

STATE AUDITOR'S
GUIDELINES FOR DRAFTING
CONSULTING CONTRACTS

Note: These guidelines are issued to furnish guidance to state agencies in the preparation of Consulting Contracts. These guidelines should be followed for any Consulting Contract, unless the contract is otherwise approved as to form by the Attorney General's Office. The State Auditor may reject vouchers submitted for payment under any Consulting Contract that does not substantially comply with these guidelines, or is not otherwise approved as to form by the Attorney General's Office.

1. *Identify the parties entering into the agreement.*

Example:

Agreement made and entered into this ____ day of _____, _____,
by and between _____, a state agency,
(Name of Agency)
of _____, _____, _____,
(Address) (City) (State)
_____, (the "State") and _____,
(Zip Code) (Name)
of _____, _____,
(Company Name) (Address)
_____, _____, _____,
(City) (State) (Zip Code)
_____ (the "Consultant").
(Phone Number)

2. *Describe the work that the Consultant is to perform. Be as specific as possible in detailing the Consultant's scope of work and responsibilities. If the description of the work is lengthy, attach the description as an Exhibit to the agreement.*

Example:

The Consultant will perform those services described in the Work Plan, attached hereto as Exhibit A and by this reference incorporated herein.

Example:

The Consultant will perform services for the State as follows:

3. *Specify the date services will commence and the date services will terminate.*

Example:

The Consultant's services under this Agreement shall commence on _____ and end on _____, unless sooner terminated pursuant to the terms hereof.

4. *Describe the State's responsibilities, if any.*
5. *State whether the Consultant is using State equipment, supplies or facilities. If the Consultant is using State equipment, supplies or facilities, include a statement specifying the conditions under which the State equipment is to be used.*
6. *Require the Consultant to provide their Employer Identification Number, Federal Tax Identification Number or Social Security Number to the State. This is to be separately provided to agencies that will not be made public due to identity theft concerns; the contract itself will be public information.*
7. *Identify the maximum amount to be paid for services, including expenses. Specify whether the State will reimburse the Consultant for expenses as a separate item and state the Total Contract Amount. Where hourly rates have been negotiated, the contract must specify the hourly rate. Unless otherwise approved, legal services contracts shall include an hourly rate. Describe the method of payment, i.e. monthly, and what documentation is required from the Consultant in order to process a request for payment. Payment shall be made consistent with the terms of the Prompt Payment Act (SDCL ch. 5-26).*

Example:

The State will make payment for services upon satisfactory completion of the services in an amount not to exceed \$_____. The State will pay Consultant's expenses for travel, lodging and meals as a separate item. Expenses submitted will be reimbursed at state rates as established by the State Board of Finance, and receipts must be provided. The total amount for such expenses may not exceed \$_____. The TOTAL CONTRACT AMOUNT is an amount not to exceed \$_____. Payment will be made monthly, pursuant to itemized invoices submitted with a signed state voucher. Payment will be made consistent with SDCL ch. 5-26

Example:

The State will make payment for services upon satisfactory completion of the services. The TOTAL CONTRACT AMOUNT is an amount not to exceed \$_____. The State will not pay Consultant's expenses as a separate item. Payment will be made pursuant to itemized invoices submitted with a signed state voucher. Payment will be made consistent with SDCL ch. 5-26

Example:

The agreed upon hourly rate for services performed under this Agreement is \$_____ per hour. The State will pay Consultant's expenses as a separate item in an amount not to exceed \$_____. The TOTAL CONTRACT AMOUNT is an amount not to exceed \$_____. Payment will be made monthly, pursuant to itemized invoices submitted with a signed state voucher. Payment will be made consistent with SDCL ch. 5-26.

8. *All contracts must contain hold harmless and indemnification language.*

Example:

Consultant agrees to indemnify and hold the State of South Dakota, its officers, agents and employees, harmless from and against any and all actions, suits, damages, liability or other proceedings that may arise as the result of performing services hereunder. This section does not require Consultant to be responsible for or defend against claims or damages arising solely from errors or omissions of the State, its officers, agents or employees.

9. *Most contracts must require the Consultant to have insurance coverage for commercial general liability, or its equivalent, worker's compensation, and business automobile liability. Depending upon the nature of the services performed by the Consultant, coverage not included in a general liability policy may be necessary (e.g. pollution liability coverage). Professional liability coverage is required for medical professionals, attorneys, architects, engineers, accountants or financial advisors.*

The Office of Risk Management should be consulted to determine the appropriate amount and type of coverage necessary. The State Auditor's Office recognizes that there will be exceptions to the insurance requirements. Please contact the Office of Risk Management and the Office of Attorney General for advice regarding exceptions. Sample insurance language is set out below. Not all provisions will be applicable in each consultant contract.

Example:

A. Commercial General Liability Insurance:

Consultant shall maintain occurrence based commercial general liability insurance or equivalent form with a limit of not less than \$1,000,000.00 for each occurrence. If such insurance contains a general aggregate limit it shall apply separately to this Agreement or be no less than two times the occurrence limit.

