



# STATE OF MONTANA PROCUREMENT MANUAL



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# CHAPTER 1: INTRODUCTION

The State Procurement Bureau (SPB), within the Montana State Financial Services Division (SFSD), provides professional procurement services and resources to Montana State agencies. This Manual, one of those resources, is produced to:

- aid public Contracts Officers (COs) in the execution of their duties,
- provide a framework for procurement processes and best practices, and
- provide the public with an overview of the processes, procedures, laws, regulations, and policies that control the expenditure of public funds.

Although this Manual serves as a reference manual for implementing the requirements of the State of Montana procurement laws, it is not an exhaustive compilation of every Statute, Rule, and standard that may pertain to a particular transaction. Furthermore, this Manual is not a manual on the law of contracts, nor does it constitute legal advice; the content is restricted to describing activities related to the phases of the Procurement Cycle discussed in Chapter 6.

The list of selected Abbreviations is located on the [SPB website under Procurement Forms & Templates](#).

Templates, samples, guidelines and forms for all of the processes outlined in this guide can be found on the [SPB website under Procurement Forms & Templates](#).

## CHAPTER 2: STATUTES, RULES, AND POLICIES

**Authority.** This Manual is issued under the authority of Montana Code Annotated 2017 (MCA), Title 18, Public Contracts, and Title 28, Contracts and Other Obligations, and focuses on the implementation of these Statutes as well as Title 2, Chapter 5, State Procurement, of the Administrative Rules of Montana (ARM).

**Exceptions.** This Manual does not apply to the expenditures exempted by 18-4-132, MCA.

### **Executive Orders.**

Executive Order 6-2018, Internet Neutrality Principles in State Procurement, requires recipients of State contracts to adhere to internet neutrality principles.

Executive Order 12-2016, Promoting Equal Pay for Montana Women, incentivizes recipients of State contracts to engage in best practices to promote wage transparency.

Executive Order 4-2016, Prohibiting Discrimination in State Employment and Contracts, requires all State hiring to be merit- and qualifications based, and free from discrimination based on any of the classes of constituents within the Executive Order.

### **Public Access to Documents.**

**Freedom of Information Act (FOIA).** Both the Montana State Constitution (Article II, Part II, Sections 8 through 10) and the Montana Public Records Act (Montana Code 2-6-101, et seq.) give the public the right to examine and request public records of government bodies at all levels. The definition of records includes all writings of government bodies, electronic mail, and items in "electronic format or other non-print media, including but not limited to videotapes, photographs, microfilm, film, or computer disk." There is no requirement for a statement of purpose, but the law does place a limit on the sale of mailing lists for commercial reasons. Public documents are provided to the public through the State's official website (Montana.gov).

Public Information Request Received	
Step Taken	Time Limit for State's Response
The State Acknowledges receipt of the request.	Within 5 days of receipt.
Fulfillment of Records Request	
Documentation readily available - less than 30 minutes for the State to fulfill.	Within 5 days of Acknowledgement.
Documentation not readily available - more than 30 minutes for the State to fulfill.	90 days - 6 months dependent on the complexity of the request.

**Procurement-Related Documents and Records.** In addition to general State and Agency information, the public has 24-hour access to procurement-related forms, templates and information through the [State Financial Services Division \(SFSD\)](#), [State Procurement Bureau \(SPB\) website](#). In addition, review the [Montana Procurement Act](#), and the [Administrative Rules governing State procurement](#).

Information not readily available on the website may be requested through a FOIA request to the

Agency/ies responsible for the document(s)/information needed.

# CHAPTER 3: DELEGATED AUTHORITY

## Delegation Agreements.

**Overview.** The authority to procure supplies and services needed by the State is conferred upon the Department of Administration by 18-4-221, MCA. The Division then delegates portions of its authority to State agencies through what are called Delegation Agreements. Delegation agreements are issued on a case-by-case basis through an SPB Compliance Review- and Delegation process, although SPB may issue general rules for classes of procurements, such as particular procurement types (e.g., emergency purchases) or contract values (e.g., one-time purchase of supplies that does not exceed \$100K).

**Requirement for Competition.** Delegation agreements require State purchases to be made through competitive processes. When that is impractical or impossible, State-mandated procedures ensure these purchases are appropriate, transparent, and infrequent.

**Agreement Term.** Delegation agreements have two-year terms, beginning January 1st (of even-numbered years) through December 31st (of the following odd-numbered years). The amount and type of authority delegated to an agency is based on:

Agency performance history (as defined in the delegation agreement);

Staff training accomplishments;

- Agency resource availability to meet level of requested authority;
- The expertise of the agency CO and procurement staff in terms of specialized knowledge pertinent to the authority to be delegated;
- The degree of economy and efficiency to be achieved in meeting the State's requirements if authority is delegated; and
- Consistency of authority delegated under similar circumstances.

**Level One Delegation Authority.** Agencies with Level One authority purchase (non- controlled) services and supplies with a TCV of not more than \$100K. In addition to payment contracts pursuant to 18-4-132, MCA, this includes revenue-generating contracts and/or contracts that involve no cost to the State. Each agency's Procurement Officer (APO) oversees that agency's compliance with its Delegation Agreement, the Montana Procurement Act, and Division Montana Operations Manual (MOM) policies. (Note: Agencies may not artificially divide purchases into small- lot purchases to stay under Delegation Agreement dollar thresholds.) Should an agency fail to comply with procurement laws, or rules under its delegated purchasing authority, that authority may be revoked.

**Level Two Delegation Authority.** Agencies with Level Two authority purchase (non- controlled) services and supplies with a TCV of not more than \$200K. This also includes contracts that are revenue-generating or at no cost to the State, in addition to payments contracts pursuant to 18-4-132, MCA.

**When Delegation is Unnecessary.** Delegations and competitive procedures are not required for:

- Pastoral services;
- Training services;
- Training- and Conference space rental and catering;
- Fresh fruit and vegetables, and food products produced in Montana, subject to the provisions of 18-4-132, MCA;

- Advertising services (time on air, etc.) (the development, design, and distribution of the advertising are not included in this exception);
- Educational instructors and Guidance Counselors for inmates;
- Books and Periodicals; and
- Purchases from Sheltered Workshops.

**Agency Compliance Review Program.** To ensure there is no State agency, program, or rule that is unresponsive to the needs of the people of the State, MCA 2-8-101 requires State agencies to perform periodic self-evaluations, and to provide the results of those reviews to the State. Montana's Agency Compliance Review Program supports this Statutory requirement, and consists of agency Annual Self-Reporting, On-Site Compliance Reviews (if applicable), Compliance Reviews, and Corrective Action Plans.

**Annual Agency Self-Reporting.** Agencies perform self-reporting through a survey link, where agencies respond to questions and upload required reports. The following are also part of the self-reporting requirement:

**Annual Contract Report;**

- Purchases exceeding agency delegated authority;
- A report of current agency procurement staff and contract managers showing compliance with required training;
- A copy of the agency's procurement policies, procedures, and Manual; and
- Additional reports required.

**Compliance Reviews.** SPB conducts Compliance Reviews at each agency a minimum of every three years, at the end of which it issues a Summary Report to the agency, annotating corrective action required. On-site compliance reviews may be conducted, if applicable.

**Corrective Action Plans.** Corrective Action Plans include timelines for implementation of the corrective measures. Failure of an agency to implement its Corrective Action Plan may result in the suspension- or termination of its Delegation Agreement.



## CHAPTER 4: ETHICS LAWS, AND PROFESSIONAL STANDARDS

**Overview.** Ethical behavior and integrity are fundamental tenets of public procurement, derived from values like fairness, honesty, and accountability. Cos are the gatekeepers for the expenditure of the State's limited financial resources, entrusted to uphold the highest ethical standards and be good stewards of public funds with every purchasing decision. Any erosion of public trust, and any perception of impropriety, is detrimental to the integrity of the procurement process; therefore, all State employees involved in procurement activities behave ethically, impartially, and professionally; each State employee involved with public procurements completes and submits a Declaration of Non-Conflict of Interest and Confidential Information form to the State. A template is located on the [SPB website under Procurement Forms & Templates](#).

**Nepotism.** Nepotism is a form of conflict of interest that involves an explicit act of using one's position to favor a relative. It is the bestowal of political patronage by reason of relationship rather than of merit. Montana Code 2-2-304, Penalty for violation of nepotism law, in short, makes it unlawful to be involved in the appointment of any person related by consanguinity (blood) within the fourth degree or by affinity (marriage) within the second degree.

- A relationship by consanguinity is one established through bloodlines. The consanguinity relationship may be either lineal (persons in a direct line of descent) or collateral (persons not in a common line of descent but with a common ancestor).
- A relationship by affinity arises by virtue of marriage. A relationship by affinity exists between an individual and either the blood relatives of the individual's spouse or the spouses of the individual's blood relatives. (If at least two marriages are required to establish a link between two persons, they are not related by affinity.)

There are different ways of computing degrees of relationship. Montana law computes degrees of relationship by the civil law method. The table at 4.1 provides descriptions of the consanguinity and affinity relationships that may be referenced in the various nepotism laws which prohibit certain types of activities based on an employee's job responsibilities, employment within a branch of State, or employment by a particular agency.

Table 4.1

<b>Consanguinity and Affinity Relationship Chart From Public Official or Employee</b>				
<b>Consanguinity (Includes individuals related by blood to the official or employee)</b>			<b>Affinity (Includes an officials' or employee's spouse and individuals related to the spouse)</b>	
<b>First Degree</b>	<b>Second Degree</b>	<b>Third Degree</b>	<b>First Degree</b>	<b>Second Degree</b>
Parents	Grandparents, Grandchildren	Great-grandparents, Great-grandchildren	Spouse, Spouse's Parents	Spouse's Grandparents, Spouse's Grandchildren
Children	Brothers & Sisters	Nephews & Nieces, Uncles & Aunts	Children's Spouses, Spouse's Children	Spouse's Brothers & Sisters, Brother's & Sisters' Spouses

**Appearance of Impropriety.** The root of ethical behavior in public procurement is the commitment of State personnel to neither gain personally from, nor unduly favor anyone in the execution of their official duties. They are guided by a duty to serve the public, for whom they are employed, and therefore not only comply with the minimum legal standards of ethical conduct established by statutes, agency rules and policies, and professional certifications, but conduct themselves in a manner that avoids even the appearance of impropriety.

**Resolving Ethical Dilemmas.** This Manual does not contain a comprehensive list of every statute, agency rule, agency policy, or professional code of conduct that may apply to procurement activities; it does provide guidance on the most commonly applicable ethics laws and professional standards. The State of Montana expects each public employee to comply with all legal requirements, use sound reasoning and best judgment, and act ethically and with integrity. When faced with an ethical dilemma, staff seek assist immediately from a supervisor, Legal Counsel, the State Procurement Bureau, or ethics officer.

**Certain Employment Restrictions and Disclosure Statements.** The State of Montana Ethics Policy identifies standards by which State employees conduct themselves, in addition to the Conflict of Interest restrictions, employment restrictions, and required disclosures applicable to public procurement personnel. Personnel involved in a procurement certify their compliance with Title 2, Chapter 2 of the MCA, Standards of Conduct, by completing the Non-Disclosure and Conflict of Interest Certification, a template for which is located on the [SPB website under Procurement Forms & Templates](#).

**State Ethics Policy.** The Montana State Legislature enacted statutes that detail the ethical responsibilities and disclosure obligations of State officers and employees. These Statutes forbid State officers and employees from:

- having any financial (or other) interest,
- engaging in a business transaction or professional activity, or
- incurring an obligation of any kind that is in substantial conflict with the proper discharge of duties in the public interest.

**State Ethics Policy/Standards of Conduct.** The Legislature also established standards of conduct for State officers and employees that do not allow State officers or employees to:

- Accept or solicit any gift, favor, or service that might influence the officer or employee in the discharge of official duties, or that the officer or employee knows or should know is being offered with the intent to influence the officer or employee's official conduct;
- Accept other employment, or engage in a business or professional activity, that the officer or employee might expect would require or induce the officer or employee to disclose confidential information acquired by reason of the official position;
- Accept other employment, or compensation, that could impair the officer or employee's independence of judgment in the performance of the officer or employee's official duties;
- Make personal investments that could create a substantial conflict between the officer or employee's private interest and the public interest; or
- Intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer or employee's official powers or performed the officer or employee's official duties in favor of another.

State employees who violate the State Ethics Policy or their agency's ethics policy are subject to termination or other employment-related sanction, and civil or criminal penalty if warranted. Agencies cannot use appropriated funds to compensate State employees who violate the State Ethics Policy.

**Bribery.** Bribery is a criminal offense that occurs when a person intentionally or knowingly offers, confers, or agrees to confer on another (or solicits, accepts, or agrees to accept) any benefit (including a salary) as consideration for a violation of a public servant's legal duty or a public servant's decision, opinion, recommendation, vote, or any other exercise of discretion. A State employee is subject to criminal prosecution if the employee accepts employment as consideration for an official act. A bribery offense occurs even if the benefit is offered after the employee has acted in a manner desired, or after the employee has ceased working for the State.

## Gifts to Public Servants.

**Prohibited Activities.** It is a criminal offense for a public servant to accept a benefit from a Donor subject to the public servant's jurisdiction. It is also an offense for a public servant who exercises discretion in connection with (contracts, purchases, payments, claims, or other) State pecuniary transactions to solicit, accept, or agree to accept any benefit from any person or entity whom the public servant knows is interested in, or likely to become interested in, any contract, purchase, payment, claim, or transaction involving the exercise of the public servant's discretion. Acceptance of a gift may also be prohibited if the Donor is a registered lobbyist.

**Allowable Activities.** Not all gifts are prohibited; Promotional and commemorative items of minimal value, such as: caps, coffee mugs, T-shirts, key rings, and discount coupons, do not constitute an improper benefit if they are not solicited, and are not offered or accepted in exchange for any action or inaction on the part of a public servant. It is also permissible for an employee to accept a gift from a friend, relative, or business associate with whom the employee has a relationship independent of the employee's official status, provided the gift is given on account of the personal relationship and not because of the official status. (State employees may generally accept non-cash items with a value of less than fifty dollars (\$50) if approved by Legal Counsel.)

**Misuse of Official Information.** As a result of employment with the State of Montana, employees have access to information the public does not. State employees face criminal liability by taking information that is not public, and that was obtained during the performance of official duties and using it for a

private purpose. The phrase “information that is not public” means any information to which the public does not have access, and that is prohibited from disclosure under the Montana Public Records Act. A public servant commits an offense if, by relying on non-public information, the person:

- Acquires, or aids another to acquire, a pecuniary interest in any property, transaction, or enterprise that may be affected by the information,
- Speculates, or aids another to speculate, on the basis of the information, or
- As a public servant, coerces another into suppressing (or failing to report) that information to a law enforcement agency.

A public servant also commits an offense if, with intent to obtain a benefit or to harm or defraud another, the servant knowingly discloses or uses undisclosed, non-public information for a non-governmental purpose.

**Misuse of State Property.** State law prohibits the misuse of State resources, including computers, copiers, supplies, and staff time. A public servant commits an offense if, with intent to obtain a benefit or to harm or defraud another, the servant intentionally or knowingly misuses anything of value belonging to the State that has come into the servant’s custody or possession by virtue of the servant’s office or employment. A public servant faces criminal prosecution for use of a State- issued credit card for a (personal) expenditure that is not authorized.

## Suspected Fraud, Waste, or Abuse.

Purchasing Accountability and Risk Analysis Procedure. The Montana Legislative Audit Division (LAD) investigates allegations of fraud, waste, and abuse. Each agency develops and follows a Purchasing Accountability and Risk Analysis Procedure that includes an assessment of the risk of fraud, abuse, and waste taking place in its:

- contracting processes;
- contract provisions; and
- payment and reimbursement rates and methods.

**Reportable Activities.** Administrative heads of agencies who have reasonable cause to believe that money is being lost, misappropriated, or misused, or who become aware of fraudulent or unlawful conduct report this information to the LAD. A “reasonable cause to believe” exists when a set of facts would lead a reasonable and prudent person to believe that an offense may have been or will be committed. Employees and Contractors who become aware situations that involve suspicious activities or fraudulent acts report the concerns to LAD. The LAD coordinates investigatory work with internal auditors, federal and State prosecutors, and law enforcement agencies at the city-, county-, State-, and federal levels. Criminal offenses investigated by LAD include, but are not limited to:

- theft;
- forgery;
- tampering with a State record;
- securing execution of document by deception;
- misapplication of fiduciary property;
- conversion of funds;
- abuse of official capacity;
- gift to a public servant by a person subject to his or her jurisdiction; and
- bribery.

Reports of fraud, waste, and abuse involving State resources may be submitted anonymously via the following:

On-Line at: [Fraud Hotline](#)

By electronic mail to: [LADHotline@mt.gov](mailto:LADHotline@mt.gov)

By telephone at 800-222-4446

**Reporting of Anti-Competitive Practices.** In accordance with MCA 2017, 18-4-314, if for any reason collusion or other anti-competitive practices are suspected among Vendors, a notice of the relevant facts shall be transmitted to the Attorney General by the Department.

## CHAPTER 5: VENDOR COMMUNICATION

**Overview.** Communication between the State and Vendors is encouraged, and often imperative. If used effectively, communication with industry is a vital resource for Contracts Officers (Cos). To ensure a fair opportunity for eligible Vendors to compete for State work, and to avoid any appearance of favoritism, one-on-one communications with Vendors during competitive procurements are subject to enhanced scrutiny. Legal Counsel is consulted when there is any doubt about the appropriateness of communications with Vendors.

**Fact-Gathering.** Vendors are often experts in their respective fields, offering insights into potential purchases, such as trends, industry practices, products, and solutions. Montana law authorizes the exchange of information between an agencies and Vendors related to requirements and solicitations. As part of the Acquisition Planning process, the CO and procurement team develop a plan to obtain needed Vendor input, which may include issuance of a Request for Information (an RFI), industry days, and contacting industry leaders and Vendors prior to a solicitation. These interactions lead to more detailed, up-to-date technical requirements, scopes of work, and cost estimates, resulting in increased competition and a better value for the State.

**Drafting the Solicitation.** To ensure the integrity of the procurement process, all communications with Vendors cease when solicitation drafting has begun. When a Vendor provides assistance in drafting requirements documents, it is ineligible for award of the resulting contract.

**During the Solicitation.** From the date the Request for Proposal (RFP)/Invitation for Bid (IFB) is issued and until a Contractor is selected, there are no off-the-record communications regarding the procurement except at the direction of the CO. Unauthorized contact may disqualify a Vendor from award consideration.

**Single Point-of-Contact (POC).** All questions, issues, and clarifications go through the CO, the single POC for the solicitation and sole authority for interacting with potential offerors/bidders. The purpose of naming a single POC is to:

- ensure questions are routed through one person;
- eliminate confusion by providing the same information to all interested parties (general public, agencies, and offerors); and
- inform potential offerors that they may not contact members of the evaluation committee or agency staff.

**Question and Answer (Q&A) Process.** When issuing solicitations, agencies generally include a Q&A process to allow for Vendor comments and questions. Failure to do so often results in either higher costs to the agency as a result of undiscovered errors, or unclear specifications (causing Vendors to bid high to cover unforeseen costs), or requirements being delayed or unmet because Vendors failed to respond to the solicitation at all.

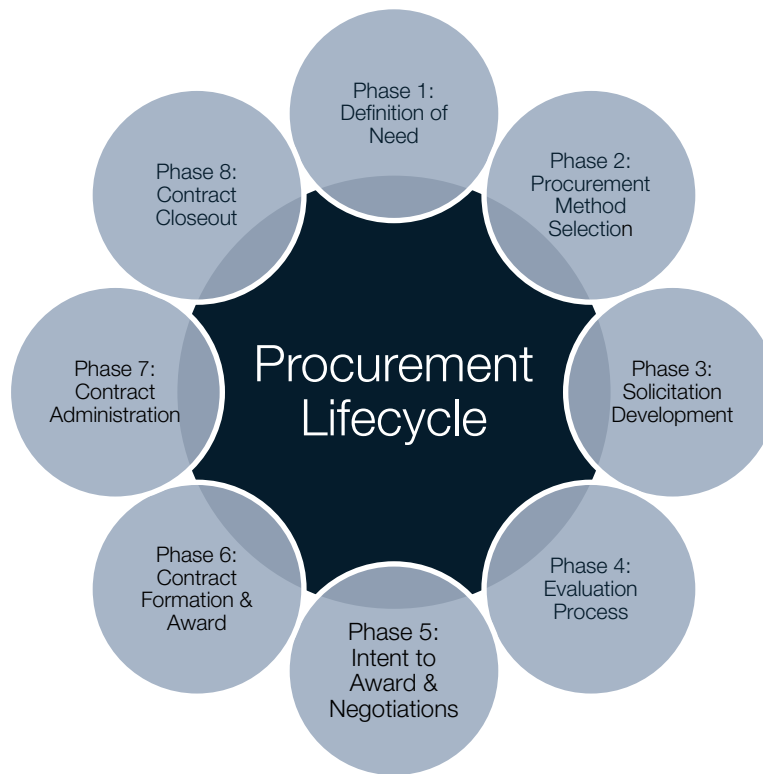
**Sharing Information During Evaluation Phase.** Proposal evaluation and Contractor selection is based solely on the proposals submitted, and presentations held by each Vendor within the confines of the solicitation requirements, not other communications. When one Vendor is provided an opportunity to clarify its proposal, similarly situated Vendors receive the same opportunity. The only Vendor-CO interactions that will take place will be for the purposes of:

- clarifying an Offeror's ability to meet the solicitation requirements;
- negotiating, including a request for Best and Final Offer (BAFO); and

- exchanging information to facilitate a potential contract award.

