
CONTRACT DRAFTING AND REVIEW MANUAL

OFFICE OF ATTORNEY GENERAL
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INTRODUCTION

The contract manual is a guide for drafting and reviewing contracts entered into by an agency of the State of North Dakota. It has been written so that a preliminary draft of a proposed contract could be prepared by a non-attorney for review by the agency's attorney, either an assistant attorney general or special assistant attorney general.

Although contracts are the product of policy decisions by the agency, it is recommended the Attorney General determine the legality of all contracts and offer suggestions and recommendations on contract terms and language before a proposed contract is forwarded to the other party.

Each agency should contact its attorney before entering into any contract.

This is particularly important if a contract contains unique or novel issues, imposes a significant financial obligation on the state, or relates to a project that could create significant liability for the state. Any contract obligating more than \$250,000 should be reviewed by an attorney. Once a form contract has been approved by the Office of Attorney General or your agency's attorney, subsequent reuse of the form contract need not be reviewed unless it contains substantive revisions or obligates more than \$250,000. However, contracts should be reviewed at least every biennium for legislative changes.

The analysis in this manual summarizes current law and is not an Attorney General's opinion.

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CHAPTER 1 - OVERVIEW OF CONTRACT PROCESS

Purpose of Contract Review

The main purpose of contract review is to ensure that the expectations of the parties are accurately described in a written contract. A well written contract avoids unexpected liabilities and promotes a smooth relationship between the parties.

Contracts should be reviewed to ensure that the agency complies with all applicable laws and is not committing itself to spending money beyond the amount appropriated by the Legislature. **This review is particularly important for contracts that were not drafted by the agency.**

State agencies and officials have only those powers expressly provided by law or which may necessarily be implied from the powers expressly given to the official or agency.¹ Every review of a contract must include a determination whether the agency is authorized to enter into the proposed contract.

Since the state is not immune from liability for its actions, all state contracts should indicate how risks arising out of the contract are assigned among the parties to the contract and what insurance coverage is required.

Role of the Agency

Once an agency determines that goods or services are needed from a specific contractor,² or that another reason exists to enter into a contract, the agency must develop a written agreement identifying the terms and conditions of the relationship between the agency and the contractor.

The most important responsibilities of an agency in establishing these terms and conditions are to:

1. describe the goods or services the agency is purchasing or providing;
2. state the dollar amount the agency will pay or receive;
3. determine how any risks of liability will be assigned among the parties to the contract; and
4. state how the parties will comply with all applicable laws.

In determining how much the agency will pay, the agency should keep in mind that its ability to extend financial obligations beyond the current biennium is restricted. See N.D.C.C. §§ 54-16-03, 54-16-05, 54-44.1-10.

¹ State administrative agencies are creatures of legislative action and, as such, have only such authority or power as is granted to them or necessarily implied from the grant. *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584-85 (N.D. 1984).

² See N.D.C.C. ch. 54-44.4 and N.D.A.C. art. 4-12 regarding bidding requirements for goods and services.

Role of the Attorney General

All state officers must look to the Attorney General for opinions on legal questions relating to their official duties. N.D.C.C. § 54-12-01(6). The Attorney General is also required to prepare drafts of state contracts when necessary. N.D.C.C. § 54-12-01(7). Although contracts are the product of policy decisions by the agency, it is appropriate for the Attorney General to determine the legality of all contracts, which should occur before a proposed contract is forwarded to the other party.

CHAPTER 2 - TYPES OF STATE CONTRACTS

Leases of Buildings or Real Property

All leases and rental agreements for office space must be reviewed for legal sufficiency by the Attorney General and approved by the Office of Management and Budget (OMB). N.D.C.C. § 54-21-24.1. The standard lease form is included in the Appendix to this manual. See *also* **E: Landlord's Obligations** and **F: State's Obligations**. OMB's procedure for completing a state office lease may be found at:

<http://www.state.nd.us/fac/forms/leaseprocedure.htm>.

