SECTION 9:  
PROFESSIONAL AND TECHNICAL SERVICE CONTRACTS 
AND INDEPENDENT CONTRACTOR V. EMPLOYEE

Professional/technical service contracts are defined as, “services that are intellectual in character, including consultation, analysis, evaluation, prediction, planning, programming, or recommendation, and result in the production of a report or the completion of a task. Professional or technical contracts do not include the provision of supplies or materials except by the approval of the commissioner of Administration or except as incidental to the provision of professional or technical services.” Minn. Stat. § 16C.08.

Minnesota statutes strictly regulate professional/technical contracts and the Minnesota Legislature closely monitors these contracts so you should carefully follow all statutes, policies, and procedures.

The laws and policies concerning professional/technical contracts change quite frequently. In order to keep you informed of these changes, the Department of Administration issues periodic informational memoranda as well as updates via email to a large distribution list of those interested in contracting issues. The notices provide updates on changes in laws, policies, and procedures. If you would like to be added to the mailing list, contact the professional/technical section of MMD.

Sample Professional/Technical Contract

The Sample Professional/Technical Contract is available on the MMD website at:

http://www.mmd.admin.state.mn.us/pdf/samplecontract.pdf
http://www.mmd.admin.state.mn.us/Doc/samplecontract.doc

Who is responsible for what is in a professional/technical contract?

Minnesota statutes divide the responsibility for contracting for services among two agencies: the agency head requesting the contract, and the commissioner of Administration.

Procedurally, your agency head or his/her designee signs the contract after the contractor signs it, then a representative of MMD’s Professional/Technical Contract Section reviews the contract for conformance with state and federal laws, state procedures, and content clarity. If it is approved, it is signed by MMD. Legislation enacted in 2003 removed the requirement that the Attorney General’s Office sign contracts as to form and execution. As a result, agencies must be certain that they are using updated and approved contract forms and that the individual signing for the contractor has appropriate legal authority to enter into the contract and has the power to bind his or her organization.
A more complete summary of the responsibilities of the agency head and commissioner of Administration is set out below.

**AGENCY HEAD** (unless specifically granted additional authority or specifically denied authority by statute):

- Determines through a cost-benefit analysis that contracting for a service is the best means of obtaining the service.
- Contracts for professional and technical services in connection with the operation of the department or agency *(Minn. Stat. § 15.061)*.
- Ensures that sufficient funds have been encumbered in the state accounting system (CFMS) *(Minn. Stat. § 16C.05, subd. 2 (a)(3))*.
- Bears full responsibility for diligently administering and monitoring the contract *(Minn. Stat. § 16C.05, subd. 4)*.
- Makes sure none of the boiler plate contract terms have been changed. If other terms have been negotiated or additional terms added, alert the Department of Administration to these changes.
- Certifies to the commissioner of Administration that specific requirements will be or have been met before he/she seeks approval for a professional/technical contract valued in excess of $5,000 *(Minn. Stat. § 16C.08, subd. 2)*.
- Reviews the final product of the contract and certifies that the contractor has satisfactorily fulfilled the terms of the contract *(Minn. Stat. § 16C.08, subd. 5 (b))*.
- Designates to small businesses at least 25 percent of the value of anticipated procurement of the agency for professional/technical services *(Minn. Stat. § 16C.16, subd. 3)*.

**COMMISSIONER OF ADMINISTRATION**

- Performs all contract management and review functions for contracts, except those functions otherwise provided for by law *(Minn. Stat. §§ 16C.03, subd. 4 and 16C.05, subd. 4)*.
- Approves the agency head’s decision to enter into a contract and the agency head's decision as to who the contractor will be and how the contractor was selected *(Minn. Stat. §§ 15.061; 16C.08, subd. 3)*.
- Requires an agency to report to the commissioner of Administration at any time on the status of any outstanding state contract to which the agency is a party *(Minn. Stat. § 16C.05, subds. 1 and 4)*.
- Reports to the governor and Legislature on all contracts *(Minn. Stat. § 16C.08, subd. 4)*.
- Sets goals that require agencies to include participation by targeted group businesses *(Minn. Stat. § 16C.16, subd. 6 (c))*.

**When should you consider using a professional/technical contract?**

In some situations, state agencies lack the staff, time, or expertise to perform a particular function or provide a particular professional/technical service. In these situations, it may be necessary to contract with an outside party.

Generally, professional/technical services contract may be used when:
An agency requires highly specialized work, for which no qualified state employee is capable or available; OR state employees do not have the time to perform the work required; OR a contract is determined to be the most efficient and least costly method of accomplishing the work.

Inappropriate uses of professional/technical services contract

It is important to note those activities that are inappropriate for state contracts. Several specific prohibitions that apply uniquely to professional/technical service contracts are written into state law.

Listed below are several additional prohibitions that are more general in nature:

- Professional/technical services contract may not be written to evade hiring restrictions, salary limitations, or competitive employment procedures.

