Materials Management Division
112 Administration Building
50 Sherburne Avenue
St. Paul, MN 55155
Voice: 651.296.2600
Fax: 651.297.3996

Date: August 4, 2014

To: State Agencies

From: Kent Allin, MN Chief Procurement Officer

Subject: Requesting Background Checks on Non-Employees in Solicitations

Objectives: This notice provides guidance on issues that State agencies should consider when requesting background checks on non-employees in solicitations for goods, services, professional/technical services, and construction.

- Agencies must decide whether to include background check requirements in solicitations and contracts on a case-specific basis. Admin recommends that agencies make these decisions in consultation with their legal representatives.
- Admin is unable to provide a formal policy that will address the wide variety of situations in which agencies may choose to require background checks.
- Admin developed the following information in consultation with the Office of the Attorney General. It includes guidelines and references that agencies may find helpful in assessing the appropriate use of background checks.

(1) When Should an Agency Require a Background Check

Each agency should develop a policy governing the use of background checks for vendor-provided positions. The policy should outline types of situations where a background check is required, advisable, or prohibited. When deciding whether to require a background check, agencies should ask:

- Are background checks **required or prohibited** for the type of position in question?
  - Review State and federal statutes and regulations governing the **agency** and **the type of position**.
  - The Minnesota House Research Department released a summary of State statutes for governmental agencies at www.house.leg.state.mn.us/hrd/pubs/bkgdchck.pdf.
- What is the **nature** of the position? For example:
  - Will the position provide access to buildings, especially secure facilities?
  - Will the position provide access to computer, security, or electronic systems?
  - Will the position involve contact with the general public or vulnerable clients?
- Does the agency require background checks for its **own employees** who hold **similar positions**?
  - The Minnesota Management & Budget's *January 2011 Data Practices for Personnel Records and Guidelines for Background Checks* governs background checks for State employees. The policy is located at www.mmb.state.mn.us/hr-data.

(2) How to Include Background Check Requirements in a Solicitation/Contract

An agency should write its own clauses on background checks, which agency heads must approve. The clauses must be added to agency solicitations/contracts or provided to MMD for processing solicitations on behalf of the agency. Requirements for background check clauses may include the following:

- Identify who will obtain background checks, the agency or the vendor. If the vendor is responsible for obtaining background checks:
  - Indicate that the vendor must be able to provide adequate documentation of its process as evidence of compliance if requested.
  - Indicate that the vendor is required to comply with all State and federal laws and regulations governing background checks.
  - Indicate whether the agency will require that it receive reports for each background check or if the agency only wants the ability to obtain copies when requested.
- Identify instructions indicating what type of background check is required.
- Indicate that the vendor will review the background check results and will decide whether to exclude an individual based on the results.
- List the criteria and process for excluding applicants based on background check results. Remember to follow federal and State laws.
- List any special security requirements for the agency's facility.
- Identify who is responsible for background check costs, the agency or vendor.

(3) What to do with the Results of a Background Check

Agencies should review federal and State laws including, but not limited to, Minn. Stat. Ch. 364.

Agencies may also review the EEOC's *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, available at www.eeoc.gov/laws/guidance/arrest_conviction.cfm. It contains examples of acceptable and prohibited practices. To identify criteria for vendors to use in the screening process, the agency should consider:

- <u>What types of criminal convictions pose a risk</u>? According to the EEOC, only convictions that directly relate to the position in question may be used to exclude an applicant. To determine whether a criminal conviction directly relates to a position, and employer must consider:
  - The nature of the position, including level of access to secured information, vulnerable populations, or the public;
  - The nature and seriousness of the crime;
  - The relationship of the crime to the purpose of regulating the position; and
  - The relationship of the crime to ability to perform job duties.
- <u>How much time has elapsed since the conviction</u>? The EEOC states that very old convictions may no longer indicate security concerns in some circumstances. The agency can generally decide what time frame the vendor should consider when doing background checks (five years, ten years, twenty years, etc.). Alternatively, the agency can leave it up to the vendor to decide the time frame, but should note for the vendor that the vendor needs to consider the age of the crime as part of its process.
- <u>Will the agency require the vendor to provide individualized assessments of the applicants</u>? Individualize assessments give applicants notice that the vendor has excluded them based on

criminal history, and an opportunity to explain why the exclusion should not apply. The EEOC states that individualized assessments help to satisfy anti-discrimination requirements.

Agencies should ensure that any background check information they receive is stored securely and in accordance with their records retention policy and the Minnesota Government Data Practices Act.

References:

Minnesota Management & Budget: January 2011 Data Practices for Personnel Records and Guidelines for Background Checks, www.mmb.state.mn.us/hr-data

House Research Department: February 2014 Criminal Background Checks, An Overview of Minnesota Law, www.house.leg.state.mn.us/hrd/pubs/bkgdchck.pdf

EEOC Enforcement Guidance Number 915.002 dated April 25, 2012. www.eeoc.gov/laws/guidance/arrest_conviction.cfm