Leases of Equipment

Leases of equipment can be converted to rental purchase agreements with the approval of OMB, as long as the conversion is to the financial advantage of the state and the agreement does not commit the state to payments beyond the current biennium. N.D.C.C. § 54-06-17. OMB has created a form to assist an agency in making this determination. The instructions and form may be found at:

<http://www.state.nd.us/fiscal/docs/leasevspurchinstruct.doc> and
<http://www.state.nd.us/fiscal/docs/leasevspurchase.xls>.

Contracts for Services

Make sure the service contract does not make the contractor an "employee" of the state. See **Y: Independent Entity**. Note also that an agency may be required to obtain services on a competitive basis. See N.D.C.C. ch. 54-44.4; N.D.A.C. art. 4-12 and the OMB Procurement Office at: <http://www.state.nd.us/csd/spo/>.

Architect, engineer, and land surveying services are governed by N.D.C.C. ch. 54-44.7.

Contracts for Goods

Most materials, furniture, fixtures, printing, insurance, and other commodities used by state agencies are purchased through OMB if the price of the goods exceeds a certain threshold. See generally N.D.C.C. ch. 54-44.4. An agency may be required to obtain goods on a competitive basis. See N.D.C.C. ch. 54-44.4; N.D.A.C. art. 4-12 and the OMB Procurement Office at: <http://www.state.nd.us/csd/spo/>.

Joint Powers Agreements

Joint powers agreements are a special category of contracts in which a state agency enters into a binding agreement with another state agency or with a political subdivision of the state. Joint powers agreements may be used for a number of purposes, including: acquiring, constructing, and maintaining any building for the joint use of the contracting government agencies; the use of buildings under the control of the state; and the joint exercise of any power or function that any of the parties to the agreement is authorized to perform. See *generally* N.D.C.C. chs. 54-40, 54-40.3.

Any joint powers agreement involving the use of state property (N.D.C.C. ch. 54-40) or the exercise of a state power or function between the state and a political subdivision

must be reviewed by the Attorney General for legal sufficiency. N.D.C.C. §§ 54-40-08, 54-40.3-01(2). Joint powers agreements do not relieve the agency of its statutory duties, but actual and timely performance of those duties by another party created by the joint powers agreement is sufficient. N.D.C.C. § 54-40.3-01(3) and N.D.A.G. 94-F-08.

Joint powers agreements authorized under N.D.C.C. ch. 54-40 must contain certain provisions. Joint powers agreements authorized under N.D.C.C. ch. 54-40.3 have no required form, but a number of suggested contract topics are listed in N.D.C.C. § 54-40.3-01(1).

Agreements with Indian Tribes

Some agreements between a state agency and an Indian tribe are governed by N.D.C.C. ch. 54-40.2. If N.D.C.C. ch. 54-40.2 applies, the state agency involved must publish notice of the agreement and, if requested, hold a public hearing. These agreements must be approved by the Governor and by the governing body of the tribes involved. N.D.C.C. § 54-40.2-04. In addition, agreements with an Indian tribe may implicate federal statutes and regulations.

Contracts for Public Improvements

The contracting process for public improvement projects is subject to numerous requirements in N.D.C.C. ch. 48-01.2. All bids and proposals for public improvement contracts must include a copy of the license or certificate of renewal thereof issued by the secretary of state enclosed in the required bid bond envelope showing the contractor is licensed as provided in N.D.C.C. ch. 43-07. N.D.C.C. § 43-07-12. Contractors with the state also must file a certificate showing the contractor has paid all applicable state taxes. N.D.C.C. § 43-07-11.1.