- Agencies cannot spend money that they do not already have in their budgets and/or accounts on professional/technical contracts. Anticipated receipts are a special case, however agencies cannot commit to spending money from other states or jurisdictions unless those funds have already been deposited in Minnesota state accounts. Even when acting as an approved fiscal agent, agencies should only commit to spending money for which the State of Minnesota is liable. Check with your agency contract coordinator for assistance.

- Materials and supplies may not be obtained through a professional/technical services contract unless they are incidental to the contract. The outcome of a professional/technical services contract is "intellectual" in nature. With the specific approval of the commissioner of Administration, materials and supplies incidental to the provision of intellectual services in a professional/technical services contract may be obtained as part of a professional/technical services contract.

- Services of craft, service, or office workers may not be obtained through a professional/technical services contract; and only the Department of Administration has the authority to purchase these services. These services are generally not "intellectual" in nature and can be obtained by a “service contract.” Minn. Stat. § 16C.09. Snow plowing, garbage collection, printing, keylining, and typesetting are examples of things that should not be obtained through a professional/technical services contract.

Special Considerations

All contracts an agency enters into MUST comply with these special conditions. Some may not apply to all contracts, but if they apply, they must be complied with. Questions should be directed to your agency contract coordinator or the Materials Management Division.

Small Targeted-Group requirements  State law encourages agencies to purchase goods and services from small targeted-group businesses. These may be businesses that are at least 51 percent owned, operated, and controlled on a daily basis by racial minorities (African American, Hispanic, American Indian, Asian/Pacific Islander, Alaskan native), women, or persons with a substantial
physical disability.

Agencies should have plans for using small targeted-group businesses for professional/technical services contract. Certifications and/or contracts that are reviewed by the Department of Administration may be returned to agencies with specific small targeted-group business goals identified and/or vendors recommended.

**Printing, paper stock, and ink requirements:** If this Contract results in reports or documents paid for by STATE, CONTRACTOR must comply with Minn. Stat. §§ 16B.121 and 16B.122, for the purchase of printing, paper stock, and printing ink. The contractor must ensure that all subcontractors comply with this requirement.

**Contracts with the University of Minnesota:** Contracts with the University of Minnesota include requirements that differ from the normal contract procedures and requirements and are discussed later in this manual.

**Contracts funded by the Legislative Commission on Minnesota Resources:** Like contracts with the University of Minnesota, contracts with the Legislative Commission on Minnesota Resources are governed by a separate set of requirements and are discussed later in this manual.

**Authority to contract:** Agency heads and deputy agency heads, unless that authority has not been granted by the agency head as defined in Minn. Stat. § 15.06, subd. 7, hold the authority to enter into contracts. They may delegate this authority for specific contracts or particular types of contracts to an assistant agency head if the delegation has first been approved by the commissioner of Administration and filed with the secretary of state. An explanation of this delegation process is discussed later in this manual.

**Specific restrictions and conditions relating to certain kinds of services**

The following kinds of services have specific statutory restrictions or conditions that need to be taken into account BEFORE you proceed with a contract or use these kinds of services under an annual plan.

**Contracts for audits with a public accountant:** Minn. Stat. § 3.972, subd. 3, places a restriction on contracting with public accountants for audits. It requires (in summary terms) that "a contract shall not be negotiated unless the contract has been reviewed by the legislative auditor." You should send the certification form and a copy of the RFP or a draft of the contract to the legislative auditor. It is not good practice to sign a contract and then have it reviewed, since changes will result in
additional time delays. Send the certification form and a copy of the RFP or a draft of the contract to:

Office of the Legislative Auditor  
Deputy Legislative Auditor  
Public Finance Division  
1st Floor South, Centennial Office Bldg.  
658 Cedar Street  
St Paul, Minnesota  55155

**Contracts with law firms or lawyers:** Law firms and lawyers (as individuals) provide a wide range of services, including many that are not related to representing a client in court or providing a client with legal services. Agencies must include the statement below in the contract language of ANY contract entered into with a law firm or a lawyer. ONLY the attorney general has the authority to represent the state, ONLY the attorney general can sign a contract with a law firm or a lawyer for legal services. If you require legal services, work through your assistant attorney general to obtain them.

"Contractor's duties do not include providing legal services to the State within the meaning of Minnesota Statutes Section 8.06."

**Contracts for banking services and banking related services:** Minn. Stat. § 16A.27, subd. 1, gives to the commissioner of finance the authority to, “control the amount and manner of deposit of state funds.” Agencies need to work with the Department of Finance when seeking ANY services related to the handling of state funds, banking, or banking services.

**Contracting Checklists**

Checklists are provided in the appropriate section (Contracts $0-$5,000; $5,001-$50,000; $50,000+; and Contract Drafting Checklist) to assist you with complying with all statutory and policy required steps when you are preparing a professional/technical service contract. You must estimate the total value of your contract then select the appropriate checklist. The total contract value means the entire cost of the work from beginning to end, including any anticipated amendments.