## CHAPTER 6: THE PROCUREMENT LIFECYCLE

Before engaging in public procurement activities, it is important to understand that there are common characteristics between procurements, and that following each of the processes outlined in this Manual ensures procurements are conducted in a transparent and efficient manner. The phases of the Procurement Lifecycle are identified as follows:



**Phase 1, Definition of Need:** Define business needs and establish procurement objectives.

**Phase 2, Procurement Method Selection:** Identify the appropriate procurement method to obtain the desired goods or services based on the estimated total contract value, characteristics, constraints, and risks.

**Phase 3, Solicitation Development:** Once Phase 2 is complete and the procurement method has been selected, the solicitation documentation is developed. Solicitation refers to an invitation for bid, request for proposal, or any other document issued by the State to solicit bids or proposals to enter into a state contract.

**Phase 4, Evaluation Process:** This phase begins after the State has solicited bids or proposals, and vendors have provided responses. During this phase, the Procurement Officer and, if required, the evaluation committee reviews answers from the vendors to determine their responsiveness or compliance with the requirements in the solicitation. It is then determined which vendor will be awarded the contract based on the predetermined criteria provided within the solicitation.

**Phase 5, Intent to Award and Negotiations:** After the winning vendor is selected in phase 4, a Notice of Intent to Award (NOIA) is posted to the public bids site. The NOIA is open for 7-day period prior to contract award. During this 7-day period, comments from the public regarding the proposed award may be submitted to the Contracts Officer listed. Once the NOIA is posted, solicitation documents are



available for inspection upon request subject to 18-4-304, MCA, and 18-4-126, MCA. Once the NOIA has been publicly posted, negotiations can begin with the awarded vendor. This phase provides an opportunity for the parties to negotiate non-material changes to a contract's terms and conditions.

**Phase 6, Contract Formation and Award:** After the NOIA has been posted for the required 7-day period and all negotiations have been completed, the contract can be finalized and awarded. Finalized and awarded indicates the acceptance of a bid or proposal through a formal agreement or signed contract.

**Phase 7, Contract Administration:** The Contracts Officer is responsible for overseeing the entire procurement lifecycle and works with the Contract Manager to manage and maintain the contract.



**Phase 8, Contract Closeout:** The Contract Officer the Contract Manager work together to complete the contract closeout. The contract closeout provides a record for the contract end of life and provides the following information.

1. The term of the contract and whether it was closed at the end of life or terminated early.
2. All issues reported during the life of the contract and the resolution, if applicable.
3. Payments.
4. Any reporting as required by law.

## CHAPTER 7: PROCUREMENT PLANNING

**Overview.** Every procurement begins with procurement planning. With proper planning, the State is likely to achieve its procurement objectives in an efficient and timely manner; without it, the parties are unable to efficiently or effectively carry out an appropriate and timely procurement. Planning activities include developing a needs assessment, a cost estimate, and an acquisition plan. With these elements, Cos craft that have the information Vendors need to respond to the State's solicitations. Content and structure of solicitations vary depending on the commodity, the complexity of the transaction, and known (cost, schedule, etc.) risks. Cos ensure that:

- solicitations are clear and accurate;
- requirements promote overall economy for the purposes intended; and
- source selection methods meet the State's needs without being unduly restrictive.

Solicitations usually include the following components:

- Description of Items, and Quantities required
- Scope of Work, Contractor Qualification requirements, etc.
- Contract Term
- Delivery/Performance Location Requirements
- Inspection Requirements
- Payment Terms and Procedures
- Standard Terms and Conditions
- Evaluation Criteria for Award
- Response Submission Requirements (Cost/Price, Proposal, Technical, Past Performance, etc.)
- Draft Contract
- Other Attachments

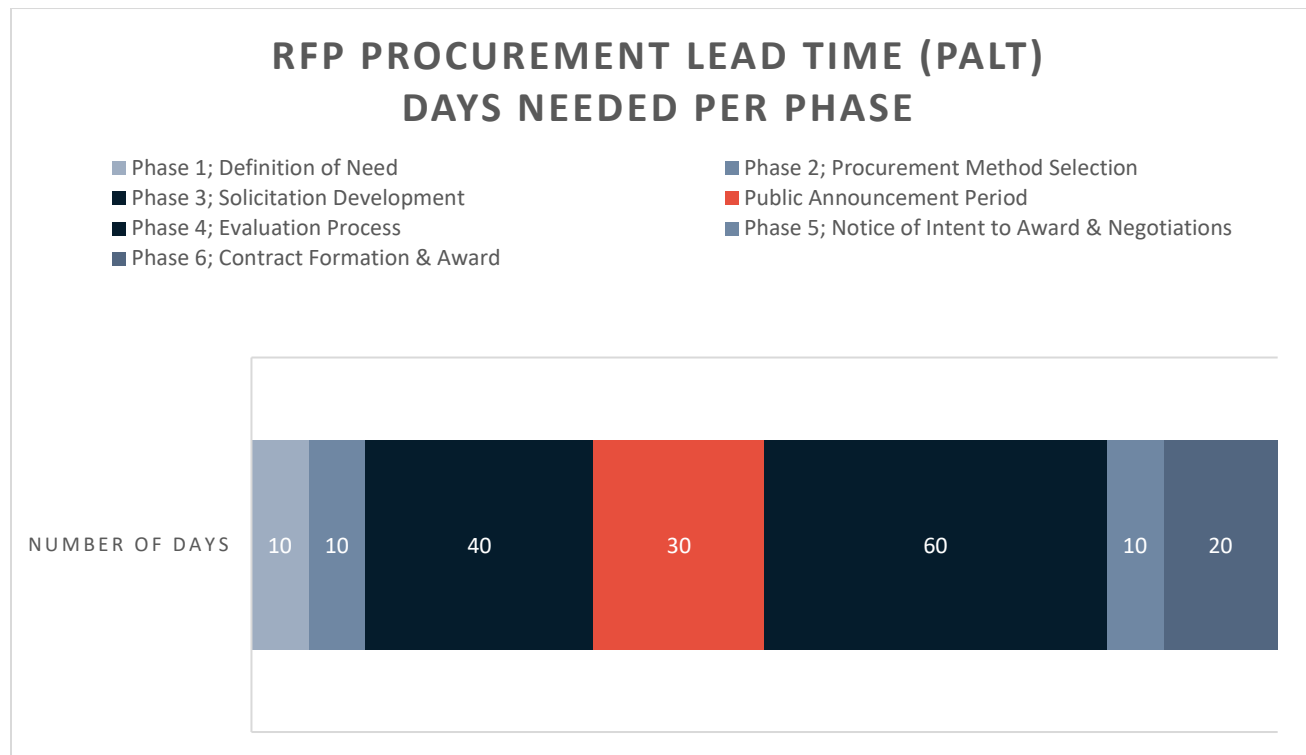
The templates used by the State to build solicitations are available at: [The Procurement Lifecycle](#)

**Procurement Leadtime.** To inform all parties of the expected time required for a procurement, one of the first steps in the solicitation process involves a Procurement Leadtime (PALT) determination. PALT is the interval between a need being identified and award of the vehicle used to fulfill the need. Estimates vary for formal solicitations, but 180 days from requirements identification to contract award is typical. Structured tasks that comprise PALT include, but are not limited to:

- Solicitation Preparation;
- Obtaining Required Approvals (e.g. ITPR for IT projects; Budget Office for projects exceeding \$200,000, etc.);
- Public Announcement Period;
- Evaluation and Selection;
- Internal Review Periods; and
- Contract Formation.

Table 7.1 provides an example of PALT documentation for a contract pursuant to a competitive RFP, with a rapid evaluation process and minimal Contractor negotiations.

Table 7.1



**Agency Calendar of Events.** The State often develop an internal calendar of events for each procurement. This calendar includes solicitation-associated dates already detailed in the external calendar of events, as well as milestone dates for both standard- and critical activities and events occurring pre- and post- solicitation. These include inter-departmental workflow processes and timelines, finance-mandated processes and deadlines, and procurement-specific events (such as statutorily mandated commencement dates, or the on- boarding of successor Contractors prior to cessation of services by incumbents). The internal calendar of events is resident in Acquisition Plans and other procurement monitoring tools used (e.g., QASP, etc.). The calendar of events is for internal use only and is not included within the solicitation documentation.

**State of Montana Procurement Forecast.** View the State's [quarterly procurement forecasts](#).

These updates provide the public with overviews of anticipated solicitations with a TCV exceeding \$10,000.

Requirements with TCVs less than \$100K are handled by the requiring agency.

Actions with a TCV of \$100K (supplies/services) or greater are associated with formal solicitations and are posted at the [State's bid site](#).

**Solicitation Preparation.** COensure solicitations are complete, non- restrictive, and in compliance with statute, rule, policy, and procedure. Coordination and collaboration between members of the various agency teams, structured planning, and thorough research tend to minimize the time required

for solicitation preparation.

**Public Announcement Period.** Agencies determine solicitation posting- and response times on a case-by-case basis. However, to allow for a Q&A period and the response time needed by Vendors, 30+day solicitation periods are standard. Particularly complex or unusual requirements often result in questions from industry and multiple/lengthy Q&A rounds, in which case, longer overall solicitation periods result.

**Review, and Contract Formation.** The time required for evaluation of proposals depends on the size of the evaluation committee, the complexity of the procurement, and the number of proposals evaluated. Evaluation periods are more extensive when there are presentations, discussions, and Best- and Final Offers (BAFOs). Contract formation time varies depending on the type of contract document, complexity of the procurement, volume of work, and the skillset of the agency's administrative team. Review- and signature requirements of both the agency and the Contractor vary according to contract value, complexity, and size of the organizations involved.

## Acquisition Plans.

**Overview.** Using the needs assessment, cost estimate and COR advice, the CO determines the procurement method, process, and contract type for each procurement, often developing some form of an acquisition plan. Factors considered in determining which procurements would benefit from an acquisition plan include:

- Complexity,
- Commodity (e.g., furniture, software maintenance, consulting services),
- Total Contract Value, and
- Whether the procurement is part of a larger organizational project.

A sample Acquisition Plan is located on the [SPB website under Procurement Forms & Templates](#).

**Objective.** Acquisition plans aid COs in ensuring procurements are solicited, negotiated, executed, and managed in a way that delivers the best overall value to the State. Acquisition plans identify the procurement:

- team members, their roles and responsibilities,
- schedule of events, and
- activities necessary to ensure that the contract requirements are satisfied, the supplies and services are delivered timely, and the financial interests of the agency are protected.

**Needs Assessment.** How well a contract meets the needs of the State often depends upon how well-defined the requirements are. As part of needs assessment, agencies conduct market research, look at historical spend data, use benchmarking, and/or issue Requests for Information (RFIs). The result of a needs assessment is the requirement's Performance Work Statement, Statement of Objectives, Statement of Work, or Specification.

**Scope of Work (SOW).** The requirements definition section (Statement of Work (SOW), PWS, Scope, Specifications, etc. (collectively referred to as the SOW)) fully defines the agency's needs and requirements, allowing the Contractor to achieve the agency's goals. An effective SOW provides clear, complete directions enabling the Contractor, using the SOW alone, to finish the job in an effective and efficient manner. The level of clarity, completeness, and accuracy of the SOW is a major predictor of the success of the effort. It is not enough that the people involved understand the desired outcome, or

the paths to achievement - such understandings don't last much past the first disagreement. The State's requirements must be clear, concise, and accurate; written so that a clear and thorough description of the products and services is provided while fostering competition. Even in level-of-effort situations, when it is not known where the effort will lead in terms of measurable results, SOWs must be specific about the goals and directions toward which the Contractor is to deploy its resources. The State of Montana issues a Guideline for Statements of Work, and a Statement of Work Template, are located on the [SPB website under Procurement Forms & Templates](#) respectively. Those documents discuss the following topics in depth.

**Level-of-Effort:** (1) The total amount of work, time, or resources necessary to deliver the project's deliverables. (2) A support activity which is difficult to measure but is directly related to the project's objectives. It usually consists of short amounts of work which must be repeated periodically. Examples of such an activity may be project budget accounting, customer liaison, etc. ([Level of Effort Definition](#))

**Unique.** Each SOW is tailored specifically for each requirement, unique in language and expressing the State's minimum needs regardless of commodity. The audience for the SOW is broad and diverse, including engineers, scientists, lawyers, salespeople, accountants, architects, COs, and political figures, etc.—a group with a wide range of interests and knowledge, each of whom must be able to understand the solicitation.

**Organized.** A clearly defined, effective SOW is logically organized, allowing Vendors to fully understand the State's requirements and to propose meeting them intelligently and competitively. Effective SOWs neither restrict Contractor efforts, nor permit Contractors to wander from the objectives of the requirement. They define the Contractor's obligations and protect the State's interests.

**Affects Contract Type.** The type of contract selected (fixed-price versus some form of cost-reimbursement) also depends on the precision of the requirement. The more well-defined the requirement, the more complete and accurate cost estimates for completing the work are, allowing the parties to fix the cost/price for completion of the work. Conversely, the less defined a requirement, the less accurate cost estimates are, causing the parties to only be able to identify a range of costs for the work (contract types involved are CPFF, CPAF, T&M, LH, etc.).

**Affects Proposal Evaluation.** The SOW is the baseline for evaluating Contractor responses to a solicitation, and for correlating those responses to the requirements. The degree of difficulty and amount of time required to complete proposal evaluations are based to a great degree on the evaluators' understanding of the requirements as expressed in the SOW. The clearer the requirements, the more succinct and complete proposals are, resulting in increased confidence on the part of evaluators and Vendors to make sound Source Selection decisions while presumably, decreased processing time.

**Affects Contract Administration.** Monitoring the contract is helped by a good SOW. High-quality SOWs allow for consistent interpretation of the State's requirements and alleviate the need for repeated direction from the program office.

**Drafting Tips.** A solicitation is effective when the State's requirements are clearly articulated; it is ineffective if awkwardly worded, disorganized, or has errors or visual distractions. A poorly drafted solicitation may prompt responses that are not aligned with the State's actual requirements, or that include unnecessary costs due to Contractor confusion. It is imperative that solicitations are written in a manner that attracts responses that meet the State's needs. The following techniques are used in effective solicitation drafting.

**Organize Content for Readability.** Present the information in a logical manner. Include relevant documents (e.g., organizational charts, site plans, work-flow diagrams) as attachments to the solicitation.

**Use Short, Precise Sentences.** Present information in a direct manner. For example, the text should plainly state who is to do what:

- In its response, the respondent must include...
- The Contractor shall provide...
- The solution delivered by the Contractor shall include the following...
- Within five (5) business days of receipt of the project plan, the agency shall...

**Use Active Voice.** Active verbs assign responsibility to a particular entity more clearly than passive verbs. Solicitations and contracts use active voice as much as possible.

Example of active voice: The Contractor shall develop the solution to be scalable to X standard.

Example of passive voice: The solution shall be scalable to X standard.

In the passive voice example, it's not clear whether the Contractor, the State, or both parties are responsible for the referenced standard.

**Use "Shall," "Must," "May," and "Should" Appropriately.** The words "must" and "shall" are used to describe commands and mandatory conditions; inappropriate use results in restrictive specifications and a lack of proposal submissions. The words "may" and "should" describe advisory- and permissible actions; they do not represent mandatory conditions with which Contractors must comply.

**Use Terms Consistently.** Using consistent terminology helps readers understand the SOW and the terms and conditions of the procurement. In contrast, using multiple terms to describe a person, function, activity, item, or entity causes confusion.

**Avoid Ambiguity.** Define terms, even industry terms, to ensure there is no misunderstanding as to the meaning. Do not use terms or phrases that have the potential for more than one interpretation.

**Avoid Repetition.** State requirements once. Repeating does not emphasize importance, but increases the potential for confusion, especially if there are slight variations stated in different areas of the solicitation.

**Proofread.** Proofreading the solicitation ensures requirements are clear and accurate, extraneous statements are removed, and that there are no spelling errors.

**Appropriate Standards.** When drafting a solicitation:

- select the appropriate requirements definition document (SOW, SOO, PWS, specification, etc.);
- identify deliverables, milestones, and performance-monitoring methods;
- specify licensing and certification requirements and standards; and
- highlight transaction-specific requirements.

Matters customarily addressed in requirements documents include the following:

- Name of Supply/Product/Service required

- Purpose/Use
- Specifications/A description of the end-product/Service required
- Special requirements
- Unusual Conditions
- Contractor responsibilities
- Receiving Procedures
- Personnel Qualifications;
- Constraints on the Contractor
- Availability of agency resources (e.g., Mon.-Fri. access)
- Agency security policies (e.g., State building admittance procedures, email encryption protocols)
- Agency responsibilities
- Access to agency facilities (including storage space for Contractor materials and supplies), equipment, and computer systems
- Evaluation of Contractor performance (e.g., standards of performance, inspection, testing, and deliverable acceptance and rejection process)
- Communication protocol (e.g., designated points of contact, routine communications, and escalation plan for problem resolution)

Consult information security personnel and legal counsel when internal or confidential information is being included in a solicitation.

**Requirements Documents.** Requirements documents come in many forms (PWS, SOO, SOW, specifications, etc.), each of which describes, in various degrees of certainty, the products, services, and outcomes the State seeks. Requirements documents are:

- Performance based (PWS, SOO),
- design-based (specifications), or
- mixed (SOW).

Requirements can also be descriptive or restrictive. These are discussed below.

**Performance-Based.** Performance-based requirements are reasonable and measurable, focusing on outcomes and results rather than the processes by which products and services are produced. Contractors choose the methods, tools, and approach used to accomplish its contractual obligations. Performance-based requirements allow Vendors to bring their expertise, creativity, and resources to satisfy agency requirements. Performance-based requirements.

**Design-Based.** Design-based requirements focus on how Contractors perform services, and how products are made, rather than what the product or service does. Contractors have little- to no discretion regarding the methods or processes to be used. These types of requirements definitions are most often used in A&E and construction projects.

**Descriptive (Brand-Name or Equal).** Descriptive requirements identify the physical, functional (or other) characteristics of specific products that are essential to meeting the State's minimum needs, while providing a competitive bidding environment. Descriptive language does not include characteristics that are unique to one product or that would eliminate competition of other products (those are restrictive requirements). It's considered a best practice to identify a minimum of two known acceptable manufacturer/brand names and model numbers as "equals" in addition to the Brand-Name product identified. Solicitations using descriptive requirements language include a clause citing the purpose for the references as "or equal" and the submittal requirements for evaluation. A solicitation clause example for a referenced brand is as follows:



- “Catalogs, brand names, or manufacturer’s references are descriptive only and indicate type and quality desired. Bids on brands of like nature and quality will be considered. If proposing other than the referenced brands/model number, Vendor must provide the manufacturer, brand, or trade name, product number and provide complete descriptive information of product offered and include it with the bid.”
- Submitted “or equal” offers are given full consideration, and are not rejected for minor differences in design, construction, or features from the reference models when those differences do not affect the suitability of the product for its intended use.

**Restrictive (Brand-Name Mandatory).** Restrictive descriptions are only used when only the products or services identified will meet the State’s needs. In this case, the State competes the requirement among authorized distributors.

### **Contract Term, Deliverables, and Milestones.**

**Contract Term.** The term of a contract is the discrete, defined period during which a contract remains in effect. All contracts have a commencement date and a specific expiration or delivery date. As a general policy, the maximum duration for a non-IT contract without reissuing a competitive solicitation is seven years, including renewals and extension periods. The maximum duration for an IT contract without reissuing a competitive solicitation is ten years, including renewals and extension periods.

**Deliverables.** Deliverables are the measurable tasks and outcomes (e.g., product, service) provided by the Contractor, one of the most common of which is a Report, which has various forms. For example, status reports are used to assess whether products and services are being provided by the Contractor on schedule; time sheets, however, are used to track time spent by Contractor personnel in performance of the contract.

**Milestones.** A milestone is a scheduled event associated with a deliverable and gauges progress. For instance, a milestone may be the date when a specified percentage (e.g., 10 percent) of work is to be complete, or may mark the occurrence of the installation of a critical piece of equipment.

**Professional Licenses and Certifications.** When a service requires a professional license or certification, the solicitation identifies the certification, license and certifying authority. It also requires the Contractor to maintain required certifications/licenses during the term of the contract, and to notify the State of status changes. Solicitations also identify remedies available to the State for Contractor non-compliance.

**Established Standards.** Depending on the procurement, the State often uses established standards (e.g., international, national, state, local, industry) as an effective means of defining requirements. Examples of national and international standards include:

- American National Standards Institute (ANSI),
- American Society for Testing and Materials (ASTM),
- International Organization for Standardization (ISO),
- Occupational Safety and Health Organization (OSHA), and
- National Institute of Standards and Technology (NIST).

The State also often uses references to standards maintained by entities representing individual industries, such as:

- Generally Accepted Accounting Principles (GAAP),



- Institute of Electrical and Electronic Engineers (IEEE),
- National Electrical Manufacturers Association (NEMA), and
- Payment Card Industry (PCI).

If an industry standard is used, the solicitation will identify it by name and number; merely referring to “meeting industry standards” is inadequate.

**Monitoring Activities.** When developing solicitations and contracts, the State clearly identifies the methods (processes, procedures, materials, data, etc.) it will use to monitor Contractor performance. Requiring a Contractor, without prior notice, to produce time-consuming reports or maintain stringent testing standards outside normal industry parameters is grounds for legal challenge. The monitoring activities chosen by the State are balanced in type, scope, and frequency to achieve the desired results for the procurement. Overly restrictive oversight interferes with Contractor ability to complete work and may unnecessarily and inadvertently increase costs. Examples of monitoring activities include inspection dates, customer complaint, scheduled meetings, status reports, etc.

**Additional Considerations.** Issues such as the following may also affect pricing:

- Use of State equipment;
- Storage space for Contractor materials and supplies;
- Required permits;
- Subcontractor responsibilities;
- Public Information Act obligations;
- Conflict of interest disclosures and/or organizational restrictions;
- Criminal background investigation requirements;
- Security policies (e.g., State building admittance procedures, email encryption protocols);
- Intellectual property/copyright issues;
- Lease (operating/finance) conditions;
- Records retention periods; and
- Disposal requirements.

## Minimum Qualifications.

**Overview.** “Minimum Qualifications” relate to the characteristics of the Contractor, and include elements such as:

- technical skills, certifications, or licensing requirements;
- experience (business and/or personnel);
- facility requirements;
- status requirements (business size, not debarred, citizenship, etc.), and
- demonstrated financial capability.

**Pre-qualification Criteria.** When there are qualifications that Vendors must meet to be eligible for further evaluative consideration, they are identified as such within the solicitation’s evaluation criteria. Examples are:

- Business size
- Citizenship
- Licensing
- Location, etc.

Proposals are evaluated against these criteria on a “pass/ fail” or “failing to obtain xx% of possible points” basis. Solicitations provide notice to Vendors of the threshold condition(s) that, if not satisfied, will result in the rejection of proposals. If these criteria are not evident from the context of the solicitation, pre-qualification criteria are identified by statements similar to the following:

“Failure to meet this qualification shall result in disqualification of the proposal and the proposal shall receive no further consideration.”

**Cost Estimate.** Each procurement has a cost estimate, developed from:

- Informal Quotes;
- Catalogs and published pricelists;
- Standardized estimation methods; and/or
- Historical spend data.

Each cost estimate is developed in good faith as it is used in determining both the procurement method (formal vs. informal solicitation) and the cost/price reasonableness of offers.

**Informal Quotes.** When preparing cost estimates, the State may contact Vendors and obtain pricing information by seeking informal quotes or price estimates. Informal quotes are not formal solicitations, and no contractual vehicle or reimbursement results from them. When obtaining these estimates, COs and CORs avoid giving Vendors a competitive advantage through transmission of procurement-sensitive information.

**Funding Source.** The State ensures its procurements (and grants) comply with the laws, regulations, restrictions, and limitations that apply as a result of funding source restrictions (e.g., State vs. Federal, etc.). This includes such elements as allowability (e.g., bribes are not allowable and cannot be reimbursed; construction funds cannot be used for other commodity purchases; etc.), allocability (used when apportioning funds, and when assigning cost elements for overhead calculations); funding term (money can be used for only a discrete period of time), and funding caps.

## Requests for Information (RFIs) & Market Research.

Requests for Information (RFI). An RFI is a formal research method used to gather information from industry about products and services. One of the benefits of the RFI process is that information pertinent to a requirement (applicable industry standards, best practices, potential performance measures, cost structures or pricing methodologies, and feedback on innovative items) is obtained in real time directly from the Vendor community. An RFI template is located on the [SPB website under Procurement Forms & Templates](#).

**Publication.** RFIs are published on eMACS, the State’s electronic Acquisition and Contracts System, or are submitted to appropriate professional- or trade organizations. This has the benefits of using venues that optimize access by the Vendor community and ensuring Vendor communications only occur with designated POCs. By establishing a prescribed communications protocol at the beginning of the RFI process, there is no competitive advantage granted within the Vendor community.

**Informational Only.** Responding to RFIs is voluntary; there is no downside for Vendors who choose not to participate. Consequently, an RFI cannot be used to pre-qualified Vendors. Vendors do not participate in RFIs for a variety of reasons; for some it is a company policy, for others, they simply don’t see them, or don’t respond to RFIs seeking information readily available on the internet. The number of responses to an RFI, therefore, do not represent industry interest in any procurement initiative.

**Knowledge Transfer.** Because RFI responses are often used to develop requirements definitions for solicitations, it is imperative that no knowledge transfer take place (information from an RFI response being used in such a manner that a Vendor is given an advantage in a procurement). In the event that a knowledge transfer does take place or a vendor assists with the development of a solicitation, that vendor is barred from responding to the event. Note: It is a best practice for RFI activities to conclude prior to drafting requirements documents.

**Market Research.** Market Research is a term for a collection of methods used to obtain information relating to the size of potential Vendor pools, pricing, industry standards, market trends, and for determining whether items/services are available commercially. Market research includes on-line research, review of industry periodicals, information obtained from professional organizations, attendance at trade shows, discussions with other customers, and consultations with industry representatives.

**Historical Spend Analysis.** By studying historical purchasing data, the State identifies potential cost savings from consolidating purchases, or timing deliveries differently. For instance, a study of agency spending patterns may reveal that the State is missing a volume-discount opportunity that could be realized by consolidating purchases under a state-wide vehicle.

**Evaluation Criteria.** Evaluation criteria reflect the essential qualities or performance requirements necessary to achieve the objectives of the contract. They are stated within the solicitation and are critical to the Source Selection process.

**Objective.** The primary objectives for every acquisition are to conduct fair and impartial solicitation- and evaluation processes, and to obtain the best value for the State. One aspect of ensuring fairness in the evaluation process is by notifying Vendors of the basis for contract award. For example, will award be based on price only, or will it involve a cost/price-technical trade-off? Another critical aspect of a solicitation is ensuring the evaluation criteria are clear, concise, fair, logical, and relate directly to the requirement.

**Weighting.** Each solicitation identifies both the evaluation criteria and the relative weight assigned to each criterion. The weight assigned to each criterion correlates directly to its importance.

**Evaluation Criteria.** It is common for there to be three criteria which broadly address the following:

- the Offeror's proposed methods, processes, procedures, product, etc.
- the Offeror's technical qualifications, past performance and experience; and
- the Offeror's proposed price.

Agencies often include other criteria such as Management Plan, Key Personnel, etc. Further, when Vendors receive additional points for possessing a national accreditation, this criterion is stated in the solicitation so all Vendors are notified; if the national accreditation information is not requested in the solicitation, Vendors who fail to demonstrate it cannot be penalized. The State Procurement Bureau has examples of evaluation criteria.

**Describing the Process.** At a minimum, solicitations identify the evaluation criteria and either their corresponding weights or relative importance, as well as the evaluation process itself. Some agencies prefer to provide detailed information in the solicitation regarding how each criterion is broken down into smaller units or sub-criteria, or simply include a copy of the evaluation scoring sheets as an attachment to the solicitation. Either approach is acceptable.

**Scoring Matrix.** A solicitation's Evaluation Criteria Scoring Matrix is always finalized prior to issuing the solicitation. The scoring matrix is discussed with the evaluation committee so members have an understanding of both the evaluation criteria and the process.

**Price Reasonableness.** Typically, the cost/price criterion is evaluated on either a "reasonableness" basis, or on objective criteria. A reasonableness assessment of a proposed cost/price considers factors such as the appropriateness of cost metrics chosen by the Vendor (labor categories chosen, material identified, etc.), and its cost realism (the impact of any identified assumptions or constraints on the proposed price). In contrast, an objective assessment of a proposed price relies on a mathematical formula, rather than independent judgement to calculate the score. Regardless of the scoring method used for the price criterion, COs ensure it is appropriate for the requirement. (For instance, objective criteria are not suitable for consulting services procurements because State law requires prices to be evaluated based on the reasonableness of the proposed fees for services.)

**Objective Criteria.** Exclusive reliance on reasonableness criteria for pricing may not be suitable for non-complex procurements; mathematical formulas are often used for these. A formula for simple purchases is as follows:

$$\text{Price Score} = \text{Lowest Price} / \text{Price of Response Being Evaluated} \times \text{Maximum Available Points}$$

Price/cost formulas are available from the State Procurement Bureau.

**Risk of Protest.** The manner in which the State conducted the solicitation evaluation process is the first place an unsuccessful Vendor will look in order to understand why their firm was not awarded the contract. It is when the State fails to adhere to the published evaluation criteria, the evaluation process, and/or basis for award that Vendors legitimately and successfully protest. By adhering to the standards and processes in the solicitation, all parties will be satisfied, regardless of the outcome, because both the State and the Vendors will have followed the published evaluation criteria, the evaluation process, and/or basis for award.

## Terms and Conditions.

**Overview.** Clear terms and conditions are the most effective means of protecting the State from unintended risk. For expedience and consistency, it is common for contracts to include standard terms and conditions, often referred to as "boilerplates." Unless SPB approves an exception, each State agency uses the most current version of the SPB's procurement forms and standard terms and conditions, including (but not limited to) the following:

- Standard Terms and Conditions (RFP)
- Standard Terms and Conditions (IFB)

Requests for exception(s) and/or change(s) must be sent to SPB for approval. Check out our [forms, templates, and boilerplates](#).

**State's Rights Reserved.** While the State has every intention to award one or more contract(s) resulting from each solicitation, issuance of a solicitation in no way constitutes a commitment by the State to award and execute a contract. Upon a determination that such action(s) would be in its best interest, the State, in its sole discretion, reserves the right to:

Cancel, or terminate any solicitation (18-4-307, MCA);

- Reject any and/or all proposals received in response to an RFP (ARM 2.5.602);

- Waive minor variations in a bid, offer, or solicitation (ARM 2.5.505.);
- Not award a contract, if it is in the State's best interest (ARM 2.5.602); and
- If awarded, terminate any contract if adequate funds are unavailable (18-4-313, MCA).

## Payment and Pricing Terms.

**Overview.** Payment- and pricing terms detail how payment(s) are made to whom, and/or costs reimbursed under the contract. A thorough understanding of the requirements and industry standards is needed by COs to develop appropriate payment- and pricing terms.

**Alignment.** In effective contracts, the requirements and pricing terms are aligned, and the pricing terms are consistent with industry standards. Contracts include a price sheet, or other document that identifies the products and services and the associated units of measure that are the basis for payment (e.g., each, job, lot, month). For example, in an equipment purchase, the State will determine whether the pricing- and payment terms are (1) a lump sum price that includes the cost for the equipment, shipping, and installation, or (2) a separate line-item price for each individual component.

**Timing of Payments.** An essential component of payment terms is the timing of payments. When and how the State makes payments is clear; for example, will the entire amount be paid at the end of the project or will the Contractor bill in arrears for work performed monthly, or quarterly? (Best practice is that each payment reflects the value of the work performed.) For projects with long-term implementation schedules, the State may divide contract payments into smaller amounts that reflect an increment of work or deliverable. This is an effective technique for managing financial risk; the scope of any dispute between the State and Contractor is contained to a discrete deliverable, rather than the entire contract.

**Disclosure of Budget.** The State does not typically disclose its budget in a solicitation because it may either (1) result in Vendors bidding to the State's identified budget rather than offering competitive pricing, or (2) discourage Vendor participation if the established (initial) budget is not commercially reasonable. (However, when the State has an "absolute do not exceed" cost, that information is in the solicitation.)

**Reimbursement Methodologies.** Payments are structured to compensate the Contractor fairly and to encourage timely and complete performance of the contract. In addition to "full" and "partial" payments, the State may allow "advance" or "early" payments or may withhold amounts (retainage) from the Contractor.

**Advance Payment.** The State does not pay for supplies or services before their delivery unless an advance payment is necessary and serves a public purpose. Exceptions include lease costs, subscriptions, and maintenance contracts. Agencies that make advance payments to Contractors are responsible for pursuing legal remedies to recover payments should it be warranted.

**Early/Prompt Payment and Discounts.** Prompt-payment discounts are reductions in payments due to the Contractor in exchange for rapid payment. For example, if a Contractor offers 2%/10 Net 30, the State will take the two percent (2%) discount if it pays before or by the 10th day; if the State waits the full 30 days, it owes the Contractor the full amount. The State's policy on payment scheduling prohibits agencies from making payments earlier than the payment due date unless:

- a discount is specified in the contract and is taken, or
- the payments are required by law or contract, or other obligation to the Contractor.

A Contractor's request that its invoice be paid upon receipt does not create an obligation on the State to make the early/prompt payment to the Contractor. For questions regarding Early/Prompt Payment, please contact State Procurement Bureau.

Note: Early/prompt-payment terms are not considered during solicitation evaluation phase.

**Retainage.** If permitted by the contract, the State may withhold a set amount, or percentage of each payment due. Upon completion of the project, the Contractor invoices for outstanding work and for the retainage, which is payable in full upon acceptance of the work.

**Invoice Requirements.** Solicitations and contracts specify invoicing procedures. The Contracts Manager monitors both the State's and Contractor's compliance with the procedures to ensure invoicing and payment for products and services are in accordance with contract terms. Although recommended for all procurements, agencies often implement procedures to detect and report double-billing, and review agency payment and reimbursement methods and rates biennially.

**State and Federal Taxes.** Purchases made for the State are exempt from the imposition of certain taxes; standard language regarding taxes is included in every solicitation and contract. In addition, a tax exemption statement appears on the front of each contract. When a contract requires supplies to be delivered, the State is exempt from the tax paid by Contractors on behalf of the State for materials incorporated into the supplies delivered. When fulfilling a State contract, the Contractor pays applicable tax on the purchase or rental of equipment, accessories, and repair or replacement parts for its equipment, unless the equipment or materials will be used entirely for the State's project. State and Federal Tax Exemption Certificate forms are available in the [Procurement Forms](#).

**State and Local Sales Tax.** The State is exempt from paying State and local sales taxes (city, transit authority, etc.), and Federal excise taxes for specified commodities. Taxes of other states are not applicable to purchases when the shipment type is free-on-board (FOB) destination to a Montana location.

State agencies are required to pay Montana State motor fuels tax on gasoline and diesel fuel. However, MCA 15-70-425(2)(a) allows agencies a refund of the taxes paid on special fuel (aka diesel) for both on- and off public road- and highway use. There is no provision for refund of the gasoline taxes paid to agencies when the gasoline is used in vehicles traveling on the public roads and highways of Montana, but agencies may request a refund of State motor fuels taxes paid on gasoline used in off-highway equipment. The Department of Transportation POC for motor fuels tax refund information can be reached at 406 444-7664.

**Dyed Fuels.** Instead of buying tax-paid special fuel (aka diesel) and applying for a refund, agencies often use dyed special fuel in government-owned vehicles and equipment. No state or federal tax is collected, and the fuel may be used legally both on- and off public roads. For information on dyed special fuel at the Montana Department of Transportation, please call 406 444-0806.

## Risk Mitigation Measures.

**Financial Capability.** For high-risk and/or high-dollar procurements, COs require Vendors to provide evidence of financial capability to perform the services required by the solicitation, as well as all services offered in proposals. For capital-intensive projects, solicitations require disclosure of the sources of resources the Vendor will use to enable it to perform under the contract. The State reserves the right to determine the financial integrity and responsibility of a Vendor and to reject a proposal on



the grounds of its lack of financial soundness. The following may be required to assess the financial viability of a Vendor:

- A copy of the most recent audited financial statements, including financial statements with all sub-schedules and footnotes, to include balance sheets, profit and loss statements, change in financial position and management letters, with findings and responses to findings; or
- If audited financial statements are unavailable, unaudited financial statements compiled, reviewed and attested by an independent certified public accountant or certified public accounting firm.
- Depending on the procurement, the State may determine that financial statements certified as accurate by the Vendor's chief financial officer are acceptable. If there is a solicitation requirement for financial data, the State must have a resource or subject matter expert qualified to review it.

**Insurance.** While the State is self-insured, the public generally is not. Insurance is a common risk-mitigation measure employed by commercial entities and individuals. When a contract requires a Contractor to carry insurance (or Bond), it should cover claims against the Contractor as well as costs the State might incur. The insurance coverage must be effective from the commencement of the contract and remain in place with no lapse at any time during the contract. Solicitations require insurance policies from insurance companies licensed in Montana with at least an "A" rating (from A.M. Best Co., etc.) to reduce the likelihood of a Contractor being represented by a financially unsound carrier. There are many types of insurance policies; COs are knowledgeable about which insurance policies are suitable for each purchase and ensure dollar values are consistent with risk of non-performance. Common insurance policies carried by Contractors are discussed in the following paragraphs.

**Commercial General Liability.** These are policies that protect business organizations against liability claims for bodily injury and property damage arising out of premises, operations, products, and completed operations; and personal injury liability. The standard commercial liability policy excludes coverage for damage to work performed by the insured or to personal property in the care, custody, and control of the insured. It is intended to address damage incurred by a third-party. The State can be sued for vicarious liability for these damages.

**Professional Liability.** These are policies designed to protect professionals against liability incurred in performance of their professional services. Most professional liability policies only cover economic or financial losses suffered by third parties and exclude bodily injury and property damage, which is intended to be covered by the general liability policy.

**Workers' Compensation.** This is an insurance program that helps people with work-related injuries and illnesses. It does not apply to sole proprietors. Employees covered by workers' compensation obtain medical care to treat their work-related/incurred injuries and illnesses. It may also provide payments to replace an injured employee's lost income, up to time- and dollar limits set by law, compensation for burial expenses for employees killed on the job, and death benefits for dependents of employees killed on the job.

**Commercial Umbrella Excess Liability Coverage.** This type of policy is designed to provide protection against catastrophic losses, and generally supplements primary-liability policies, such as the Contractor's auto policies, general liability policy, watercraft and aircraft liability policies, and employer's liability coverage. An umbrella policy serves three purposes:

- It provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims,

- It picks up where the underlying policy leaves off when the aggregate limit of the underlying policy is exhausted by the payment of claims, and
- It provides protection against some claims not covered by the underlying policies.

**Automobile.** This protects the insured against financial loss because of legal liability for automobile-related injuries to others, or damage to their property by an automobile. Automobile coverage may include liability coverage of bodily injury, property damage, medical payments, and physical damage.

**Other.** Depending on the procurement, the State may require Contractors to provide specialized insurance policies, such as:

- Cyber liability;
- Medical malpractice;
- Builder's risk;
- Business interruption.

When guidance is needed, Legal Counsel or the State Office of Risk Management (SORM) is consulted.

**Surety Bonds.** Solicitations provide notice if a bond is required and identifies what forms are acceptable (e.g., irrevocable letter of credit or cashier's check). The three most common forms of surety bonds used in the procurement process are bid bonds (deposits), performance bonds, and payment bonds. Use of a bond requirement in a solicitation may restrict competition, delay award, and/or increase the cost of the contract as the cost of the bond is passed on to the State by the Contractor.

## Warranties.

**Overview.** A warranty is an assurance that specific facts or conditions are either true or will happen. A warranty may be either express (stated) or implied and is legally binding. Warranties, among other things, may protect the State against poor workmanship, intellectual property violations of third parties, malfunctioning products, and debts. Warranties become effective once the State has accepted the product or service and require either repair or replacement of a product, or re-performance of a service, at no additional cost to the State during the warranty period.

**Implied or Statutory.** Unless excluded or modified by language in the contract, warranties and standards are implied or imposed into contracts by Statute or case law. For example, in the sale or lease of some types of personal property or supplies, there may be statutory warranties implied, such as: warranty of title, a warranty that the supplies are merchantable, or a warranty that supplies are fit for a particular purpose.

**Extended Warranties, and Maintenance Agreements.** An extended warranty, sometimes referred to as maintenance agreement or service contract, is a repair- and-replace service available from a manufacturer or dealer for a cost. It is typically available for products such as machinery, appliances, and electronics. Caution is exercised, as extended warranty terms often differ from the warranties for a new item.

**Limitation of Liability (LOL) Clauses.** Limitation of liability (LOL) clauses limit potential breach-of-contract damages. LOL clauses alter the extent of liability otherwise recoverable at common law. Such clauses establish the maximum liability or exposure of one party for damages that may be recovered against a contracting party if there is a valid claim. (In the absence of controlling public policy, Montana



courts, which have a history of supporting freedom of contract, consistently recognize that parties are permitted to draft legally enforceable agreements with minimal judicial intervention and that LOL clauses do not violate public policy.) Under common law, parties are only liable for damages that are foreseeable at the time of contracting. Often, an LOL clause is a simple restatement of the principle that neither party is liable for unforeseeable losses suffered by the other. More robust LOL clauses also limit foreseeable losses: either arising out of certain kinds of claims, such as infringement or disclosure of confidential information, or putting a dollar cap on the total losses for which the party can be liable. LOL provisions are enforceable in Montana if they meet a conspicuousness requirement and there is nothing otherwise unconscionable about the contract. The State of Montana expressly provides that parties to public contracts may:

- limit or alter the measure of damages recoverable,
- provide exclusive remedies for breaches, and,
- absent unconscionability, limit/exclude recovery of consequential damages.

Note: A Limitation of Liability clause is required in all State IT contracts.

**Contract Types.** Many factors go into determining what type of contractual vehicle will be used. Ultimately the objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable Contractor risk, provide the Contractor with the greatest incentive for efficient and economical performance, and meet the State's requirements.

**Overview.** To provide flexibility in acquiring the large variety and number of supplies and services required by the State, a variety of contract types is used. Contract types vary according to:

- The degree and timing of the responsibility assumed by the Contractor for the costs of performance; and
- The amount and nature of the profit incentive offered to the Contractor for achieving or exceeding specified standards or goals.

Factors considered in selecting a contract type are:

- Acquisition history
- Competitive environment
- Price/cost estimate
- Type and complexity of the requirement
- Urgency
- Period of performance, or length of production run
- Vendor pool's technical capability and financial responsibility
- Contractor accounting system required
- Concurrent contracts
- Extent and nature of proposed subcontracting

**Fixed-Price and Cost-Reimbursement.** The types of contracts are divided into two broad categories: fixed-price and cost-reimbursement, with sub-types ranging from the most well-defined (firm-fixed-price (FFP)), in which the Contractor has full responsibility for the performance costs and resulting profit (or loss), to the least well-defined (cost-plus- fixed-fee (CPFF)/T&M/LH), in which the Contractor has minimal responsibility for the performance costs and the negotiated fee is fixed. In between are the various incentive contracts, in which the Contractor's responsibility for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance. A brief description of the most commonly used contracts types follows.

**Fixed Price.** Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price (which may include a ceiling price, a target price (including target cost), or both). Unless otherwise specified in the contract, the ceiling price or target price is subject to adjustment only by operation of contract clauses providing for equitable adjustment, or other revision of the contract price under stated circumstances. The State uses firm-fixed-price (or fixed-price with economic price adjustment) contracts for commercial items. The most commonly used Fixed-Price vehicles are described here.

**Firm, Fixed-Price (FFP).** A firm-fixed-price contract provides for a price that is not subject to any adjustment because of the Contractor's cost experience in performing the contract. This contract type places maximum risk and full responsibility for all costs and resulting profit or loss upon the Contractor. It gives maximum incentive for the Contractor to control costs and perform effectively and imposes a minimum administrative burden upon the parties. Firm-fixed-price contracts are used in conjunction with award-fee incentives, or performance/delivery incentives when the award fee or incentive is based solely on factors other than cost.

**Fixed-Price with Economic Price Adjustment (FPEPA).** A fixed-price contract with economic price adjustment provides for upward and downward revision of the contract price upon the occurrence of specified contingencies. Economic price adjustments are based on three general standards:

**Established prices.** Price adjustments are based on increases or decreases from an agreed-upon level in published- or established prices of specific items or the contract end-items.

**Actual costs of labor or material.** Price adjustments are based on increases or decreases in specified costs of labor or material that the Contractor experiences during contract performance.

**Cost indices of labor or material.** Price adjustments are based on increases or decreases in labor or material cost standards or indices in the contract.

**Fixed-Price Level-of-Effort (FPLOE).** A firm-fixed-price, level-of- effort term contract requires (a) The Contractor to provide a specified level of effort over a stated period of time on work that can be stated only in general terms; and (b) the State to pay the Contractor a fixed dollar amount.

**Cost Reimbursement.** Cost-reimbursement contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total costs for the purpose of obligating funds and establishing a ceiling the Contractor may not exceed (except at its own risk) without approval of the CO. These are used when circumstances don't allow the State to define requirements sufficiently to allow for a fixed-price type contract; or uncertainties involved in contract performance don't permit costs to be estimated with sufficient. The most commonly used cost-reimbursement vehicles are described here.

**Cost Only.** A cost contract is an arrangement under which the Contractor receives its costs only, and no fee. They are used for research and development (R&D) work, particularly with non-profit educational institutions.

**Cost Sharing.** A cost-sharing contract is an arrangement under which the Contractor receives no fee and is reimbursed only for an agreed-upon portion of its allowable costs. It is used when the Contractor agrees to absorb a portion of the costs, in expectation of substantial compensating benefits (tangible or otherwise).

**Cost Plus Fixed-Fee (CPFF).** A cost-plus-fixed-fee contract is an arrangement under which the

Contractor receives a negotiated fee that is fixed at the inception of the contract. The fixed fee does not vary with actual costs incurred but may be adjusted as a result of changes in the work to be performed under the contract. This contract type permits contracting for efforts that might otherwise present too great a risk to Contractors but provides the Contractor only a minimum incentive to control costs. A cost-plus-fixed-fee contract is used when the contract is for the performance of research, or preliminary exploration or study, and the level of effort required is unknown; or development and test and using a cost-plus-incentive-fee contract is not practical. A cost-plus-fixed-fee contract is not normally used in development of major systems once preliminary exploration, studies, and risk reduction have indicated a high degree of probability that the development is achievable, and the State has established reasonably firm performance objectives and schedules.

**Cost Plus Award Fee (CPAF).** A cost-plus-award-fee contract provides for a fee consisting of a base amount (which may be zero) fixed at inception of the contract and an award amount, based upon a judgmental evaluation by the State, sufficient to provide motivation for excellence in contract performance.

**Time-and-Materials (T&M).** A Time-and-Materials contract allows the State to acquire supplies or services on the basis of direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, profit; and (actual) costs for materials. A T&M contract is used when it is not possible to accurately estimate either the extent or duration of the work or the costs with a reasonable degree of confidence. It gives no positive profit incentive to the Contractor for cost control or labor efficiency; therefore, close surveillance of Contractor performance is necessary to give the State reasonable assurance that the Contractor is using efficient methods and effective cost controls.

**Labor Hour.** A labor-hour contract is a variation of a T&M contract, differing only in that materials are not supplied by the Contractor (T only).

**Letter Contracts.** A letter contract is a preliminary contractual instrument that authorizes the Contractor to begin manufacturing supplies or performing services. Letter contracts are issued when the State's interests demand that the Contractor be given a binding commitment so work can start, and negotiating a definitive contract is not possible in time to meet the State's time requirements. Letter contracts are as complete and definite as feasible under the circumstances, and always include a price ceiling prior to definitization.

**Indefinite Delivery Vehicles.** Indefinite delivery vehicles are not contracts, but ordering vehicles used to fulfill recurring requirements where the delivery times and/or quantities needed are not known at the time of the establishment of the ordering vehicle. There are three types of indefinite delivery vehicles:

- Definite Quantity
- Indefinite Quantity
- Requirements.

All satisfy the State's requirements through the issuance of Task and/or Delivery Orders, and offer the following advantages:

- Allow State inventories to be kept at minimum levels.
- Permit flexibility in both quantities and delivery scheduling; and ordering of supplies or services after requirements materialize.
- Limit the State's obligation to the minimum quantities specified in the contract.
- Requirements contracts allow faster deliveries when production lead-time is involved, because Contractors are usually willing to have limited stocks when the State will obtain all of its

requirements from the Contractor.

**Response Submission Requirements.** All formal solicitations are issued using the Montana Acquisition & Contracts System (eMACS). (For eMACS resource information, visit [our resources page](#)) Each solicitation has response submission requirements, that include:

Vendor introduction or cover letter requirements;

- Format and numbering requirements;
- Technical Proposal content and submission requirements;
- Information required by Solicitation Attachment(s) and Questions, as appropriate;
- Cost/price proposal content and submission requirements; and
- A requirement for compliance with all instructions and requirements in the solicitation.

Note: Vendors bear all costs associated with the preparation and submission of proposals. Initiate Solicitation Requisition Process. Regardless of the complexity of the requirement, each procurement process begins with the issuance and acceptance of a Requisition. Formal State solicitations are issued using the Montana Acquisition & Contracts System (eMACS). For some procurements, initiating the requisition process involves activities comprised of merely reviewing documents for compliance with procurement law, policy, and procedure before initiating the purchase. For other procurements, the solicitation drafting phase of the Procurement Cycle alone involves a collaborative multi-departmental approach.

**Public Notice.** Solicitations are mailed, posted electronically, or otherwise furnished to a sufficient number of Vendors to secure competition. (The State may require payment of a fee or a deposit for supplying a solicitation.) When it is impractical or otherwise not helpful to the State to furnish solicitations to all Vendors on its central Vendors list, the State selects a sample of Vendors to receive the solicitation directly. The requirements for Public Notice can be found in 18-4-303, MCA, 18-4-304, MCA, and Administrative Rule 2.5.503.

## Communication with Potential Solicitation Respondents.

**Pre-Bid/Proposal Conferences.** The State holds at least one pre-Bid/Proposal conference after the issuance of a formal solicitation, and prior to bid-opening/proposal-closing. These conferences give Vendors the opportunity to pose questions, seek clarifications, and notify the State of any ambiguities, inconsistencies, and errors in the solicitation. It also provides an opportunity for Vendors to develop subcontracting relationships and may provide the State some insight into industry interest in the procurement. Comments made by the State during the conference are not binding until confirmed in writing by the CO. All changes to the solicitation are published through solicitation amendments.

**Mandatory vs. Optional.** Pre-bid/proposal conferences are either mandatory or optional. Conferences are mandatory only if the solicitation is so complex that the State believes attendance is critical for Vendors to understand the requirement.

**Notice and Timing.** Solicitations indicate the date, time, and location of any conferences, and whether attendance is mandatory. To allow time for Vendors to receive and review solicitations prior to pre-bid/proposal conferences, they are usually held no earlier than 10 days after solicitation issuance. If mandatory, the following statement is in the solicitation:

“Failure to attend the pre-bid/offer/proposal conference will result in disqualification of the proposal.”

When mandatory, the CO identifies multiple dates and/or times. All conference attendance is documented on an official record used by the State to verify Vendor attendance. Mandatory conferences require sign-in sheets to be collected at the beginning of the event.

## Question and Answer (Q&A) Period.

**Overview.** Solicitations generally include a Question-and-Answer (Q&A) process for questions and answers from Vendors. Besides allowing Vendors the opportunity to better understand the State's requirements, the benefit to the State is that the Q&A process uncovers ambiguities, errors, and failure to include critical information in the solicitation. Dates by which questions must be submitted, as well as the anticipated release dates of the State's answers, are published in the solicitation.

**Compilation and Publication.** Questions regarding solicitations are submitted to the Q&A Board in eMACS with every question received accounted for by the Board. The Q&A document is published in the solicitation in eMACS with each question listed with its corresponding proposal Solicitation Amendments.

**Amendment.** Amendments are used to make clarifications and to correct errors within solicitations.

**Response Time.** Vendors are given a reasonable time to respond to solicitation amendments, and proposal due dates are generally extended.

**Amendment Identification.** Each amendment is numbered; if more than one is issued, each is sequentially numbered. Each amendment is posted to the eMACS no later than the next business day following its release to the public.

**Communications with State Personnel.** Each solicitation provides for a single POC: the solicitation's CO, through which all communication with Vendors occur. Program staff and other non-purchasing personnel are forbidden from discussing the solicitation with Vendors during the solicitation period (except at the pre-bid/proposal conferences). (Refer to the Vendor Communications Chapter of this Manual.)

# CHAPTER 8: PROCUREMENT METHOD DETERMINATION

**Overview.** The second phase of the Procurement Process involves determining the best procurement method to fulfill a requirement. Procurement method determination is based on several factors, such as dollar value (TCV), complexity, timeliness, and commerciality. This chapter discusses the various procurement methods used by the State in fulfilling its requirements.

**Procurement Methods.** State agencies have several methods available to them for purchasing supplies and services. Generally, these methods are based on the TCV of the requirement.

**Small Purchases (< \$10K).** Purchases estimated to have a TCV less than \$10K are made through whatever processes that best meet the State's needs (oral quotes, written quotes, etc.). These processes are typically streamlined, reducing administrative costs for both the State and Vendors. The contractual vehicle most commonly issued for purchases at this threshold is a Purchase Order (PO). (Procurements are not artificially divided or sequenced to avoid using the other source selection methods set forth in Title 18, Chapter 4, MCA.)

**Limited Solicitations (\$10-\$100K).** If authorized in a Delegation Agreement, purchases greater than or equal to \$10,000 and less than \$100,000 will require an informal Limited Solicitation process. This method requires the agency to:

- solicit and evaluate a minimum of three Vendors, if available;
- use the "Limited Solicitation" form (available on the State Financial Services Division website at [SPB Resources](#)).
- when practical, use the State Vendors List.

(This method does not apply for "controlled items," such as the Requisition Time Schedule, and Term Contracts.) Limited Solicitations are carried out using eMACS; while a less streamlined process than that for a Small Purchase, it is more detailed regarding documentation required to support transactions.

**Formal Solicitations** (purchases greater than or equal to \$100K). Acquisitions of non-controlled items and services that exceed the TCV limitations of a Limited Solicitation are carried out through one of several formal solicitation processes. All formal solicitations are carried out using eMACS.

**Overview.** Two primary methods of formal solicitation are used in Montana State procurements:

Competitive Bids (Invitations for Bids (IFBs)), and  
Competitive Proposals (Requests for Proposals (RFPs)).

These types of competitive solicitations:

- Avoid putting the State at the mercy of Contractors who could charge almost anything for products or services, knowing it's the only place the State can go to meet its requirements.
- Protect Sources of Supply: If the sole Contractor goes out of business, the State has no means to fill its needs.
- Encourage efficiency and quality: Sole-source Contractors have no incentive to be creative, nor

to improve on what they might perceive as a good thing.

In most instances, competition yields better prices. Competition stimulates creativity by allowing competitive exploration of alternate solutions to program needs. Such exploration is regarded as relatively cheap insurance against a premature or preordained choice that might prove to be costlier or less effective.

**Invitations for Bids (IFBs).** An IFB is a formal, written, competitive method used to obtain written bids from which a contract award, based on lowest price and adherence to specifications, is made to

- the responsive,
- responsible bidder
- presenting the lowest-priced bid.

IFBs are used for procurements \$100K or greater (supplies/services) and are a straight-forward procurement method when compared to a Request for Proposal (RFP). SPB created a Template for the IFB, located in [in our forms and templates](#).

For guidance in bid preparation, reference ARM 2.5.404.

**Requests for Proposals (RFP).** An RFP is a written solicitation for purchases acquired by means of a competitive, negotiated procurement method. With an RFP, the State will make a written award of a contract to the Vendor whose proposal offers the best value for the State, considering price, technical capability, past Contractor performance, etc. as specified within the evaluation factors of the RFP. An RFP is used when

- Factors other-than price are considered when making the award decision,
- negotiations may be desired,
- requirements cannot be described by detailed specifications, and/or
- the Contractor is expected to provide innovative ideas.

This solicitation type is used when an IFB is neither practical nor advantageous. The State of Montana's RFP Guide, and associated forms, processes and procedures are located [on our website](#).

**Contractor Engagement Proposal (CEP) (Tier II).** The Contractor Engagement Proposal process is used when the State wants to request proposals from pre-qualified Contractors. Once the State has identified a requirement for CEP, the process is the same as a standard RFP, to include pre-award (justifications, D&Fs, etc.) documentation, with one exception: final negotiations (timelines, deliverables, payment terms, etc.) between the State and the Tier II Vendor are carried out after the Vendor has been selected for award, and not prior. The list of current Tier II Vendors available for use under a CEP process are identified on [our website](#).

**Sole-Source Procurements.** Under limited circumstances, due to the unique nature of the requirement, the Vendor, or market conditions, the State's need may be such that it can only be satisfied by soliciting only a single Vendor (referred to as a Sole-Source). Because Sole Source acquisitions take place without the benefit of competition, the State is reluctant to pursue this procurement method. Sole Source procurements for services or supplies exceeding \$10K are permissible under the following circumstances:

- The compatibility of current services or equipment, accessories, or replacement parts is of paramount consideration;
- There is no existing equivalent product; or



- Only one source is acceptable, suitable, or available.

In cases of reasonable doubt, competition should be solicited. For purchases equal to or greater than \$10K, and unless specifically authorized in an agency delegation agreement, the SPB makes the determination regarding whether a procurement will be sole-sourced. A request by an agency that a procurement be restricted to one vendor is accompanied by a written justification.

COs maintain a record of all sole-source procurements with a value equal to or greater than \$10K, to include the justification used. If an extension, or renewal of a sole-source contract is necessary, a new Justification is required.

Sole-Source is distinguished from "Sole Brand" in that under "Sole Brand," several Vendors are available to distribute a specific brand of equipment/software, etc. Upon approval of a Sole-Brand procurement, a formal solicitation process begins.

A Sole Source Justification Request form must be completed and submitted to SPB through the eMACS system.

**Exigency Procurements.** Under limited circumstances, the State needs the flexibility to make "exigency" purchases, which are made without following normal purchasing procedures due to unexpected events or conditions that require immediate action. Exigency procurement is not authorized because of:

- poor planning on the part of the State;
- convenience, or preference, on the part of the State;
- a desire to prevent funds from reverting at the end of the fiscal year, or
- any reason that seeks to circumvent regular procurement methods.

Exigency procurements equal to or greater than \$10K are limited to those supplies and services necessary to meet the exigency. The determination whether a procurement shall be using exigent processes is made by the CO. The determination is in writing and states the basis for the exigency and for the selection of a particular Vendor. Procedures used assure that the required supplies or services are procured in time to meet the exigency; however, such competition as is practicable is obtained. A record of each exigent procurement is made as soon as is practical and identifies:

- the Vendor's name;
- the amount and type of the contract;
- a listing of the supplies or services procured under the contract; and
- the written documentation of the basis for exigency procurement and the selection of a particular vendor.

An Exigency Declaration must be completed and submitted to SPB through the eMACS system for tracking purposes.

**Direct Negotiations.** When solicitations have no valid response, COs (with approval from the Division) directly negotiate price, delivery, and contract terms with a Vendor or Vendors if the CO determines that a subsequent solicitation would also be unsuccessful.

**Alternate Procurement Methods.** "Alternate procurement method" means a method of procuring supplies or services in a manner not specifically described in law, but authorized by the department under [18-4-302](#), MCA, following the requirements of [18-4-122](#), MCA.



**Comparison of Competitive Procurement Methods.** There are advantages and disadvantages to every procurement method, and it is necessary to consider each within the context of what is being acquired. An IFB, for example, is not an appropriate procurement method for technical services, as the primary characteristics of an IFB are lowest price and meeting specifications with no opportunity for negotiation.

**Best Value to the State.** Montana State law mandates that contract awards be made to responsive and responsible Vendors that provide the best value to the State. This is accomplished by using any of a number of source-selection approaches. In different acquisitions, the relative importance of cost or price varies; when the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost/price plays a dominant role in source selection. The less definitive the requirement, or the greater the performance risk, the more the non-cost (technical, management, past performance, etc.) factors play in source selection. Therefore, COs ensure that the appropriate Source Selection standard (Price Only; Price- and Price-Related Factors; Low Price, Technically Acceptable (LPTA); or Trade-Off) is used as the basis for contract award. The following narratives discuss the various Source Selection processes used by the State.

**Price Only.** Solicitations indicating the basis for award as “Price Only” are those in which the CO will issue one or more awards to the Vendor(s) whose response(s) to the solicitation is/are most advantageous to the State, considering only the price(s) indicated in the solicitation response(s). This method typically involves Invitations for Bids (IFBs), which are issued when:

- requirements that are well-defined and commercial in nature;
- there is a reasonable expectation of receiving more than one response to the solicitation, and
- it is not necessary to have discussions with Vendors about their responses.

**Price- and Price-Related Factors.** A solicitation indicating “Price and Price-Related Factors” as the basis for award is one in which, in addition to the price, factors related to price are included in determining which Vendor(s) will receive award(s). Price-Related Factors are foreseeable by both parties and include:

- Warranty terms,
- Transportation terms (FOB origin, etc.); and
- Federal, state, and local taxes.

Price- and Price-Related Factors solicitations also involve well-defined requirements, and involve most commodities, such as commercial supplies and services, and construction.

**Low Price, Technically Acceptable (LPTA).** The LPTA source-selection process is used when the best value to the State is expected to result from award to the Vendor with the proposal determined to be technically acceptable and presenting the lowest evaluated price. Under this process:

- Solicitations specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for the non-cost/price (technical, past performance, etc.) factors set forth in the solicitation;
- Proposals are evaluated for acceptability, but not ranked (pass/fail only), using the non-cost/price factors in the solicitation;
- Discussions/negotiations are permitted; and
- Cost/Price vs. Technical Merit trade-offs are not permitted.

**Trade-Off.** A trade-off process is appropriate when it is in the best interests of the State to consider award to other-than the lowest-priced proposal, or other-than the highest-rated proposal. When using

this process:

- Evaluation factors and significant subfactors that will affect contract award, and their relative importance, are clearly stated in the solicitation;
- The solicitation states whether evaluation factors (other-than cost/price), when combined, are significantly more important than, equal to, or significantly less important than cost/price;
- This process permits tradeoffs among the cost/price factors and the non-cost/price factors and allows the State to accept other-than the lowest priced, or highest-rated proposal;
- The perceived benefits of a higher-priced proposal merit the additional cost; and
- The rationale for any trade-off is documented by the CO.

**Controlled Commodity.** One component of protecting the tax dollar is to centralize the procurement of "common-use" supplies and services through state-wide (controlled commodity) contracts. While the State Financial Services Division delegates authority to State agencies to make some purchases, major areas of "common-use" supplies and services are controlled by the Division due to both the expertise required to establish the contracts, and the need to ensure the greatest level of competition (and therefore, the lowest pricing) through volume purchasing. Controlled commodities include items from the "Requisition Time Schedule," supplies and services available through "Exclusive Term" contracts, printing, and new vehicles.

**Print & Mail.** The General Services Division (GSD) operates a printing program on behalf of the State and has the exclusive authority to contract for all printing. Approximately 65% of the printing expenditures are procured through commercial Vendors. In consideration of many factors, including complexity, delivery and cost, Print Services, within the GSD, determines whether to produce required documents internally or procure them commercially.

**Vehicles.** Twice each model year (once each model year for patrol vehicles), the State of Montana issues bids for passenger cars and light duty trucks (up to 1 ton). Local Governments include their vehicle purchases with the State's by submitting the proper request forms by SPB-established deadlines. The State solicits bids from Vendors and notifies local Governments of the results. For complete information, contact the State Procurement Bureau at (406) 444-2575.

**Exclusive Term Contracts.** Term contracts are established by the State Procurement Bureau for high-use supplies and services. These contracts offer the advantages of volume buying while relieving agencies of the cost of stockpiling or warehousing items. Term contracts are either issued as "exclusive or "non-exclusive." In most instances, agencies have the option of using a "non-exclusive" term contract, while those identified as "exclusive" are mandatory for use. Under Term contracts, agencies order directly from Contractors, with some requiring further competition. The State Procurement Bureau publishes [a list of all Term Contracts](#).

**State-Wide Contracts.** SFSD requires employees to purchase goods exclusively through state-wide contracts to leverage the benefits of rebates to the State. This includes, but is not limited to, office supplies, paper products, and kitchen disposables.

**Information Technology (IT).** The SPB develops Master (Tier II) contracts for the procurement of IT commodity items, and offers the following categories of contracts through the Master Tier II Program, which are acquired through use of the CEP process:

- Hardware,
- Software,
- Technology-based training,
- Managed services,

- IT Staff Augmentation Contracts, and
- Deliverables-Based IT Services.

The Master Tier II Program leverages the volume buying power of the State to negotiate competitive pricing, which translates into savings for agencies. The IT master contracts offer negotiated discounts on hundreds of products and services. Agencies negotiate even deeper discounts based on individual purchase volumes by issuing pricing requests to multiple Vendors to drive price competition for the final purchase award. See Chapter 8, Contractor Engagement Proposal (CEP)(Tier II) for the CEP process.

**Environmental Services.** The CEP process is also used for Environmental Services. The Tier II Process, Coversheet and Instructions, Statement of Work Task Order, Evaluation Criteria Outline, Scoring Matrix, and Tier II Solicitation Checklist for Environmental Services are at [www.spb.mt.gov](http://www.spb.mt.gov)

**Leases.** A sample Lease Finance Master Agreement, and Lease Finance Schedules [are located on our website](#).

**Total Contract Value (TCV).** For SPB reporting-, review-, and delegation requirements, TCV is defined as “the estimated dollar amount that an agency may be obligated to pay pursuant to the contract and all executed and proposed amendments, extensions and renewals of the contract.” TCV, therefore, is not limited to just the cost for the initial term; but rather by the total value of the contract over a contract’s term as well as any modifications, renewals, and extensions of the contract.

## CHAPTER 9: SOURCE SELECTION

**Overview.** The third step of the procurement process is to select the Source that provides best value to the State. The State conducts evaluations in a fair and impartial manner consistent with Montana law and either the evaluation procedures published in the solicitations or, for informal bidding situations, established by agency written procedures.

**Correctional Institution (CI) Program, State Use Program, and Term Contract Purchases.** State purchases using the following procurement methods have been determined to be best value to the State by Statute or Administrative rule:

- the CI Program,
- the State Use Program, and
- Term Contracts.

Accordingly, the State does not conduct an evaluation process when selecting a Contractor for these purchases.

**SPB Initial Review.** After bids or proposals are opened, the CO determines whether they are responsive to the solicitation (conforming in all material respects to solicitation requirements).

**Single Bid/Proposal.** Before evaluation begins, the CO may investigate why the agency received only one response to a competitive solicitation by:

- Reviewing the solicitation for any restrictive specifications, and
- Contacting several Vendors to inquire why they chose not to respond.

If there are unduly restrictive specifications in the solicitation such that the specified product or service is only available for purchase through a single Contractor, the CO either re-advertises the solicitation or prepares a “Sole-Source/Sole-Brand Justification” for the purchase. Otherwise, the CO considers the reasons that potential, eligible Vendors did not participate in the agency’s competitive solicitation to assess whether it is in the best interests of the State to proceed with the evaluation process or re-advertise with a revised solicitation. If the State decides to proceed with the procurement, the CO either tabulates the bid (only if objective criteria are used for informal bidding or an IFB) or directs the evaluation committee to evaluate the proposal.

### Solicitations-Receipt and Control of Responses.

**Receipt.** Responses must be received on or before the due date and time designated in the solicitation. The terms “Bid opening date” and “solicitation closing date” both describe the deadline for receipt of responses. A response is considered timely if received on or before the published due date and time, and in conformance with the delivery instructions specified in the solicitation. To ensure fairness to all Vendors, no submitted responses are opened or reviewed before the due date and time has passed; and the State may only confirm that a sealed submission has been received.

**Handling of Confidential Information.** Upon receipt at the location specified in the solicitation, responses are marked with the date and time of receipt, and then transmitted to the appropriate official(s). Proposals are safeguarded from unauthorized disclosure throughout the source-selection process. If any portion of a response received electronically or by facsimile is unreadable, the Vendor is

permitted to resubmit the unreadable portion of the response. The method and time for resubmission shall be determined by the CO. For the purpose of determining timeliness, the resubmission is considered as if it were received at the date and time of the original unreadable submission provided the Vendor complies with the time- and format requirements for resubmission prescribed by the State.

**Late Bids and Proposals.** Bids and proposals must be received by the due date and time established in the solicitation. If received after the published date and time, they are considered late, will not be opened, and the Vendors are notified that their responses were rejected because they were not timely. The State then returns the unopened responses to the Vendors (at Vendor expense) or disposes of the response according to the arrangements specified in the solicitation. The only exception to the prohibition against accepting a late response is if an agency's written policy permits the acceptance of a late response due to extenuating circumstances. For example, if an agency has a practice of accepting responses received for up to two business days following the solicitation closing date whenever the agency's main office is closed due to inclement weather events, then this practice must be documented as written policy.

**Withdrawal of Proposal.** Vendors may withdraw responses prior to the opening/closing date and time in a solicitation. Requests to withdraw are made in writing, on company letterhead, or by completing a form prescribed by the agency involved. The preferred practice is for the Vendor to submit the withdrawal of bid/proposal in person and provide appropriate identification (e.g., corporate identification card, photo identification card to match the authorized contact person listed in the response) so the State may verify the request is legitimate. If the Vendor's request is submitted by mail, email, or fax, the agency will notify the Vendor regarding what documentation is necessary to comply with the request.

**Cancellation of Solicitation.** The State may cancel a solicitation at any time. If cancelled, the State will provide notice of the cancellation in the same manner as the issuance of the solicitation. For example, a notice of the cancellation will be posted to eMACS if the original solicitation was posted to eMACS. Cancellation notices contain, at a minimum, the following information:

- State agency name, address, and contact name,
- Purchase requisition number or solicitation number, and
- Reason for the cancellation.

Unless other delivery or disposition arrangements are specified, all responses are returned unopened with a notification letter from the agency issuing the solicitation cancellation.

**Internal Procedures.** Each agency has internal procedures outlining the responsibilities and steps for the receipt and control of responses. Such procedures include, but are not limited to, the following:

- identifying the timepiece that will be used for determining timely receipt of responses, such as mail room clock, time stamp machine, or email server time stamp;
- specifying the marking process used to document the date and time each response is received;
- maintaining a log of responses received, containing the following information: solicitation number, due date and time, Vendor name, date and time response received, and delivery method and, if applicable, tracking number (i.e., email, fax, hand delivery, USPS or other delivery service);
- securing responses until the due date and time;
- outlining processes to be followed after inadvertent opening of responses received hard copy, email, or fax; and
- designating agency staff responsible for each task.

## Bid Tabulation Process.

**Bid Tabulation Process.** As a rule, bids are tabulated when opened, but there are times when this is not practical. It is recommended that the bid tabulation be prepared within a maximum of three business days from the solicitation close date. If the responses to an IFB are evaluated solely on objective criteria, the tabulation is generally conducted by the CO. The following, as applicable, are within the bid tabulation document:

- NIGP Class/Item;
- Confidential or Proprietary declarations by Vendor;
- Contractor (Payee) Identification Number;
- Respondent name;
- HUB Status;
- Price Sheet Line Item Descriptions;
- Manufacturer/Brand;
- Product Number;
- Package Quantity Information;
- Unit Price;
- Delivery Days After Receipt of Order;
- Warranty;
- Comments/Remarks – Include indicators for disqualification and non- responsive; and
- Award Column to indicate the Bidder receiving the award for any given item.

It is considered a best practice for the bid tabulation to be reviewed by a second CO to ensure it was conducted properly. The CO then conducts a due diligence inquiry regarding actual and potential conflicts of interest related to the solicitation. Any actual or potential conflicts of interest are reported promptly to agency Legal Counsel. After contract award, bid tabulation results are available for release through the Montana Public Information Act.

**RFP Evaluation Committee Process.** For RFPs, other-than cost (technical, past performance, etc.) elements are generally evaluated by committee.

**Evaluation Committee.** Evaluation committees are composed of subject-matter experts and stakeholders. Committee members generally have diverse, relevant disciplinary expertise and knowledge of the product or service being procured. Because service on an evaluation committee involves a significant time commitment, care is taken to ensure each scoring member is able to attend all meetings, oral presentations, and site visits.

**Selection.** Evaluation committee member selection generally occurs prior to receipt of responses, with members often having been involved in the procurement planning activities. A program staff member is usually the designated Committee chair, serving as a non-scoring member of the Evaluation Committee. (Depending on the procurement, the Contracts Manager may participate as either a scoring or non-scoring member.) When an agency uses individuals who are not employees, Legal Counsel is consulted to ensure appropriate procedures are implemented to protect the interests of the State.

**Size.** The recommended size of an evaluation committee is three- to five scoring members. To avoid potential individual bias, committees do not have fewer than three scoring members. There is no restriction on how many individuals may comprise on an evaluation committee; however, good judgement dictates that the number of individuals on the committee be limited to the minimum

required to accomplish its purpose.

**Responsibilities.** Each evaluation committee member independently assesses the content of each response using only the criteria and weights published in the solicitation. Accordingly, the evaluation committee members must fully understand the solicitation, be able to critically read and evaluate the responses, and document their decisions in a clear and concise manner.

## Non-Disclosure Agreements and Conflict of Interest Disclosures.

**Non-Disclosure Agreements.** To safeguard the integrity of the evaluation process, individuals serving on an evaluation committee or serving as technical advisors sign a non-disclosure agreement prior to receiving responses or participating in committee activities. Committee members may not communicate with Vendors or anyone else outside the committee regarding responses received or the evaluation process without prior approval of the CO, as appropriate. Examples of permitted communications may include the CO's coordination of the committee's consultation with authorized Technical Advisors and the committee's attendance at oral presentations.

**Conflict of Interest Disclosures.** Due diligence inquiries regarding evaluation committee members and technical advisors are conducted to screen for conflicts of interest related to the responses. It is considered a best practice for the CO to give the names of the Vendors and proposed sub-contractors to the committee members and any assigned advisors prior to providing access to the responses. Any actual or potential conflicts of interest are reported promptly to the CO and/or Legal Counsel.

## Evaluation of Proposals.

**Overview.** Prior to evaluating solicitation responses, COs schedule a meeting with the evaluation committee and advisors to provide them with guidance on the evaluation process and Scoring Matrix. When a numbering system is used to identify committee members and/or track the responses, this system is also explained.

**Responsibilities.** Evaluation committee members are instructed as to their responsibilities, including the critical nature of confidentiality and the integrity of the evaluation process. Committees are careful not to engage in technical leveling, technical transfusion, or other improper activities. Evaluations do not begin until each committee member has signed a Non-Disclosure Statement and a preliminary assessment regarding actual- and potential conflicts of interests has been conducted. The Evaluation Process.

- Documents. Evaluation committee members are provided with documents as applicable to the specific procurement:
- The Solicitation, including all addenda and Q&A documents;
- A list of technical proposals received; and
- A copy of each technical proposal determined to be responsive by the CO (clearly marked with the assigned reviewer's number, if a numbering system is used by the agency).

**Scoring.** Evaluators record their individual scores for each proposal. Each response is evaluated independently against the evaluation criteria published in the solicitation and not compared to any other proposal. Evaluation committee members do not conduct independent research; each member's evaluation is based solely on the member's personal review of proposals and other information authorized by the CO or Legal Counsel (e.g., written clarifications received from the Vendors, oral presentation material, and reference check information).



**Minor Technicalities.** Minor technicalities in responses may be waived. If an evaluator determines that a waiver of minor technicalities is appropriate, this is brought to the attention of the CO for approval; the CO will provide the information to the entire committee to ensure all the evaluators are using the same evaluation standards on the Scoring Matrix.

**Differences of Opinion.** Under no circumstances does any committee member pressure any other member(s) to change evaluation scores. However, if it is apparent that one or more members' evaluation differs significantly from the majority, the committee chair ensures the evaluation criteria were clear to all scoring members and that information was not overlooked or misunderstood. If, after this discussion, a member determines there was a misunderstanding of the criteria, the requirement, or information, the evaluator may provide a revised Scoring Matrix. Best practice for avoiding this scenario is to use the Consensus Scoring method that allows for all members to discuss their scores and arrive at an agreed upon score.

**Multiple Rounds.** Some procurements involve multiple rounds of evaluations that narrow the competitive field (e.g., second scoring round following oral presentations). Evaluators record their scores on the Scoring Matrix following each round. It is considered a best practice to label each Scoring Matrix with the applicable scoring round number or date.

## Communications.

**With Technical Advisors.** If assistance is requested from technical advisors, the evaluation committee routes its questions through the CO. The inquiry is limited to areas related to the evaluation criteria. Evaluators and Technical Advisors do not initiate or reply to communications regarding the solicitation from a Vendor during the evaluation process. To protect the integrity of the evaluation process, only the CO or an assigned attorney communicate with Vendors.

**Between Members.** Discussion of responses/proposals only occurs at evaluation committee meetings, generally with all scoring members present. (A quorum of committee members must be present to begin evaluations.) Communications between two or more committee members related to evaluating proposals or the content of proposals are not permitted outside the presence of the committee. Committee members attend all meetings and participate as required by completing committee responsibilities in the time allotted. Absence from meetings or failing to meet deadlines may result in the removal of a member from the committee, or removal of the evaluator's scoring from consideration.

**Scoring Matrix.** Scoring Matrices are standardized forms used by evaluation committee members to record scores for each proposal. Each Matrix is based on the evaluation criteria and weights published in the solicitation and, if applicable, unpublished sub-criteria. It is considered a best practice for Scoring Matrices to be finalized prior to publishing a solicitation; however, if time doesn't permit, they can be completed prior to the receipt of proposals.

Technical Advisors.

**Overview.** Depending on the procurement, evaluation committees may seek assistance from subject-matter experts to gain a better understanding of certain aspects of both the requirement and technical proposals. Technical advisors are used when an area of subject-matter expertise is not within the skill set of the committee members. For instance, an employee from the agency's budget division may serve as a technical advisor during the evaluation committee's review of the financial capability documentation submitted by the Vendors. Similarly, for an IT procurement, an employee from the agency's Information Security Division may serve as an advisor during the committee's review of the

various data-safeguard standards proposed by the Vendors.

**Non-Disclosure Requirements.** Technical advisors comply with the same Non-Disclosure and Conflict of Interest restrictions applicable to the evaluation committee members. Accordingly, technical advisors do not discuss solicitations with anyone (even evaluation committee members) outside of the committee meetings. COs coordinate all communications between evaluation committee members and technical advisors to maintain the integrity of the evaluation process.

**Price Component.** The price component of a proposal is usually assessed by using either a “reasonableness” standard, or objective criteria.

- For a price criterion being assessed using a reasonableness standard, the evaluation committee conducts the evaluation.
- For a price criterion evaluated using only a mathematical formula, such as for an IFB, it is generally scored by the CO.

It is recommended that the evaluation committee review and score the entire proposal, including the price component, to facilitate a more comprehensive evaluation of proposals (e.g., ensure that the proposed pricing aligns with the proposed products and services).

**Reference Checks.** If required by a solicitation, Vendors submit customer references with their responses/proposals. The CO, or a subcommittee of the evaluation committee, contacts these references to verify the Vendor’s ability to perform the contract requirements. The State reserves the right to use any information or additional references deemed necessary to establish a Vendor’s capabilities. All information obtained during reference checks is documented.

**Format.** The same script or format of questions is used when conducting reference checks, so results are consistent. Reference check questions are prepared prior to a solicitation closing date. When developing questionnaires, the CO generally keeps in mind the types of questions to which the references will respond. For example, many entities will not participate in business reference activities that involve a lengthy questionnaire or questions that appear to ask for an endorsement.

**Timeliness.** The State should not request submission of customer references it does not intend to verify. However, events following solicitation issuance may shorten the procurement timeline such that reference check activities cannot be conducted by the State in a timely manner. When the solicitation requires the submission of references or references are considered as part of the evaluation criteria, an agency decides whether it will verify customer references before the solicitation closing date. When reference checks are not going to be conducted, this determination is documented and placed in the procurement file.

## Clarification of Proposals.

**Overview.** As part of initial proposal evaluations, evaluation committees may decide that clarification is necessary. Accordingly, committees pose questions to a Vendor to resolve conflicting information, apparent ambiguities, or minor clerical errors within the proposal. If a clarification to the proposal is necessary, the CO or Legal Counsel contacts the Vendor, requests the clarifications, and distributes the response to the committee. Acceptable Vendor’s clarifications are in writing and signed/issued by an authorized representative.

**Clarifications are Not Opportunities to Change Solicitation Responses.** Vendor clarifications are not used to “cure” deficiencies in proposals, nor to revise them. Clarifications are used to understand the

information provided in proposals. A request for a Vendor to clarify its proposal is not negotiating the specifications or terms and conditions; a request to clarify does not provide one Vendor an advantage over another.

**Competitive Range Determination.** After the evaluation committee has completed its scoring of proposals, the CO determines which make up the Competitive Range of Offerors (those responses determined to have a reasonable chance of receiving award). Making a Competitive Range determination is an objective means of narrowing the field of Vendors to participate in subsequent evaluation activities, such as oral presentations. Generally, natural breaks in scores or pricing make determining the Competitive Range relatively uncomplicated. Contact the SPB for examples of, or assistance with, a Competitive Range determination.

**Oral Presentations.** After reviewing proposals, and if expressly included in the solicitation, COs conduct oral presentations. Oral presentations provide an opportunity for Vendors to highlight the strengths and unique aspects of their proposals and to provide answers to clarifying questions the State may have. Presentations that include demonstrations of product functionality are recommended.

**Overview.** Oral presentations are usually scheduled for all Vendors within the Competitive Range but may be limited to the top-ranked Vendor(s). Before oral presentations, the Evaluation committee prepares its list of clarification questions for the presenting Vendor(s).

**Impartial.** Oral presentations and demonstrations are fair to all parties. The time allowed and the agenda format is the same for all presenters. Because some presenters may believe there is an advantage to the order in which they present, it is considered a best practice to randomly select the presentation order. Random selection is mostly commonly achieved by providing a list of available presentation times to the vendor pool, requesting a top three list of preferred times from the vendors, and then scheduling on a first-come, first-serve basis.

**Written Follow-Up.** As part of the oral presentations process, Vendors provide written copies of material being presented. Meeting minutes and evaluator notes also document material presented during oral presentations.

**Scoring.** Upon conclusion of each oral presentation, each evaluation committee member completes another round of Scoring, using the evaluation criteria and weights published in the solicitation. To protect the integrity of the evaluation process, committee members who evaluated the written proposals generally evaluate the clarifying information obtained from the Vendors during presentations and site visits.

**Best and Final Offers.** Under Montana law, the procurement officer may request a BAFO if information is required to make a final decision. The State reserves the right to request a best and final offer based on price/cost alone, but the State rarely requests a BAFO based on cost alone.

**Evaluation Committee Recommendations.** Once the evaluation- and discussion processes are complete, the committee chair prepares, signs, and dates the master Scoring Matrix, and proceeds with an award recommendation. Each committee member reviews the Master Score Sheet to verify the accuracy of the scores. The committee ensures raw data is accurately transcribed into formulas, and that formulas are properly loaded into electronic spreadsheets/workbooks when such electronic aids are used. If solicitations allow, committees may recommend a contract award to more than one Vendor.

## Preferences.

**Overview.** Evaluative preferences are established by Statute. With the exception of the Reciprocal Preference (MCA 18-1-1), and Preference to Blind Persons (MCA 18-5-502, when State property is proposed to be made available to private persons for use as a vending facility), Montana law does not grant an evaluative preference to either small businesses or disadvantaged businesses, including women- or minority-owned companies. (Information on minority business enterprises (MBE) and women's business enterprises (WBE) can be obtained by contacting the Montana Department of Transportation Disadvantaged Business Enterprise (DBE) Program.)

**Reciprocal Preference Law.** MCA 18-1-102(1)(b)(2). The State of Montana applies a reciprocal preference against a Vendor submitting a bid from a state or country that grants a residency preference to its resident businesses. A reciprocal preference is only applied to an Invitation for Bid for goods/supplies or non-construction services for public works as defined in section 18-2-401(9), MCA, and then only if federal funds are not involved. For a list of states that grant resident preference, [see our vendor resources page](#).

**Resolving Ties.** A tie occurs when two or more responses receive the same score after evaluation. Priority of the claimed preference is given in the sequence listed below:

- Blind Persons
- Montana Agricultural Product
- Montana Product
- Montana Bidder
- U.S. Product

**Contractor Compliance Verifications.** State law only allows agencies to solicit offers from, award contracts to, and consent to subcontracts with responsible Contractors. The following systems and processes assist COs in making Responsibility determinations.

**Request for Documents Notice.** At the culmination of the RFP process, the CO issues a Request for Documents Notice to the successful Offeror. During this period, documents required by the State to complete the procurement process are requested from, and are submitted by, the apparent successful Vendor.

**Suspension & Debarment Check.** The State of Montana maintains a Suspension & Debarment List of Vendors prohibited from doing business with the State. [The list is maintained by SPB](#).

**System for Award Management (SAM) Check.** The Federal Government keeps track of Contractors that have been suspended, debarred, and otherwise declared ineligible for Federal awards. The [General Services Administration's System for Award Management](#) contains Federal exclusion (Suspended and Debarred Vendors) records. An Exclusion record in SAM provides COs with the following:

- Names and addresses of the entities debarred, suspended, proposed for debarment, declared ineligible, or excluded or disqualified under the non- procurement common rule, with cross-references when more than one name is involved in a single action;
- Name of the agency or other authority taking the action;
- Cause for the action, or other statutory or regulatory authority;
- Effect of the action;

- Termination date for each listing;
- Unique Entity Identifier;
- Social Security Number (SSN), Employer Identification Number (EIN), or other Taxpayer Identification Number (TIN), if available; and
- Name and telephone number of the agency point of contact for the action.

**Verification of License of Surety Company.** When verification of surety authority and AM Best rating from the Auditor's office is required, the Vendor must submit, and the CO will verify the information within Verification of License of Surety Company.

# CHAPTER 10: CONTRACT FORMATION AND AWARD

**Overview.** This Chapter identifies the legal principles and procurement processes involved in building and completing a contract upon completion of a solicitation process and after final award recommendation has been made.

**Award Notifications/Notice of Intent to Award (NOIA).** After the evaluation process is complete and supporting documents have been approved, the CO will post the Notice of Intent to Award to the public bids site and awards the contract in eMACS. Following this step, tailored award notifications will be emails to:

- The Vendor awarded the contract (a “Request for Documents”);
- Program- and Finance staff; and
- Unsuccessful Vendors.

Award evaluation materials are included with the award notices and are available for public view.

**Notice of Intent to Award (NOIA):** The fifth phase of the Procurement Lifecycle is the notice of intent to award and contract negotiations. Once the winning vendor is selected, the NOIA is posted to the public bids site through eMACS. The NOIA includes the following pertinent information.

- Solicitation Title/Event Name
- Solicitation Number
- Solicitation Close Date
- Notice of Intent to Award Posting Date
- Issuing Contracts Officer/Contact Information
- Apparent Successful Offeror(s)
- Unsuccessful Offeror(s)
- The final bid tab or scoring matrix.

The NOIA will be open for a 7-day period prior to contract award. During this period, comments from the public regarding the proposed award may be submitted to the Contracts Officer listed. Once the NOIA is posted, solicitation documents are available for inspection upon request subject to 18-4-304, MCA, and 18-4-126, MCA.

Before a contract can be finalized, the agency may have the ability to refine the agreement with the awarded vendor. This phase provides an opportunity for the parties to negotiate non-material changes to a contract’s terms and conditions.

**Contract Refinement.** Contract refinement begins after

- selection of the highest scoring Offeror,
- the recommendation for award has been received from the evaluation committee, and
- final approval from the CO has been given.

**Allowed Refinement.** Contract refinement is limited to non-material changes in contract language after contract award. This includes, but is not limited to, the specifics of the supplies or services in the solicitation, payment schedules, and project deadlines. Material requests for exceptions to the contract may become negotiation items if they meet the following criteria:

- The requested contract amendment language was submitted to the Q&A Board in eMACS by the closing date for questions;
- Requests must include an explanation detailing why the exception is being sought, what specific effect it will have on the Offeror's ability to perform the contract, and include the proposed language from the Offeror;
- The agency agrees, in whole or in part, to negotiate the specific topic presented by the Offeror as described above; and
- The state, at its sole discretion, identifies the topics that will be negotiated.

## Contract Formation.

**Overview.** Fundamentally, the purpose of a written contract is to serve as a reference document that records the terms of an agreement to prevent misunderstanding or conflict, and creates a legal, binding, and enforceable obligation. Montana courts define a contract as a promise, or a set of promises, to which the law attaches legal obligation. The law regards the performance of these promises as a duty and provides a remedy for the breach of this duty. Contracts that deviate substantially from requirements defined in the solicitation are open to challenge from unsuccessful Vendors. Awarding a different project from the one solicited undercuts competition and the contract is void. For example, if a solicitation is for bicycles but the award is issued for scooters, that award undermines the specifications of the solicitation and would be considered a substantial deviation from requirements.

**Approach to Contract Formation.** Creating contracts for the State is an exercise in balancing potential conflicting interests. These interests include the State's requirements, fiscal constraints, statutory requirements, and the Contractor's requirements. Most often, conflicts over contracts arise well into a contract period when memories are unreliable, and representatives of the State and/or Contractor may have changed. Clarity and completeness of contractual terms are of primary importance, because contract law does not allow parties to add terms not part of the original contract without the consent of both parties.

**Legal Elements of a Contract.** The essential elements necessary to form a binding contract are described as follows:

- Offer
- Acceptance
- Legal Purpose
- Consideration
- Certainty of Subject Matter
- Competent Parties

**Offer.** An offer is defined as the manifestation of the willingness to enter into a bargain so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it.

**Acceptance.** Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. An acceptance does not change the terms of an offer; if it does, there is no "meeting of the minds" and the offer is rejected. A material change in a proposed contract constitutes a counteroffer, which must be accepted by the other party for there to be a binding contract between the parties. Generally, agencies structure their contract processes so that they have the last look at the document and the last opportunity to accept or reject.



**Legal Purpose.** The objective of the contract must be for a legal purpose. For example, a contract for illegal distribution of drugs is not a binding contract because the purpose for which it exists is not legal. A contract for which the agency does not have statutory authority may be void.

**Consideration.** Consideration is present when each party receives something under the contract. The same concept can be described as “mutuality of obligation.” Mutuality of obligation refers to the idea that both parties make binding promises under the contract. Consideration can take many forms other than money. For example, the promise not to do something can be a valid and valuable consideration.

**Certainty of Subject Matter.** To be enforceable, the parties must have agreed on the essential terms of the contract. A contract is legally binding only if the essential terms are sufficiently defined to enable a court to understand the parties’ obligations. For example, in an agreement to lease office space, the location of the offices is an essential term. The lack of non-essential terms will not typically void a contract. For example, if an office lease fails to specify how rent will be paid, a court would likely say that the rent can be paid by cash or check or other generally accepted methods. Historically, Montana courts prefer to validate transactions rather than void them, but courts may not create a contract where none exists, and they generally may not insert or eliminate essential terms. A contract that includes an agreement to reach an agreement on an essential term will not be upheld. For example, the amount of monthly rent could be an essential term in a lease agreement. If the contract merely says that the parties will agree on that amount, the court cannot order them to agree. The court cannot supply an essential term. Because an essential term is missing, there is no contract. If the contract says, instead, that the rent will be calculated from a certain benchmark, or determined by a third-party expert, that is not merely an agreement to agree. The contract references an objective method for determining the rent, and thus it could be enforced.

**Competent Parties.** Parties to a contract must be competent and authorized to enter into a contract.

A competent party in a contract is an individual who is legally eligible to engage in a contractual agreement and understands the implication and potential outcomes of the accord.

An authorized party refers to an individual who has been legally empowered to endorse a contract on behalf of an entity such as a corporation or governmental agency, thereby binding the entity to the terms and conditions stipulated in the contract.

**Contract Terms.** This Chapter provides guidance regarding essential terms (clauses and provisions) that agencies include in contracts to protect the interests of the State, and recommended terms agencies may include. The State recognizes the unique contracting needs of individual agencies, and provides enough flexibility to accommodate those needs, consistent with protecting the interests of the State.

Required Elements. Each contract includes terms addressing the following:

- Identification of the contracting parties
- Scope- and Quality of work,
- Quantity
- Price and payment Terms
- Delivery/Period of Performance/Ordering Period
- Termination provisions

By their very nature, these terms are transaction-specific; therefore, the text will vary for each contract.

**Essential Terms.** There are provisions and clauses (terms) that are statutorily required for Montana State procurements. For each required term, both standard- and alternate text are provided that serve

as safe harbor for compliance with the applicable Statute(s). It is recommended that COs seek assistance from Legal Counsel prior to modifying text, as slight variations may result in non-compliance with Statutes and Rules.

**Recommended Terms.** While recommended terms are not mandated by Statute to be included in every contract, they are not “optional.” Rather, the recommended terms are provisions and clauses that are included in most contracts. They include:

- Administrative provisions,
- Provisions that allocate risk and specify remedies,
- Provisions that relate to the identification and safeguarding of confidential information, and
- Provisions that relate to rights and ownership of work product and intellectual property.

Agencies include appropriate recommended terms in each contract. The determination as to the appropriateness of a particular contract term is dependent on the characteristics of the transaction. These contract clauses have sample text because it is expected that the wording of the recommended terms will vary due to the unique contracting needs of the individual requirements.

**Boilerplates.** It is common for agencies to want to use their own standard Terms and Conditions, often referred to as “boilerplates,” to provide uniformity across their transactions. COs must be careful to avoid including terms and conditions from other contracts, even boilerplate, without a thorough and independent review of how they relate to the current procurement.

**Authority to Contract.** A threshold issue in State contracting is whether an agency has statutory authority to contract. Contractors are not to presume or rely on the implied authority of an Officer or agency of the State to contract. Only persons having actual authority (demonstrated through issuance of a Contracting Warrant, or similar instrument) to act on behalf of the State bind the State. The powers of all State officers are set by law. People dealing with State officers must be aware of the limits of the Officers’ authority.

## Contract Award.

**Overview.** To ensure compliance with procurement laws, pre-award due diligence/compliance checks are conducted. These reviews consist of confirmation that:

- internal reviews and approvals have been performed,
- required disclosure statements have been completed, and
- award to the selected Vendor is not prohibited by law.

**Contract Award Registration.** Within 10 days after contract award, each Contractor, regardless of State residency, completes and returns a “1% Contractor’s Gross Receipts Contract Award Registration Form (CGR-1)” to the Contract Manager.

**Award Announcement.** After contract award, a notification of award is posted to eMACS. The eMACS notice of award includes the following information:

- Requisition Number (as it was listed on the eMACS solicitation posting);
- Class/Item Code;
- Agency Name;
- Proposal Title (as listed on the eMACS solicitation posting);
- Dollar Amount Awarded;

- Proposal Status (e.g., full award, partial award, multiple award, canceled);
- HUB Certification Status;
- Contractor Name;
- Contractor Address.

Depending on the procurement, agencies may notify each unsuccessful Vendor of their non- selection. The CO maintains proof of the eMACS posting in the procurement file.

**Debriefings.** Debriefings are post-award events where the State and (usually) an unsuccessful Offeror discuss the results of the solicitation as it pertains to that Offeror. Debriefings are beneficial to both the Offeror and the State; while the unsuccessful Offeror will obtain information as to why its proposal was unsuccessful, the debriefing also provides an opportunity for the State to obtain valuable insight into the procurement process from the Offeror's perspective. Debriefings are limited to a discussion of the unsuccessful Offeror's proposal; they do not include how the unsuccessful Offeror's proposal compares to other proposals. The parties discuss only the strengths and weaknesses of the unsuccessful Offeror's proposal relative to the advertised evaluation criteria, as well as how the award decision complies with both procurement law and the solicitation.

(Note: It is not uncommon for several representatives of an Unsuccessful Offeror to attend the debriefing, which may be conducted by telephone conference; A list of the attendees should be requested in advance. When the unsuccessful Offeror's legal counsel attend(s), COs should promptly notify the State's legal counsel.)

## Protest of Award.

Exclusive remedies for unlawful solicitation or award can be found under 18-4-242, MCA, and 2.5.406, ARM. All protests must be in writing and state in detail all of the protestor's objections and allegations of violations of the Montana Procurement Act. Protests must be submitted to the:

State Financial Services Division,  
P.O. Box 200135, Helena, MT 59620-0135,

and to the agency that issued the solicitation no later than the close of business 14 calendar days after the execution of the contract in question.

The Department may exercise its discretion in deciding what is in the best interest of the State.

Agencies that exercise their delegated authority and engage in purchasing activities are responsible for responding to protests or contested case hearings concerning the solicitations, awards, or the administration of contracts within their authority.

# CHAPTER 11: CONTRACT MANAGEMENT

**Overview.** The seventh phase in the procurement process is contract management. The objective of contract management is to ensure a contract is performed satisfactorily and the responsibilities of both the State and the Contractor are properly discharged. Effective contract management prevents, minimizes, and resolves problems and potential claims and disputes. For contract management to be successful, the Contract Manager should be involved throughout the Procurement Cycle.

**Transition from CO to Contract Manager.** One of the first post-award activities is for the CO to transition the procurement to the Contract Manager. For relatively routine procurements, like purchases using set-aside programs, Montana eMACS, or informal bidding, transition activities are minimal (issuance of a transfer letter, etc.). For high-risk and/or high-dollar procurements, it is common for staff to hold a post-award meeting that includes the CO, the Contract Manager, end- users, and Project Manager (if used). During this meeting, the CO ensures the Contract Manager and other stakeholders understand the key procurement activities that have occurred prior to contract execution. To the extent that the Contract Manager did not participate in pre-award activities, the CO facilitates the transition of documents and foundational knowledge of the solicitation and contract. Specifically, the CO provides a thorough review of the SOW and relays the contract terms and conditions, agreed-upon inspections and acceptance criteria, extension and renewal potential, and articulated remedies. After the team has been briefed on the events preceding the contract award, the Contract Manager begins administration of the contract.

## Contract Management Responsibilities.

**Overview.** The extent of contract administration required is not the same for all contracts. The level of contract administration is consistent with the complexity and level of risk of the contract, the contract term, and dollar value. The Contract Manager ensures contract requirements are satisfied, supplies and services are delivered in a timely manner, and the financial interests of the State are protected. Further, all guidance provided to a Contractor is within the scope of the contract. Contract Managers do not impose additional requirements upon the Contractor, nor manage Contractor operations to the extent that the Contractor is relieved of its responsibility to perform.

**Contract Management Team.** The number of participants in the contract administration process varies depending on the size, level of risk, and complexity of the contract. Early in the procurement process, the agency identifies staff who will participate in contract management. The assignment of roles and responsibilities are then documented in the contract file.

**Responsibilities.** The primary responsibilities of the Contract Manager include:

- Participating in solicitation development and review of contract documents;
- Serving as the primary point of contact for agency communication with the Contractor;
- Managing State property used in contract performance, (e.g., computers, telephones, identification badges);
- Implementing a quality control- and contract monitoring process;
- Monitoring Contractor progress and performance to ensure supplies and services
- Conform to the contract requirements, and keep timely records;
- Consulting with Legal Counsel to address concerns and/or issues;
- Managing, approving, and documenting changes through the amendment process;
- Inspecting and approving products and/or services by completing written acceptance of deliverables, or obtaining documentation from end-users responsible for receipt;

- Verifying accuracy of invoices and authorizing payments consistent with contract terms;
- Monitoring contract budget to ensure funds are available throughout the term of the contract;
- Identifying and resolving disputes with the Contractor timely;
- Exercising remedies when a Contractor's performance is deficient;
- Maintaining appropriate records;
- Performing contract closeout processes; and
- Maintaining a master contract file of records produced throughout the life of the contract.

A sample Master Contract File Checklist is provided here.

TABLE 11.1

MASTER CONTRACT FILE CHECKLIST	
	A copy of the entire contract, including all amendments and POs
	A copy of the Acquisition Plan
	A copy of the Quality Assessment Plan e.g., a schedule of compliance review (Contract Monitoring Schedule) and documentation of monitoring activities (Finding Reports).
	A reference list or a list of prior contracts with this specific vendor (if they offer valuable historical data).
	The records/minutes of all meetings, both internal and external (Including sign-in sheets and/or agendas).
	A copy of all reports and written deliverables required by the contract such as sales reports, approval requests, and inspection reports.
	A copy of all letters of approval pertaining to such matters as materials, the contractor's quality control program, prospective key personnel, and work schedules.
	A copy of all notices to proceed, to stop work, to correct deficiencies or change orders.
	A copy of all contractor invoices, information related to discount provisions for prompt payment, letters pertaining to contract deductions or fee adjustments.
	A copy of all general correspondence (internal and external) related to the contract.
	A copy of the Contract Close-Out Checklist.

**Prohibitions.** Contract Managers are not authorized to:

- Allow the Contractor to commence work before the contract is fully executed;
- Change the scope or extend the term of the contract without complying with the formal amendment process;
- Authorize the Contractor to perform work that is not specifically described in and funded by the terms of the contract; or
- Allow the Contractor to recover costs incurred prior to the effective date of the contract or recover costs in excess of the budget limit set by the contract.

**Post-Award Conferences.** Post-award conferences are meetings scheduled by the Contract Manager

immediately following contract award, and which include the Contractor and agency stakeholders. These conferences are an orientation for Contractors to ensure a clear and mutual understanding of all contract terms and conditions, and the respective responsibilities of all parties. Although Contractor and agency personnel should already be fully aware of contract requirements, post-award conferences ensure all parties involved in the contract administration process understand the contract performance requirements. Holding a post-award conference for high risk, high-dollar value contracts should be considered a best practice of contract management.

**Formality Not Required.** Not every contract requires a formal post award conference, but there is generally some form of discussion between the contracting parties after award to ensure all parties are aware of performance requirements and administrative procedures.

**Alternatives.** The Contract Manager decides whether a post-award conference is necessary. For less complex, low risk, low-dollar value contracts, a telephone call with the Contractor may be sufficient. During the telephone conversation, the Contract Manager reviews the major points of the contract with the Contractor, such as the value of the contract, major performance milestones, deliverables, reports, meetings) and times and places of delivery. Factors used to determine whether a conference is appropriate include:

- Type of contract;
- Level of risk associated with the contract;
- Value and complexity;
- Length of contract, period of performance and/or delivery requirements;
- Procurement history of the products or services required and expertise of the Contractor;
- Urgency of delivery schedule;
- Agency's prior experience with the Contractor;
- Any special or unusual contract requirements; and
- Any special or unusual payment requirements.

**Monitoring Methods.** Monitoring contract performance is a key function of contract administration. The purpose is to ensure the Contractor is performing all contract obligations and for the State to be aware of and address developing problems or issues. Agencies generally implement monitoring programs that have well-defined follow-up actions. Follow-up is essential as problems do not correct themselves simply by being identified.

**Overview.** Results of the Contractor's monitoring efforts are periodically reviewed by the Contract Manager to:

- ensure corrective actions have been taken,
- identify common problem areas that might require training, and
- improve contract requirements for future contracts.

Contract Managers select from different monitoring methods when conducting quality assurance, and may include desk reviews, site visits, and third-party monitoring, which are discussed in more detail in this Chapter. Other monitoring methods include status telephone calls, expenditure document reviews, spot audits, and scheduled audits. (Telephone calls and meetings are substantiated in writing and maintained as part of the contract file. Documentation includes the date and time that phone calls or meetings occurred as well as a summary of topics discussed (e.g., meeting minutes) including pending action items and decisions made.)

**Desk Reviews.** Typically, desk reviews are Contract Manager examinations of reports submitted by the Contractor. To be effective monitoring tools, the types of reports required are tailored to each the



contract's requirements. Examples of reports include progress reports, status reports, activity reports and financial reports.

**Progress Reports.** Progress reports describe what has been accomplished over time and assist the Contractor in correcting or re-evaluating the work being performed. These types of reports work best when they are tracking deliverables tied to specific milestones so progress can be documented as contract deliverables are completed.

**Status Reports.** Status reports describe achievement or current standing. Status reports should be consistent with the organizational structure of the SOW (i.e. phases, segments, deliverables and products) and clearly identify what work is completed, what remains pending, and how the status of deliverables compares to the contract schedule. Only work that has been verified as completed or accepted is categorized as complete

**Activity Reports.** Activity reports describe any activity on the project; project activity is not the same as a status report. A project may have a great deal of activity without making substantive progress. On the other hand, activity reporting can be a core feature of contract management. For example, a Contractor payment in an outsourcing contract may be based on the number of completed transactions. In this example, activity reporting is critical to contract administration.

**Financial Reports.** Financial reports include financial statements, timesheets, and similar data that substantiate the Contractor's financial resources and ability to perform.

**Contractor Performance Reports.** Contract Managers report Contractor performance using the Total Contract Manager in eMACS maintained by the SPB. Accurately reporting Contractor performance allows Contract Managers to share Contractor information, which facilitates better oversight of State contracts (e.g., aids in identifying Contractors that have exceptional performance history, and protects the State from Contractors with unethical business practices).

**Customer Complaint.** Periodically, the State receives complaints from end- users, customers, or other constituents.

**Considerations During Review.** Contract Managers review Contractor performance reports for the following factors:

- Compare performance against contract requirements. (Is the Contractor performing the contract requirements?)
- Compare expenditures to the budget. (Is the Contractor following its approved budget plan?)
- Compare the current period to prior periods. (Are there any
- unexplained trends? Is the Contractor performing work significantly different from the last period or the last year?)
- Compare the relationships between key components of the report such as:
- the cost per unit of service or the percentage of the fees charged to the program;
- the change in variable costs compared to the units of service provided; and
- reported salaries with the submitted staffing plan.
- Compare the report with what is known about the Contractor's operating environment. (Did a weather emergency in the area recently increase the cost of construction supplies or is the cause of a temporary reduction in services provided?)

**Site Visits.** More complex contracts, and contracts the State perceives as having a higher degree of risk, may require both reviews and visits to the Contractor's facilities to ensure progress is following the contract schedule. Site visits verify performance against scheduled and reported performance. These



visits are an opportunity to verify that the Contractor is dedicating enough resources and personnel to the contract. Although site visits are an efficient tool for monitoring, they are not meant to interfere with the Contractor's ability to carry out work. (If you are considering using Site Visits for contract management, be sure to include a clause in the contract and define the process and schedule for conducting visits.)

**Site Monitoring Checklist.** Prior to performing site visits, Contract Managers prepare comprehensive Site Monitoring Checklists that outline the contract compliance requirements of the Contractor. Site Monitoring Checklists are tailored for each contract. While there are standard items in each checklist, each has specific requirements unique to its contract, the results of which are documented by the Contract Manager in Site Monitoring Reports.

**Site Monitoring Report.** Upon completion of every site visit, the Contract Managers (or site monitors) complete a stand-alone document that serves as a record of the site monitoring work, called a Site Monitoring Report. A copy of each Site Monitoring Report is sent to the Contractor and any others who may benefit.

**Monitoring by Third Parties.** In some instances, the obligation of monitoring the progress of a contract is assigned to another Contractor; this is also known as independent oversight. For example, in the case of construction contracts, the task of ensuring progress is performed by the architectural firm that provided the construction plans. For highly technical work, subject-matter experts may perform monitoring services independently or in conjunction with agency staff.

- Enhanced Contract- and Performance Monitoring.
- Overview. Enhanced monitoring is an increased level of monitoring beyond the regular methods normally used. It is unusual and requires significant oversight on the part of the State to ensure methods are not abusive or fiscally unmerited. Increased monitoring may include, but is not limited to:
  - increased frequency of site visits,
  - independent testing;
  - unannounced inspections;
  - detailed documentation requirements as deemed necessary by the State to assess progress of the Contractor toward meeting the identified goals and outcomes established in response to assessments of unsatisfactory performance.

The State may use enhanced monitoring methods for high-dollar and high-risk contracts.

Enhanced Monitoring. Agencies should identify contracts that require enhanced performance monitoring and submit this information to their governing body or officer who governs the agency. When enhanced monitoring is being used, a senior Contract Manager or Contracts Officer immediately notifies the governing body or governing official of any serious issue or risk identified.

**Reporting Requirements.** Agencies should develop and implement contract reporting requirements that provide information on:

- compliance with financial provisions and delivery schedules,
- corrective action plans required and the status of any active corrective action plan, and
- liquidated damages assessed or collected if allowed for by contract.

In addition, each agency verifies the accuracy of information reported that is based on information provided by the Contractor.

## Inspection, Testing, and Acceptance.

### **Overview.** The State:

- Inspects and evaluates supplies/services at the time of receipt to determine whether they comply with the contract, and
- Certifies, if true, that supplies/services comply with contract requirements and that invoices are correct.

When supplies or services are not contract-compliant, agency program personnel notify the Contract Manager. (For state-wide contracts administered by the SPB, agencies provide prompt, written notice to the SPB CO of deficiencies.) The contract manager shall document the deficiencies and use available contract language to cure outstanding issues.

A defaulting Vendor may be referred by the SPB to the Office of the Attorney General for action, and repeated failures may make the Vendor subject to state-wide debarment if the SPB determines it appropriate. Contract managers must ensure there is adequate documentation to support a declaration of default and must work with their legal representative before taking action.

**Testing.** All supplies are subject to inspection and testing by the State. The State may also arrange for testing and inspection of supplies and services before they are purchased. Inspection and testing requirements must be clearly stated in the solicitation and contract. Authorized agency personnel have access to Contractor places of business for the purpose of inspecting merchandise. When products fail to meet specifications, the costs of the sample used, and any testing performed, are borne by the Contractor. Latent defects may result in revocation of acceptance of any product. (Legal Counsel is consulted when latent defects are discovered.)

**Shipping and Receiving.** At the State's option, supplies that have been delivered and rejected in whole or in part are returned to the Contractor at the Contractor's risk and expense, or are disposed of in accordance with Montana Administrative Rules or Statutes. Contractors may request supplies be held for a reasonable period and for later disposition (at Contractor risk and expense).

**Shipment Acceptance.** Acceptance terms and conditions should always be included in the solicitation and resulting contract. The State must identify who is authorized to accept delivery of goods and services in its contract. Acceptance of a shipment only occurs when supplies delivered match the items on the contract, and the corresponding receiving report meets the quantities ordered at the specifications required. The State immediately inspects all shipments received, and reports discrepancies to the Contractor within timelines outlined in the contract.

**Inside Delivery and Pallets.** When contracts specify "inside delivery," it is the responsibility of the Contractor to deliver to the floor and room specified. When shipments are not on pallets as required, the State either:

- Requests the Contractor to palletize the shipment at the agency location for no additional charge; or
- Accepts the shipment with a notation on the receiving report and notifies the CO to amend the contract to remove any charges for pallets.
- Shipments Delivered in Error. When a shipment includes an item not ordered by the State, the State shall refuse the shipment.

**Package/Container Count Discrepancy.** Documentation is necessary to validate the receipt of the containers received from the transportation company. The authorized end-user or Contract Manager inspects each shipment, notes discrepancies on the Bill of Lading and agency receiving report, and provides a copy of the annotated Bill of Lading to the driver (prior to departing), Contractor, and CO.

**Bill of Lading.** A bill of lading is a legal document in the procurement process which travels with shipped goods. This document represents an agreement between the carrier and shipper and lays out all essential details of the shipment.

**Non-Conforming or Incorrect Items Received.** State personnel shall not sign for a shipment without first inspecting the delivery. Only the authorized staff person may sign on behalf of the State. When a shipment is signed for in error and the error is discovered after the driver departs, the Contractor is contacted for pick-up/replacement, and the finance office is notified to withhold payment until the matter is resolved by the Contract Manager and/or CO, if warranted. Every contract should include inspection/testing language to establish the procedures for quality assurance and acceptance/rejection of delivery.

**Minor Visible Damage.** Minor damage visible on the outside of containers is noted on the Bill of Lading prior to signing by authorized staff and departure of the driver. Recording external damage provides documentation if there is concealed damage. The Contractor is made aware of the minor visible damage by the information provided on the Bill of Lading.

**Severe Visible Damage to Container or Contents.** In the event of significant damage to containers and/or contents, the State may refuse either the entire shipment or refuse only the damaged containers (it is recommended that agencies reject only the damaged containers to prevent unnecessary delay in receiving required supplies). When an entire shipment is refused, the reason for refusal is annotated on the Bill of Lading, and the Contractor is notified that the shipment was refused, and that reshipment is required. When FOB Origin (the State pays freight/shipping charges from the point of origin to the point of destination), shipments are damaged enough that contents are damaged, the State accepts the shipment, records the damage on the carrier's freight bill, and files a claim with the carrier.

**Concealed Damage to Contents.** Damage to contents found during inspection and unpacking of a container is documented and reported to the Contractor. The end-user contacts the Contract Manager and the appropriate agency finance department, so payment is not made for damaged supplies.

**Pickup and Return of Shipments.** Contractors may be required to pick up damaged supplies and those not conforming to specifications and provide replacements in the time outlined by the agency or in the original terms of the contract. Replacements are provided at no additional cost to the State.

**Internal Receiving Report.** Shipments are always compared to the contract (or receiving documents). The following are checked by the Contract Manager or end-user:

- order quantity per item;
- number of items per package or container; and
- unit of measure for each line item.

A receiving report is completed for each shipment and is forwarded to the finance department for payment processing.

**Quantity Overages.** The State is not obligated to accept and pay for amounts delivered that exceed

the contract's stated quantity/ies.

**Partial Shipment.** For partial shipments, the State requests a timeline in writing from the Contractor detailing when the balance of requirements will be delivered.

**Carrier Shipping Methods.** A summary of common carrier shipping methods is shown here.

TABLE 11.2

Carrier Shipping Methods				
Shipping Method	Carrier Paid By	Freight Listed on PO	Title Held in Transit By	Claims Filed By
FOB Origin Freight Collect	Agency	Yes	Agency	Purchasing
FOB Origin Freight Allowed	Vendor	No	Agency	Purchasing
FOB Origin Freight Prepared & Charged Back	Vendor	Yes	Agency	Purchasing
FOB Destination Freight Collect	Agency	No	Vendor	Vendor
FOB Destination Freight Collect & Allowed	Vendor	No	Vendor	Vendor
FOB Destination Freight Collect & Allowed	Agency	No*	Vendor	Vendor
*Freight charged to vendor by deducting freight charges from invoice.				

### Invoice Review and Payments.

**Overview.** After supplies and services have been inspected and accepted, the Contract Manager reviews invoices to verify that:

- the description of supplies and services is in sufficient detail to identify the contract relating to the invoice;
- the quantities and unit measures correspond with the referenced contract, and
- the invoice conforms to the contract's invoicing standards.

To avoid a suspension of work, the Contract Manager promptly reviews invoices and, following the internal procedures, notifies the Contractor of a disputed invoice if the invoice is determined to be inaccurate.

**Withholding a Payment.** The withholding of payment clause should be considered for every state contract. Although the State must pay its Contractors promptly, the State also has the responsibility to protect the interests of the public. Despite best efforts to resolve an invoice issue, some circumstances may require that payment approval be withheld. Circumstances where it may be necessary to withhold payment include:

- invoice errors;
- undocumented and/or unsupported costs;
- remediating overpayments to the Contractor; and
- Contractor's performance is non-conforming or unacceptable.

When invoicing issues cannot be resolved, Contract Managers take the following steps to escalate the

issue:

- notify the agency accounts payable division;
- notify division management and the agency's Contract Administration Office (CAO);
- notify the Contractor of invoice issues as soon as possible;
- request assistance, if needed, from the Legal Counsel to timely send a disputed invoice letter; and
- maintain documentation regarding the incident resolution.

## Payment.

**Purchase Orders (POs) and Contracts.** Purchase orders and contracts are the documents most frequently used by agencies to authorize the purchase of supplies and services. Once services are performed and/or supplies are received, the Contractor will request payment by submitting an invoice, including reference to the contract number, to the agency with a copy of the purchase order/contract.

**Payment Card (P-Card).** Payments made for purchases using a payment card are processed in accordance with agency policies.

**One Percent (1%) Contractor's Gross Receipts Withholding Return (Form CGR-2).** For all construction contracts, Form CGR-2 must be completed and submitted to the Department of Revenue within 30 days after each payment made to each prime Contractor or any sub-contractor. Contract award registration, CGR-1, gross receipts withholding return, and GCR-2 can be filled online on the Department of Revenue's TransAction Portal (TAP). The form is completed by the State or the Contractor, depending on the entity making the payment.

## Contract Changes.

**Overview.** Throughout the term of any contract, changes may become necessary. These changes may be minor and administrative such as a change of address, or they may be substantial, affecting quantity, quality, price or delivery. A formal change control process is included in each contract and includes, but is not limited to:

- a requirement for formal, written pre-approval of all changes (outside of rare instances, verbal authorizations of the Contractor to work on a change before the change is fully analyzed, documented, and approved in writing could result in the individual incurring personal liability for the change should it not be authorized by the State);
- a requirement for a single point of contact to authorize any change; and
- a plan for how draws against a contingency allowance will be made.

In addition, contracts often include requirements for:

- Evaluating the impact of each change to:
- the contracting objective,
- the corresponding product and/or service,
- the schedule, cost, and increase in agency overhead resulting from the change,
- work in progress or completed work, standards, and acceptance criteria.
- Developing a plan for how any draws against a contingency allowance will be requested and approved.
- Documenting all changes, no matter how small, and avoiding any informal undocumented

change process.

**Change Control.** Solicitations and contracts identify the change control processes used to manage changes to scope, schedule, or pricing that may occur. These change control processes describe the communications protocols and documentation required to make changes (e.g., amendment, change order).

**Change Control Process.** Changes during the contract term are managed several ways. For non-complex procurements, the change control process is for the CO to simply issue contract amendments in accordance with policy and procedure. For more complex procurements, the change control process involves a formal routing procedure with prescribed forms, minimum review periods, and named individuals with approval authority. Other change control processes may involve plans (e.g., transition plans) to be implemented if a specific event occurs.

**Defined Processes.** The benefit of a well-defined change control process is that of uninterrupted performance while the parties investigate proposed changes to the contract. Regardless of the change control process selected, the process expressly states the circumstances under which changes are approved. For instance, many service contracts provide that a change will not be implemented until both parties agree to it in writing.

**Transition Plans.** It is a best practice for transition plans to be included in solicitations and contracts when the State has a requirement for uninterrupted service during the transfer between the outgoing and incoming service providers. Transition-in and transition-out plans (TIPs and TOPs) describe the coordination activities for both service providers and the State. Transition plans identify tasks to be completed, the roles and responsibilities of each entity, resource requirements, dependencies, and the timelines for key activities. Provisions for safeguarding confidential information are included in transition plans. Because ambiguity may lead to service delays, solicitations and contracts identify which entity/ies will bear the burden of the transition costs. Depending on the service and whether the Contractor is performing out-going or in-coming activities, transition activities are provided to the State at no additional cost, for a fixed fee, or on a cost-recovery basis.

**Cost Adjustments Based on Indices.** For certain contracts, cost adjustments (upward or downward) are correlated to published price indices, such as the Consumer Price Index (CPI) or Producer Price Index (PPI). The CPI and PPI, both published by the Department of Labor's Bureau of Labor Statistics. Indices measure price changes over time for different commodities and are used to explain inflation rates in long-term contracts. The Bureau of Labor Statistics recommends this formula when using its most recent monthly information from the index, where:

A = Index from the month of the due date for the proposal; OR the effective date/month of the most recent approved price increase

B = Current or latest baseline index

The allowable percent change must be calculated as follows:  $B - A \div A \times 100\% = \text{Percent of allowable price increase}$

Solicitations and contracts specify how frequently price adjustments occur during the term of a contract — quarterly, annually or other time period that best fits the commodity or service. If a price adjustment is allowed only at the time of contract renewal, the State conducts a review of the current index pricing to determine whether there will be a price increase or decrease. This review is conducted within the 30-day period prior to a renewal date as only the most recent index pricing is used when performing calculations. It is considered a best practice for solicitations to require Vendors to specify



the maximum amount of any price- or rate increase.

## Contract Amendments.

**Overview.** There are two types of contract amendments: bilateral, where all parties to the contract agree that an amendment is necessary because the SOW, the term of the contract, or some other provision must be altered; and unilateral, where the State exercises its right to modify the contract without the Contractor's consent. Amendments are either administrative, substantive, or constructive in nature. Contract amendments are documented and conform to agency requirements.

**Administrative Changes.** Administrative changes occur within the scope of the contract and do not affect or alter the rights of the parties. These changes are typically executed via unilateral amendment. Examples of administrative changes include:

- changes in billing instructions or address;
- corrections of typographical errors not affecting the substance of the contract;
- changes as permitted by the specific contract language; and
- changes in agency personnel assigned to the contract.

**Substantive Changes.** Substantive Changes are contractual changes that affect the rights of both parties. Such changes generally require bilateral amendments (agreement by both parties). Examples of substantive changes include:

- a change in the price of the contract;
- a change in the delivery schedule;
- a change in the quantity;
- a change of deliverables (e.g., the specifications);
- a change of key personnel; or
- a change of any terms and conditions.

**Constructive Changes.** If a Contractor perceives that work beyond the scope of the contract was ordered by the agency, the Contractor may claim the contract was constructively changed, and may be entitled to additional compensation for the changes. Generally, a constructive change will require a bilateral amendment. Constructive changes occur when State personnel:

- accelerate the delivery schedule;
- direct the work to be performed differently;
- change the sequencing of the work;
- postpone the acceptance or rejection of deliverables;
- delay reviewing invoices and approving payment; or
- interfere with or hinder performance.

**Scope.** For a change to be made, the change must be determined to be within the original scope of the contract, or one that could be contemplated by the marketplace when originally competing for award. When determining what constitutes a scope change, the crucial question is whether the changes are material, or substantial. Material changes are not measured by the number of changes made to the original SOW; they are measured by the extent of change. If a change so substantially alters the original specifications that the change could not have been contemplated by the marketplace, a new solicitation is required, rather than a contract amendment. For example, if a contract to buy 10 desks is amended to include 300 file cabinets, the addition of the cabinets is change outside the scope of the contract because other Vendors did not have the opportunity to

compete for the 300 file cabinets. Additional Contractors may have competed had they known that file cabinets were being solicited.

## Name Change versus Novation Agreement.

**Novation Agreements.** From time to time, companies are bought and sold, divisions are spun off or sold, and mergers and business combinations occur. Laws prohibit transfer of State contracts from a Contractor to a third party unless the State recognizes the third party as the successor in interest to a State contract. The third-party's interest must have arisen out of the transfer of all of the Contractor's assets or the entire portion of the assets involved in performing the contract. When it is not in the State's interest and the assets are transferred anyway, the State has the right to terminate the contract for default. If the State agrees to the transfer of assets, a "novation agreement" is required. A novation agreement is a legal instrument executed by three parties - the Contractor (or the transferor), the successor in interest (or the transferee), and the State - by which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the State recognizes the transfer of the contract and related assets.

**Assignment.** Assignment occurs when one party to a contract (assignor) transfers its rights under a contract to another party (assignee). Contracts require the submission of a written request from the Contractor to the Contract Manager to change the Contractor's name or to recognize a successor in interest to the contract.

**Buyout or Sale.** A buyout or sale occurs when one company is purchased by another. The (new) Contractor must have a contract amendment stipulating that it now has the right to receive payments. The (old) Contractor of record must send the State a letter stating the circumstances of the buyout or sale and request the amendment. Replacement Contractor. When a Contractor requests the State to recognize a successor, it is the Contract Manager's responsibility to keep the State's interests in mind. The Contractor's successor must be responsible and able to perform the contract requirements. The Contract Manager performs all due diligence to evaluate the proposed new Contractor's eligibility and ability to perform. The Contract Manager also requests and reviews the documents executed by the Contractors that constitute the transaction underlying the proposed assignment/transfer. If the replacement Contractor is acceptable, the old and new Contractors sign a novation agreement transferring all rights and responsibilities under the contract to the assignee.

**Name Changes.** Simple name changes do not require novation agreements if the Contractor's rights and obligations remain unaffected. Nor does a change in organizational structure (e.g., from a sole proprietorship to an LLC) require a novation agreement. The State does, however, require documentation of a name change, which must include:

- an authenticated document effecting the name change;
- an opinion from the Contractor's Legal Counsel stating the name change was proper;
- the effective date of the name change; and
- a listing of all contracts remaining unsettled between the Contractor and the State.

A copy of the Assumed Name Certificate filed with the Secretary of State or a sales tax permit is considered proof of a name change.

**Renewals and Extensions.** When contracts have an option to extend or renew, the Contract Manager assesses whether the option will be exercised by the State. The process for exercising renewals and extensions is specified in each contract.

**Force Majeure.** Performance may be suspended when the failure to perform is excusable. An

excusable cause must be beyond the Contractor's control, and without the fault or negligence of the Contractor. Such excusable causes, often referred to as force majeure, include, but are not limited to, acts of God or of the public enemy, fires, floods, epidemics, strikes freight embargos, and unusually severe weather.

**Weather.** Severe weather, although beyond the Contractor's control, does not constitute an excusable delay if it is not "unusually severe." For example, severe heat in Honolulu in August would not be unusual, but a severe snowstorm would be.

**Subcontractors.** When Contractor performance failure is due to a subcontractor, to qualify as an excusable cause the default must arise out of a cause beyond the control and without the fault or negligence of either the Contractor or the subcontractor. Even if this requirement is met, the cause will not be excusable if the supplies or services to be provided by the subcontractor could have been obtained from other sources in time to meet the contract delivery schedule.

**Dispute Resolution.** Each contract includes a dispute resolution process. The objective of any dispute resolution process is to resolve problems before they escalate. To avoid escalation of problems and ensure the State has not worsened problems, agency personnel respond promptly to all Contractor inquiries and:

- Identify the problem - what appears to be a problem may be resolved by providing the Contractor with information or clarification;
- Research the facts - obtain information about the problem from all relevant sources, including the project manager and the Contractor; and
- Evaluate the facts and then determine the proper course of action.

Proper dispute resolution is a core skill of successful contract management. It is essential to identify problems early in the performance period and effectively communicate and formalize the process in writing via a cure notice procedure or less formal written procedure. Termination is the last resort; it is a failure by both parties to a contract.

**Remedies.** Remedies provide protection to the State when there is a contract breach. The State invests time and resources to develop and award a contract, so each key deliverable within the contract should have a corresponding remedy for Contractor non-performance. Although contract termination is an effective remedy, it may not be an appropriate remedy for every contract breach. For example, the State may determine the most suitable remedy for late delivery is to impose liquidated damages that require the Contractor to compensate the State for the contract breach by paying a pre-determined amount for each hour/day/week beyond the scheduled due date. Examples of remedies follow.

**Liquidated Damages.** Liquidated damages entitle the State to demand a set monetary amount determined to be a fair and equitable repayment to the State for loss of service due to Contractor's failure to meet contract requirements. Liquidated damages are useful when compensatory (or "actual") damages are difficult to calculate. The terms of the liquidated damages are clearly specified, identifying a deliverable, monetary amount, duration and any other necessary information. Including liquidated damages in solicitations focus Contractor attention on the deliverables identified as most important to the State. Contract Managers must work with legal staff when making a claim for liquidated damages.

NOTE: Courts enforce liquidated damage provisions only if they are not considered penalties; the clause is used only to reimburse the State for actual damages and not to penalize the Contractor by awarding damages greater than those suffered.

**Compensatory Damages.** Compensatory Damages are the monetary amount necessary to compensate the injured party for the loss. Examples of compensatory damages include the following.

**Expectation damages.** Expectation Damages are intended to cover what the injured party expected to receive from the contract, also called the “benefit of the bargain.” This is the typical measure of damages in contracts. Expectation damages are equal to the value of the defendant’s promised performance, generally identified as the contract price minus any benefit received from not having to complete the defendant’s own performance. In the case of defective performance by Contractor, the State recovers the cost of remedying or completing the performance. However, diminution of value will be awarded where the cost of completion is clearly disproportionate to the value of the performance to avoid economic waste.

**Reliance Damages.** Reliance Damages cover the loss that the non-breaching party incurred in reliance on performance of the contract and are designed to put the injured party back where they were before they entered into the contract. Reliance damages are usually used when expectation damages cannot be accurately calculated, including without limitation when profits are too speculative or where no contract exists, but some relief is justifiable.

**Consequential Damages.** Consequential Damages, also called “special damages” are intended to cover any loss incurred by a breach that is not directly related to the contract, but arose naturally, was reasonably foreseeable or had been specially communicated and should have been included in the scope of what would be reasonably be expected to arise. A Contractor can monetarily compensate the State while continuing to fulfill the contract; examples of compensatory damages include:

- Discounts on products and services within the scope of the contract can be provided to the State when certain performance measures are not met.
- Credits can be provided to the State when performance measures are not met. Credits can be applied as a dollar amount deducted from the Contractor’s subsequent invoice, or additional products or services within the scope of the contract.
- Refunds or reimbursement of previous payments by the State.
- Waiver of fees the State was due to pay for products and services that are either within scope of the contract or for substitute products and services. 300 Hadley v. Baxendale, 156 Eng. Rep. 145 (Exch. Ct. 1854).

**Restitution Damages.** Restitution Damages are the value to the defendant of the plaintiff’s performance and are to prevent unjust enrichment. Restitution damages may be awarded if the innocent party incurred a loss that benefits the other party. The recovery is based on the market value rendered to the defendant and is not limited by the contract price.

**Equitable Remedies.** Equitable remedies, such as injunctions, declaratory relief and specific performance can be exercised even when not specified in the contract. Types of Equitable Remedies include:

**Injunctions.** Injunctions are used when the State needs the Contractor to stop doing something or continue working. The court may issue injunctive relief to require the Contractor to continue working, or to stop until the case is resolved. For example, in the case of a Contractor burning tires in violation of EPA regulations rather than recycling them in accordance with the contract, the court would issue an injunction requiring the Contractor to stop burning the tires until the issue with the EPA is resolved.

**Specific Performance.** Specific performance is a remedy in which the promisor is ordered to render the promised performance. There is a general hostility and reluctance to award specific performance due to a number of factors, including the concern that specific performance may overcompensate the

injured party.

#### Limitations on Equitable Remedies include:

- Inadequate Damages. Damages must be inadequate to protect the injured party for an equitable remedy to be awarded. This usually occurs if the damages cannot be calculated with enough certainty, or if money cannot substitute for the performance.
- Definiteness. The contract terms must be definite enough to allow a court order to be framed.
- Difficulty of Enforcement. Courts must be able to enforce and supervise the court order.
- Punitive Damages are a rare type of damage and used in breach of contract cases when the sole point is to punish the wrongdoer. These damages are typically discouraged in breach of contract cases.

Nominal Damages are utilized when the injured party has not suffered a financial loss, but the injured party wants to show that it is in the right.

When an agency is unable to resolve a dispute with the Contractor, the agency's Legal Counsel contacts the Office of the Attorney General (OAG) for assistance with an action for breach of contract. The most common recovery in a breach of contract case is compensatory damages that are the "actual damages," designed to cover the loss of the State as a result of the breach. The amount awarded is intended to "make the injured party — the agency — whole again," and is not meant to give the injured party a windfall.

**Termination.** Most contracts expire by their own terms and without any affirmative action on the part of the State. There are times, however, where the State may need to end a contract early.

Terminations are accomplished by:

- mutual agreement,
- convenience,
- cause, or
- funding.

When a contract is terminated, the parties are relieved from further unperformed obligations in accordance with the agreed terms and conditions.

**Termination by Mutual Agreement.** A Termination by Mutual Agreement occurs when both parties consent to the termination prior to the expiration date. This type of termination is documented by the exchange of formal correspondence or through contract amendment.

## Termination for Convenience.

**Overview.** A Termination for Convenience, also known as a no-fault termination, allows the State to terminate any contract, in whole or in part, at any time if it is determined that such termination is in the best interest of the State. When Vendors/Contractors seek to negotiate the removal/modification of the Termination for Convenience clause, Legal Counsel is contacted. Whether the State allows a waiver of or modification to the clause is highly fact-specific (for example, in long-term contracts involving extensive capital investment by a Contractor, a 30-day termination for convenience by the State may not be a realistic contract term.)

**Procedures.** The State provides the Contractor with written notice specifying whether the State is terminating all or part of the contract. The notice of termination also gives the date of termination. If

portions of the contract are being selectively terminated, the State specifies which parts of the contract are being terminated.

**Basis for Settlement.** Each contract specifies the basis for settlement with the Contractor upon a termination for convenience, and the State must follow the contract terms. Contractors are generally paid for allowable costs incurred up to the date of termination. The State is not, however, liable for payment to the Contractor for costs related to the terminated portion of the work, or costs incurred after the effective date of termination. Upon receipt of an invoice from the Contractor for work performed prior to the notice of termination, the State reviews the invoice to ensure no excessive costs are included.

## Termination for Cause.

**Overview.** A Termination for Cause occurs when the State concludes that the Contractor has failed to perform or make progress, or in some way has breached the contract. The State is not required to terminate a contract even though the circumstances permit such action; it may determine that it is in its best interests to pursue other alternatives and work with the Contractor in getting the contract back on track. Examples of such alternatives include extending the delivery or completion date, allowing the Contractor to continue performance under the contract, and working with the Contractor's surety to complete the outstanding work. Factors to consider prior to making a termination for cause/default decision include:

Has the State assisted the Contractor in curing a default, if applicable?

- The provisions of the contract and applicable regulations.
- The specific contractual failures and the explanation provided for the failures.
- The urgency of the need for the contracted supplies or services. The State may need to weigh the respective benefits and disadvantages of allowing a delinquent Contractor to continue performance or re-soliciting for a new Contractor.
- The availability of the supplies or services from other sources and the time required to obtain them (compared to the additional time the current Contractor requests to complete the work).
- Availability of funds and resources to re-purchase if such costs cannot be recovered from the delinquent Contractor.

Under a Termination for Cause, the State is within its rights to demand re- procurement costs from the defaulting Contractor. Nevertheless, the Contractor may not be financially capable to finance the re-purchase, or such demand may result in protracted legal action. If a contract is terminated for cause, the Contractor is liable for actual damages and costs incurred by the State unless otherwise stated in the contract. The Contractor is liable for the State's costs associated with re-procurement. Terminations are carefully drafted to state the facts pertinent to the causes for termination.

**Cure- and Show-Cause Notices.** Prior to terminating a Contractor for default, depending on the type of breach, a Cure Notice may be sent to the Contractor if the contract requires it. A Cure Notice is a letter provided to the Contractor that specifies a period of time, such as 30 days, to correct or "cure" the deficiency or violation. Not all defaults can be cured. If the Contractor fails to cure the situation or provide satisfactory explanation as requested, the CO may issue a final warning, also known as a "Show Cause Notice," giving the Contractor a chance to indicate why it should not be terminated for cause.

**Corrective Action Plans.** If there is a contract breach, the parties may implement a formal Corrective Action Plan. A Corrective Action Plan is a written document that identifies specific activities that must be performed by the erring party to restore compliance. Plans are tailored to address the identified



deficiencies, clearly state the desired outcomes, and establishes a timeframe for the party to demonstrate improved performance.

**Termination for Reduction of Funding.** Section 18-4-313 (4) MCA, the Montana Constitution, and the General Appropriations Act prohibit an agency from incurring obligations in excess of amounts lawfully appropriated by the Legislature over the course of a biennium. Therefore, any installment purchase, lease or any other type of purchase which incurs an obligation beyond a single appropriation period is prohibited, unless the obligation is conditioned upon continued legislative appropriation. (There is one exception: when the SPB determines that a proposed installment purchase arrangement is cost effective and certify this finding in response to an agency request.) A Termination for Reduction of Funding clause, or “funding out” clause, is an Essential Term that is included in every contract that has a contract term that crosses fiscal years.

**Agency Reporting of Contracting Information.** Enterprise Resource Planning. As stewards of public funds, all agencies are required to manage their finances and human resources in a way that supports sound business principles. State law requires agencies to report their expenditures using a uniform, state-wide accounting system.

**Contract Close-Out.** The contract close-out process is the last phase of the Procurement Lifecycle and is usually a simple, but detailed administrative procedure. The purpose of the process is to verify that both parties to the contract have fulfilled their obligations. Accordingly, contract close-out is conducted in a timely manner. As part of contract close-out, the Contract Manager compares actual performance against performance measures, goals and objectives to determine whether all required work is complete. A contract is complete when:

- all supplies or services have been received and accepted;
- all reports have been delivered and accepted;
- all administrative actions have been accomplished;
- all State-furnished equipment and materials have been returned;
- all property inventory and ownership issues are resolved, including disposition of any equipment or licenses purchased under the contract;
- final acceptance from the project manager has been received; and
- final payment has been made to the Contractor.

The Contract Manager ensures that Contractor performance is completed and that the Contractor is aware of, and is in compliance with, records retention requirements.

**Contractor Performance Suspension/Debarment Process.** SPB may suspend, or bar a Vendor from participating in State contracts, including contracts where the purchasing authority is delegated to an agency, for substandard performance under a contract with the State or an agency. If there are material misrepresentations by a Contractor in a response to the State or an agency or during performance of a contract, the State may bar the Contractor from participation in State contracts. In addition, a Contractor may be barred due to fraud or breach of a contract with the State or a specific agency. Other reasons the State may bar a Vendor from participating in State contracts would be repeated unfavorable performance reviews or classifications, after considering the following factors:

- the severity of the substandard performance by the Contractor;
- the impact to the state of the substandard performance; any recommendations by a contracting agency that provides an unfavorable performance review;
- whether debarment of the Contractor is in the best interests of the State; and
- any other factor the State considers relevant, as specified by Rule.



SPB may also bar a Vendor from participating in State contracts if more than two contracts between the Vendor and the State have been terminated by the State for unsatisfactory Contractor performance during the preceding three years. If a Contractor is barred from participating in State contracts, the State determines the period of suspension or debarment. The period for suspension/debarment is commensurate with the seriousness of the Contractor's actions and the damage to the State's interests.

**Records Management & Retention.** Aside from the responsibility of maintaining the contract file, the Contract Manager, or a designated responsible agency employee, is responsible for ensuring that contract documents are retained by the State for the appropriate amount of time. The Montana State Library publishes the Montana State Records Retention Schedule (RRS) to help agencies determine the minimum time records must be retained before destruction. The RRS does not take the place of an agency's retention schedule but is used as a guide in creating and updating its own schedule. The retention periods given in the RRS are required minima; agencies may retain records for a longer period. The RRS requires agencies to retain its contract records until the seventh anniversary of the later date of (1) the contract completion or expiration date, or (2) the resolution of all issues that arose from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the contract or documents.

If the contract was executed on or after September 1, 2015, most documents in the contract file will have a minimum retention period of AC +8 years (after close of contract plus seven years).

If the contract was executed before September 1, 2015, then the minimum records retention period is AC+4 years (after close of contract plus four years).

State records must not be destroyed if any litigation, claim, negotiation, audit, public information request, administration review, or other action involving the record is initiated; all actions involving the record must be completed and all issues arising from the action resolved before a State record may be destroyed. Although the RRS for contract files is AC + 8 years, agencies may maintain contract files longer if there is a documented justification for the retention.

## CHAPTER 12: P-CARD PROGRAM

**Overview.** The SPB established commercial charge cards (P-Cards) for general purchasing, and for travel-related expenditures. P-Cards are used as a payment method for supplies and services with dollar amounts within an agency's purchasing authority and the cardholder's authorized charging limit.

**Policy.** Each agency ensures that each P-Card cardholder adheres to all purchasing Statutes, rules, policies, and procedures when using the P-Card. For instance, transactions that do not qualify as spot purchases follow requirements applicable to the requisite procurement method. Each agency adopts procedures that govern the issuance- and use of P-Cards by its officers and employees.

**Prohibitions.** Participating agencies may not use a P-Card, nor reimburse an officer or employee who has used a P-Card, for:

- personal use;
- cash advances;
- payments to debarred Vendors;
- any service or good not within statutory purchasing guidelines; nor
- fuel in a State vehicle if a Fuel Card is available.

# CHAPTER 13: FUEL CARD PROGRAM

**Overview.** The SPB established State of Montana Retail Fuel Card contracts for Executive Branch agency use when acquiring fuel, authorized maintenance, and roadside assistance services. With the exception of agency-leased motor pool (and daily-use) vehicles, use of these contracts (and Fuel Cards) is mandatory.

**Policy.** The following list identifies provisions relevant to Fuel Cards. This list is not exhaustive, as other policies may apply.

- ARM 2.6.203 Authorized Driver – definition
- 2-17-414, MCA: State vehicles use of ethanol-blended gasoline – definition
- 2-17-418, MCA Agency records on fuel efficiency measures
- 2-17-421, MCA Use – state business only – exception, compensation for driving personal vehicle – penalty for private use
- 2-17-425, MCA: Limit on use of state vehicle to commute to worksite – definitions In addition to use of the Fuel Card contract(s), each agency must:
- Designate an authorizing official(s) to oversee its fuel card procedures.
- Establish procedures and assign responsibilities to manage fuel card use.
- Establish internal controls for using fuel cards.

Questions about the Fuel Card program may be directed to:

Department of Administration State Procurement Bureau  
P.O. Box 200135 Helena, MT 59620-0135  
(406) 444-2575  
[fuelcardsupport@mt.gov](mailto:fuelcardsupport@mt.gov)

(Physical address: 125 N. Roberts Street, Mitchell Building, Room 165, Helena, MT)

**Exemptions.** An agency's designated procurement representative may submit requests for exemption from any part of the Fuel Card policy to the State Procurement Bureau.

**Violations.** Each agency is responsible for policy enforcement and investigates all alleged violations and complaints. The agency will take appropriate disciplinary actions, including (but not limited to) cancellation of the employee's fuel card privileges, termination, and possible criminal charges.