[In those limited circumstances when the State is leasing real property as part of the consultant contract add: Such insurance shall further include a fire and legal liability endorsement.]

B. Professional Liability Insurance or Miscellaneous Professional Liability Insurance:

Consultant agrees to procure and maintain professional liability insurance or miscellaneous professional liability Insurance with a limit not less than \$1,000,000.00.

C. Business Automobile Liability Insurance:

Consultant shall maintain business automobile liability insurance or equivalent form with a limit of not less than \$1,000,000.00 for each accident. Such insurance shall include coverage for owned, hired and non-owned vehicles.

D. Worker's Compensation Insurance:

Consultant shall procure and maintain workers' compensation and employers' liability insurance as required by South Dakota law.

10. *To verify that the Consultant has the insurance coverage required in the contract, certificates of insurance should be obtained from the Consultant and attached to your file copy of the contract. Sample language is set out below.*

Example:

Before beginning work under this Agreement, Consultant shall furnish the State with properly executed Certificates of Insurance which shall clearly evidence all insurance required in this Agreement. In the event a substantial change in insurance, issuance of a new policy, cancellation or nonrenewal of the policy, the Consultant agrees to provide immediate notice to the State and provide a new certificate of insurance showing continuous coverage in the amounts required. Consultant shall furnish copies of insurance policies if requested by the State.

11. *Contracts for certain types of services may present a high level of risk. The amount paid for services is not an accurate indication of a contract's loss exposure. In such cases, request copies of the Consultant's insurance policies to review for adequate coverage and limits, and acceptable deductibles. If you are uncertain as to the level of risk involved in the contract, the type of coverage or limits of liability necessary, or need assistance in reviewing insurance policies, contact the Office of Risk Management.*

12. *All contracts must also include the following provisions:*

A. An Independent Contractor Provision:

Example:

While performing services hereunder, Consultant is an independent contractor and not an officer, agent, or employee of the State of South Dakota.

B. A Termination Provision:

Example:

This Agreement may be terminated by either party hereto upon thirty (30) days written notice, and may be terminated by the State for cause at any time, with or without notice.

Example:

This Agreement can be terminated upon thirty (30) days written notice by either party. In the event the Consultant breaches any of the terms or conditions hereof, this Agreement may be terminated by the State at any time with or without notice. If termination for such a default is effected by the State, any payments due to Consultant at the time of termination may be adjusted to cover any additional costs to the State because of Consultant's default. Upon termination the State may take over the work and may award another party an agreement to complete the work under this Agreement. If after the State terminates for a default by Consultant it is determined that Consultant was not at fault, then the Consultant shall be paid for eligible services rendered and expenses incurred up to the date of termination.

C. A Funding Out Clause:

Example:

This Agreement depends upon the continued availability of appropriated funds and expenditure authority from the Legislature for this purpose. If for any reason the Legislature fails to appropriate funds or grant expenditure authority, or funds become unavailable by operation of law or federal funds reductions, this Agreement will be terminated by the State. Termination for any of these reasons is not a default by the State nor does it give rise to a claim against the State.

D. An Amendment Provision:

Example:

This Agreement may not be assigned without the express prior written consent of the State. This Agreement may not be amended except in writing, which writing shall be expressly identified as a part hereof, and be signed by an authorized representative of each of the parties hereto.

E. A Controlling Law Provision:

Example:

This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota. Any lawsuit pertaining to or affecting this Agreement shall be venued in Circuit Court, Sixth Judicial Circuit, Hughes County, South Dakota.

F. A Compliance Provision:

Example:

Consultant will comply with all federal, state and local laws, regulations, ordinances, guidelines, permits and requirements applicable to providing services pursuant to this Agreement, and will be solely responsible for obtaining current information on such requirements.

(Note that a more detailed Compliance Provision may be required if it is necessary to comply with requirements for use of federal funds).

G. A Reporting Provision:

Example:

Consultant agrees to report to the State any event encountered in the course of performance of this Agreement which results in injury to any person or property, or which may otherwise subject Consultant, or the State of South Dakota or its officers, agents or employees to liability. Consultant shall report any such event to the State immediately upon discovery.

Consultant's obligation under this section shall only be to report the occurrence of any event to the State and to make any other report provided for by their duties or applicable law. Consultant's obligation to report shall not require disclosure of any information subject to privilege or confidentiality under law (e.g., attorney-client communications). Reporting to the State under this section shall not excuse or satisfy any obligation of Consultant to report any event to law enforcement or other entities under the requirements of any applicable law.

H. A Severability Provision:

Example:

In the event that any court of competent jurisdiction shall hold any provision of this Agreement unenforceable or invalid, such holding shall not invalidate or render unenforceable any other provision hereof.

I. A Supersession Provision:

Example:

All other prior discussions, communications and representations concerning the subject matter of this Agreement are superseded by the terms of this Agreement, and except as specifically provided herein, this Agreement constitutes the entire agreement with respect to the subject matter hereof.

J. A Notice Provision:

Any notice or other communication required under this Agreement shall be in writing and sent to the address set forth above. Notices shall be given by and to _____ on behalf of the State, and by and to _____, on behalf of the Consultant, or such authorized designees as either party may from time to time designate in writing. Notices or communications to or between the parties shall be deemed to have been delivered when mailed by first class mail, provided that notice of default or termination shall be sent by registered or certified mail, or, if personally delivered, when received by such party.

13. *Consultant must get permission from the State to hire subcontractors. All subcontracts should include language that subjects the subcontractor to the same indemnification/hold harmless and insurance requirements that apply to the Agreement. Once permission is granted, the agency must notify the State Auditor of the subcontractor's contact information (company name, contact person, complete address, employer identification number, and phone number).*

Example:

Consultant may not use subcontractors to perform the services described herein without the express prior written consent of the State. Consultant will include provisions in its subcontracts requiring its subcontractors to comply with the applicable provisions of this Agreement, to indemnify the State, and to provide insurance coverage in a manner consistent with this Agreement. Consultant will cause its subcontractors, agents, and employees to comply, with applicable federal, state and local laws, regulations, ordinances, guidelines, permits and requirements and will adopt such review and inspection procedures as are necessary to assure such compliance.

14. *The Agreement should spell out ownership of any reports or property created by the Consultant.
For software contracts the Bureau of Information and technology should be contacted.*

Example:

Consultant hereby acknowledges and agrees that all reports, plans, specifications, technical data, miscellaneous drawings, software system programs and documentation, procedures, or files, operating instructions and procedures, source code(s) and documentation, including those necessary to upgrade and maintain the software program, and all information contained therein provided to the State by the Consultant in connection with its performance of services under this Agreement shall belong to and is the property of the State and will not be used in any way by the Consultant without the written consent of the State. Papers, reports, forms, software programs, source code(s) and other material which are a part of the work under this Agreement will not be copyrighted without written approval of the State.

Example:

All reports, recommendations, documents, drawings, plans, specifications, technical data and information, copyrights, patents, licenses, or other products produced as a result of the services rendered under this Agreement will become the sole property of the State. The State hereby grants the Consultant the unrestricted right to retain copies of and use these materials and the information contained therein in the normal course of the Consultant's business for any lawful purpose. Either the originals or reproducible copies satisfactory to the State, of all technical data, evaluations, reports and other work product of the Consultant shall be delivered to the State upon completion or termination of services under this Agreement.

15. *Agreements with federal funds need to comply with federal debarment/ suspension provisions. Recommend inclusion of language below in all contracts to insure compliance. In addition, prior to executing, the contracting agency should verify whether the Consultant is subject to federal debarment by checking the Excluded Parties List System maintained by the General Services Administration*

Example:

The Consultant certifies that neither Consultant nor its principals are presently debarred, suspended, proposed for debarment or suspension, or declared ineligible from participating in transactions by the federal government or any state or local government department or agency. Consultant further agrees that it will immediately notify the State if during the term of this Agreement Consultant or its principals become subject to debarment, suspension or ineligibility from participating in transactions by the federal government, or by any state or local government department or agency.

16. *Certain consulting contracts will require additional provisions to adequately protect the State's interest. Examples of this type of provision are set out below:*

A. Provisions for Legal Services Contracts:

1. Conflicts provision:

Consultant agrees not to participate as Counsel, in person or by his law firm, in opposition to the interests of the State of South Dakota or any of its departments, bureaus, boards, authorities or commissions, consistent with the policy attached hereto as Exhibit A. ***(A copy of the policy to be attached as Exhibit A may be obtained from the Office of the Attorney General.)***

2. Hold harmless provision:

The Consultant agrees to indemnify and hold the State of South Dakota, its officers, agents and employees, harmless from and against any and all actions, suits, damages, liability or other proceedings that may arise as the result of performing services hereunder. This section does not require the Consultant to be responsible for or defend against claims or damages arising from errors or omissions of the State, its officers, agents or employees or from the errors or omissions of third parties that are not officers, employees or agents of the Consultant, unless such errors or omissions resulted from the acts or omissions of the Consultant. Nothing in this contract is intended to impair the insurance coverage of Consultant or any subrogation rights of Consultant's insurers.

B. A Records Inspection and Retention Provision:

The State, through any authorized representative, will have access to and the right to examine and copy all records, books, papers or documents related to services rendered under this Agreement. The Consultant will retain all books and records related to the services performed for a period of not less than the greater of any applicable federal law retention requirement or three years following termination of this Agreement.

17. *Where required contracts should include all applicable federal law provisions. The nature and extent of the federal law provisions to include depends on the nature of the contract, funding source and applicable federal regulation. Examples of requirements include: Drug-Free Workplace, Lobbying Activity, Executive Order 11246 Equal Employment Opportunity Act, and the Health Insurance Portability and Accountability Act (HIPAA).*

18. *All contracts should be reviewed by your attorney. Any substantive deviations from these guidelines should be requested in writing by the head of the agency, should state the reason for requesting the deviation from the guideline examples, and must be approved by the Attorney General's Office. All contracts must be signed by the Consultant and the agency head or authorized designee, and must be dated. Copies of all consulting contracts are required to be filed with the State Auditor's Office by SDCL 1-24A-1.*