**Agency Central Contract Repository**

Agencies are encouraged to create a central repository within the agency for all annual plan agreements, professional/technical services contracts, interagency agreements, joint powers agreements and income contracts so that individuals within the agency can have access to all the information and experience contained in these documents.

**Minnesota Statutes Section 16C.05**, subdivision 2(e) requires that a fully executed copy of every contract, all amendments to the contract and any performance evaluations relating to the contract must be kept on file at the contracting agency.

**INDEPENDENT CONTRACTOR vs. EMPLOYEE**
Internal Revenue Guidance on Employee or Independent Contractor

The following rules are taken from Internal Revenue Service publications on this issue. You need to work with your assistant attorney general to carefully define, and be prepared to defend or pay for, any situation where they might apply to your proposed contract.

An employer must generally withhold income taxes, withhold and pay social security taxes, and pay unemployment taxes on wages paid to an employee. An employer does not generally have to withhold or pay any taxes on payments to independent contractors.

Common law rules. To help you determine whether an individual is an employee under the common law rules, 20 factors have been identified that indicate whether sufficient control is present to establish an employer-employee relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed. It does not matter that the employer allows the employee freedom of action, so long as the employer has the right to control both the method and the result of the services. If an employer treats an employee as an independent contractor and the relief provisions discussed earlier do not apply, the person responsible for the collection and payment of withholding taxes may be held personally liable for an amount equal to the employee's income and social security taxes that should have been withheld.

The 20 factors indicating whether an individual is an employee or an independent contractor are:

1) Instructions. An employee must comply with instructions about when, where, and how to work. Even if no instructions are given, the control factor is present if the employer has the right to give instructions.

2) Training. An employee is trained to perform services in a particular manner. Independent contractors ordinarily use their own methods and receive no training from the purchasers of their services.

3) Integration. An employee's services are integrated into the business operations because the services are important to the success or continuation of the business. This shows that the employee is subject to direction and control.

4) Services rendered personally. An employee renders services personally. This shows that the employer is interested in the methods as well as the results.

5) Hiring assistants. An employee works for an employer who hires, supervises, and pays assistants. An independent contractor hires, supervises, and pays assistants under a contract that requires him or her to provide materials and labor and to be responsible only for the result.
6) **Continuing relationship.** An employee normally has a continuing relationship with an employer. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

7) **Set hours of work.** An employee has set hours of work established by an employer. An independent contractor is the master of his or her own time.

8) **Full-time work.** An employee normally works full time for an employer. An independent contractor can work when and for whom he or she chooses.

9) **Work done on premises.** An employee works on the premises of an employer, or works on a route or at a location designated by an employer.

10) **Order or sequence set.** An employee must perform services in the order or sequence set by an employer. This shows that the employee is subject to direction and control.

11) **Reports.** An employee submits reports to an employer. This shows that the employee must account to the employer for his or her actions.

12) **Payments.** An employee is paid by the hour, week, or month. An independent contractor is paid by the job or on a straight commission.

13) **Expenses.** An employee's business expenses and travel expenses are paid by an employer. This shows that the employee is subject to regulation and control.

14) **Tools and materials.** An employee is furnished significant tools, materials, and other equipment by an employer.

15) **Investment.** An independent contractor has a significant investment in the facilities he or she uses in performing services for someone else.

16) **Profit or loss.** An independent contractor can make a profit or suffer a loss.

17) **Works for more than one person or firm.** An independent contractor gives his or her services to two or more unrelated persons or firms at the same time.

18) **Offers services to general public.** An independent contractor makes his or her services available to the general public.

19) **Right to fire.** An employee can be fired by an employer. An independent contractor cannot be fired so long as he or she produces a result that meets the specifications of the contract.

20) **Right to quit.** An employee can quit his or her job at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion, or is legally obligated to make good for failure to complete it.
IRS Form SS-8. In doubtful cases, the facts will determine whether or not there is an actual employer-employee relationship. If you want the IRS to determine whether a worker is an employee, file Form SS-8, *Information for Use in Determining Whether a Worker is an Employee for Purposes of Federal Employment Taxes and Income Tax Withholding*, with the IRS District Director. (NOTE: you should only do this on the advice of your assistant attorney general.) The form can be found at the IRS website at: [http://www.irs.gov/formspubs/index.html](http://www.irs.gov/formspubs/index.html).

If you classify an employee as an independent contractor and you had no reasonable basis for doing so, you will have to pay employment taxes for that worker (the relief provisions discussed earlier will not apply). Further, if you do not withhold income and social security taxes from his or her wages, you may be held personally liable for a penalty of 100 percent of the tax if you are the person responsible for the collection and payment of withholding taxes.