, buying more than three copies--one camera ready--of any document BEFORE you write the contract. If the product of the contract is multi-media output or audio/visual presentation--radio or television announcement--the agency must perform the same analysis. Normally, no more than a master and two copies may be provided as part of the contract. If additional copies are required, you should consider the cost of using an existing or new service contract. You must specifically justify to your agency contract coordinator and/or the commissioner of administration, buying more than a master
and two copies BEFORE you write the contract.

**Deposit of reports in Legislative Reference Library.** If the final product of a professional/technical services contract is a written report, the agency must file one of the copies with the Legislative Reference Library (Minn. Stat. 16C.08, subd. 6).

**Reports required by the legislature.** If the product of a contract is a report required by the legislature, it shall be made by filing two copies with the Legislative Reference Library, and by making the report available electronically to the Legislative Reference Library. Minn. Stat. § 3.195. This statute contains very specific and directive rules about the distribution of reports to the Legislature, and you should be aware of those in creating your contract.

**Tax withholding on compensation to entertainers.** Minn. Stat. § 290.9201, requires the state to withhold two percent of all compensation paid to a nonresident entertainer. Entertainer is very broadly defined and includes public speakers, musicians, singers, dancers, comedians, actors, and athletes.

The following suggestions in drafting language may be used for contracts for public speakers or other entertainers to ensure that the contractor understands the withholding requirement and the Department of Finance can accurately determine that portion of the compensation from which the two percent must be withheld:

1. Clearly **distinguish the contractor's duty to speak** from other duties, such as preparation of materials;
2. Clearly **distinguish compensation for speaking** from compensation for other duties; and
3. Clearly **distinguish the speaker's fee** from the reimbursement of expenses, specifically identifying the amount of compensation subject to withholding and the amount to be withheld.

**Final payment to contractor - delivery of final "product."** All professional/technical service contracts must provide for the following:

   **Retainage.** Under Minn. Stat. § 16C.08, subd. 2(10), no more than 90% of the compensation due under this contract may be paid until the final product of this Contract has been reviewed by the State’s agency head. The balance due will be paid when the agency head determines that the Contractor has satisfactorily fulfilled all the terms of this contract.

Note: A retainage clause is not required for professional services as defined in Minn. Stat. §§ 326.02 to 326.15. For further information see Minn. Stat. § 16C.08, subd. 2(10).

**Contract Processing Checklist**

The Contract Processing Checklist is available on the MMD website at: