

## MEMORANDUM

TO: Division Administrators and Legal Division

FROM: Robert M. Bell

DATE: November 25, 2014 (Updated June 9, 2017)

RE: State Contract Requirements Neb. Rev. Stat. § 73-501 thru 73-510

Christy asked me to update the contract procedure memorandum to reflect any recent changes to the law and to reflect recommendations provided to the Department by the Auditor of Public Accounts. Attached to this memorandum is 1) an approval memorandum that must be completed and signed by Christy before execution of a contract for services and 2) a United States Citizenship Attestation Form to be filled out when the contractor is an individual.

### Contracts for Services

**Reporting:** The Department must report all contracts for services (any contract that directly engages the time or effort of an independent contractor whose purpose is to perform an identifiable task, study, or report) and amendments to existing contracts, no matter the dollar amount, to the Department of Administrative Services through the NIS system. See Neb. Rev. Stat. § 73-503. This information is input into the NIS system by the Administrative Services Division. The Administrative Services Division is also responsible for posting all contracts onto the Department of Administrative Services' 'State Contracts Database' established by Neb. Rev. Stat. § 84-602.02.

**Bidding:** The Department is required to comply with the competitive bid process in the manner prescribed by the Material Division of Department of Administrative Services for contracts for services in excess of \$50,000 unless an exemption applies. Whenever any division believes a contract is required, the Administrator should visit with Randy Willey, if spending is involved, and Legal to review the process and contract specifics. There are limited exemptions available through the Material Division for sole source contracts (unique nature, only practicable source), contract for services when the price has been set by the federal government or competitively bid by another state government, and contracts that are not appropriate for Neb. Rev. Stat. § 73-504, 73-508, and 73-509 to apply. Material Division grants this exemption, in writing. If a proposed contract for services is to be bid or meets one of the previous exemptions AND is in excess of fifteen million dollars, special rules apply. Emergency contracts (urgent or unexpected, health and safety, conservation of resources), is another exemption available but it does not require Material Division approval but does require justification and is the responsibility of the Director. The final contract must be forwarded to DAS within three

days. If the contract is over \$15 million or an emergency contract, please consult with the Director and Legal before proceeding.

Neb. Rev. Stat. § 73-507(2) provides a number of specific exemptions from the competitive bidding requirements that do not require approval or review by the Material Division of DAS. The specific exemptions most commonly used by the Department of Insurance are provided at Neb. Rev. Stat. § 73-507(2)(c) and (h). Subsection (c) exempts contracts for professional legal services and services of expert witnesses, hearing officers, or administrative law judges retained by state agencies for administrative or court proceedings. Subsection (h) exempts contracts for financial or actuarial examination, for rehabilitation, conservations, reorganization, or liquidation of licensees and for professional services related to residual pools or excess funds under the Department's control.

For contracts for service in excess of \$ 50,000 that do not qualify for the exceptions found in Neb. Rev. Stat. § 73-507, the contract shall be bid following the Materiel Division Procurement Manual by either the Department, with pre-review by the Materiel Division, or by the Materiel Division at the request of the Department. See Neb. Rev. Stat. § 73-504(2). If the contract is over \$ 15,000,000, the Department must provide the Material Division a copy of the proposed contract and a proof-of-need analysis. Material must provide a certification back to the Department before it can proceed. See Neb. Rev. Stat. § 73-510.

If the contract for services is over \$50,000 and an employee subject to classified personnel system or labor contract now performs the services or previously performed the services in the last year, the Materiel Division Pre-Process must be used to evaluate the displacement of the employee. See Neb. Rev. Stat. § 73-509.

Pursuant to Neb. Rev. Stat. § 73-506, all contracts for services, including those exempt from bidding, must contain the following (a) payment terms and conditions and (b) a specific time/duration during which time the services will be performed. This information must be reported in the NIS system.

Duration of contracts is an important consideration, as is possible renewal or extension of a contract. While no time limit exists for most contracts, the Legal Division recommends a term of three to five years in most cases to allow the Department an opportunity to determine whether or not the contract should continue. A specific authorizing statute may also limit a contract's duration, such as the five year limitation of the agreement with the assigned risk insurer contained in Neb. Rev. Stat. § 44-3,158.

A contract's duration may be extended through either a renewal, an extension, or both. A renewal is a specific clause in the initial contract that provides an option for a renewal (or renewals) for a specific term after the completion of the initial contract. An extension of the contract would be an amendment to the initial contact term to extend

the contract. Neb. Rev. Stat. § 73-506 allows extensions only for fifty percent of the initial term. Only one extension is allowed per contract. Extensions can happen at any point during the initial contract period or during a renewal period, but cannot happen after the contract has terminated. The law on extensions on contracts executed prior to April 28th, 2017 is not clear. Best practice is to not extend contracts executed prior to this date, but if special circumstances and the need to extend exist, please contact the Legal Division. Extensions on contracts executed after April 28th, 2017 are proper but will require you to fill out a new "73-501 Approval Memo" and have Randy and Christy sign off.

Here is an example of how the initial term, renewal, and extension work together. Initial term three years with the option of two renewals for one year each. The contract could also, at any point during the initial three year term or one of the two renewals, be extended for up to eighteen months, once. Theoretically, the contract could last a total of six years, six months (3+1+1+1.5).

Standard contract clauses that DAS requires to be included in state contracts are available at S:\LEGAL\73-501 Contracts. We encourage the Administrators to draft their own contracts for services. In addition, Neb. Rev. Stat. § 73-506 is clear the state agency is prohibited from structuring the contract to avoid the requirements of the bidding process. You should include specific deliverables (what is expected and by whom), amounts, duration dates, and renewal options (if any). Then, forward the draft along with a completed "73-501 Approval Memo" (a fillable word document found in S:\LEGAL\73-501 Contracts) to Randy for review and then to Christy for review of compliance with statutory requirements and sign off. If you and the contractor decide to amend and extend the contract, you will need to fill a new "73-501 Approval Memo" and have Randy and Christy sign off on the contract.

If you are considering a contract with an individual, we need to consider whether that person is able to be properly classified as an independent contractor and whether or not the individual is legally able to work in the United States. It is possible that the status of an individual may be evaluated by other agencies, and I am not aware of any state agency or state government exception. Generally, the relationship of employer/employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. It is not necessary that the employer actually direct the manner in which the services are performed; it is sufficient if he has the right to do so. There are other factors characteristic of an employer/employee relationship such as the furnishing of tools and a place to work to the individual performing the services, training/instructions, financial control (significant investment, unreimbursed expenses), and the understanding of the relationship between the parties (benefits, intent of parties/written contracts, permanency, discharge/termination process, regular business activity).

Additionally, Neb. Rev. Stat. § 4-109 includes 'contract' in the definition of public benefit and, as a result, if the contract is with an individual, that person will have sign an attestation form attesting that either the individual is a U.S. citizen or a qualified alien. The attestation form "[United States Citizenship Attestation Form](#)" may be found at S:\LEGAL\73-501 Contracts. The form must be maintained with the contract.

The Director is responsible for maintaining documentation of the process used for all contracts for service and to document and ensure the services under the contract are being performed in compliance with the terms of the contracts. Before a contract is signed, the Administrator should complete the memo titled '73-501 Approval Memo' and route it, with a copy of the proposed contract, to Randy and then Christy for approval. When billings are received, Administrative Services will forward to the appropriate Administrator and that Administrator is responsible for review. The Administrator must document that the services were performed and the sign off for payment. Both the '73-501 Approval Memo' and documentation indicating services have been performed shall be maintained with each contract for service. See Neb. Rev. Stat. §73-505.

All forms mentioned in this memo are available on the intranet.

#### Purchase of Goods

Neb. Rev. Stat. § 81-1118 provides the parameters on the procurement of goods. The amounts were update during the 2017 Legislative Session. See below:

Prior to August 24th, 2017:

Less than \$10,000: Unrestricted open market purchases through the Material Division.

\$10,000 to \$25,000: Informal competitive purchases. Must be requisitioned through the Materiel Division.

Over \$25,000: Formal competitive purchases. Must be requisitioned through the Materiel Division.

August 24th, 2017 or later:

Less than \$25,000: Unrestricted open market purchases through the Material Division.

\$25,000 to \$50,000: Informal competitive purchases. Must be requisitioned through the Materiel Division.

Over \$50,000: Formal competitive purchases. Must be requisitioned through the Materiel Division.