A bidder's bond and a contractor's or performance bond are required for many public improvement and construction projects. N.D.C.C. ch. 48-01.2, N.D.C.C. §§ 48-01.2-05, 48-01.2-10. A bidder's bond generally must guarantee execution of both a contract and a contractor's or performance bond within ten days after receiving notice that the contract has been awarded. A contractor's or performance bond must guarantee the contractor's performance of the contract and payment of all bills arising during the performance of the contract. A contractor's or performance bond must include requirements that:

1. all bills or claims for labor or material be paid, including interest under N.D.C.C. § 13-01-14, for bills which are not paid within 90 days; and
2. the contractor will file a payroll report with workforce safety and insurance and pay all required premiums. N.D.C.C. § 65-04-10.

All construction contracts, except those involving federal aid or where a preference would be contrary to law, must include a clause requiring the contractor to give preference to North Dakota residents in hiring, with preference given first to veterans. N.D.C.C. § 43-07-20.

With some exceptions, any retention of amounts due to a contractor under a public improvement contract is limited to 10% of each estimate presented until the project is 50% complete. N.D.C.C. §§ 43-07-23, 48-01.2-13.

CHAPTER 3 - PROCUREMENT

Goods

Goods purchased by OMB on behalf of state agencies under N.D.C.C. ch. 54-44.4, or pursuant to purchasing authority delegated by OMB, are usually purchased under a competitive procurement procedure. OMB develops specifications, receives bids, and may reject any bids or negotiate for a lower price with the successful bidder. Term contracts and multiple awards for certain contracts are also authorized. N.D.C.C. § 54-44.4-05. For more information regarding the bidding process, see OMB's Procurement Office website at: <http://www.state.nd.us/csd/spo/>.

Bids

For certain contracts, competitive bids are required. Examples of these contracts include:

1. Contracts for construction of public improvements if the estimated cost exceeds \$100,000. N.D.C.C. § 48-01.2-04.
2. Concessions in public buildings or on public grounds. N.D.C.C. § 48-09-01.
3. Highway construction contracts exceeding \$20,000. N.D.C.C. § 24-02-17.
4. State printing contracts. N.D.C.C. ch. 46-02.
5. State purchasing contracts. N.D.C.C. § 54-44.4-05.

An agency subject to bidding requirements should be very careful to review and follow all requirements set out in law and administrative rule.

Proposals

A request for proposals, often referred to as an "RFP," is similar to the bid process but gives the agency additional flexibility after receiving proposals from potential contractors. Frequently, the process includes competitive negotiation with the bidders based on a comparison of the proposals received by the agency.

Requests for Bids or Proposals

When preparing a request for bids or proposals, the agency should specify both the terms and conditions it will require in the contract and those that are unacceptable. This gives potential contractors notice of the state's contracting requirements. Solicitation templates are available at OMB's Procurement Office website at: <http://www.nd.gov/spo/>.

Architect, Engineer, and Land Surveying Services

The procurement of architect, engineer, and land surveying services is governed by N.D.C.C. ch. 54-44.7. The standard architectural contracts used by the American Institute of Architects favors the architect, and must be amended with consultation from

your attorney. Engineering standard contracts, likewise, are written in the engineer's best interest, and should be given legal review.

CHAPTER 4 - CONTRACT FORMATION & INTERPRETATION

Essential Elements of a Contract

A "contract" is an agreement to do or not do a certain thing. N.D.C.C. § 9-01-01(1). The four essential elements of a valid contract are:

1. parties capable of contracting;
2. the consent of the parties;
3. a lawful object; and
4. sufficient cause or consideration.

The terms of a contract also must be reasonably definite and certain for the contract to be enforceable. *Delzer v. United Bank*, 459 N.W.2d. 752 (N.D. 1990).

It is essential to the validity of the contract, not only that the parties should exist, but that they should be clearly identified. N.D.C.C. § 9-02-03. If a party is an entity or organization, care should be taken to ensure that the person signing the contract has the authority to do so.

Any benefit conferred upon a promisor or prejudice suffered by a promisee is valid consideration for a contract. N.D.C.C. § 9-05-01. A written contract is presumptive evidence of consideration. N.D.C.C. § 9-05-10.

Contract Interpretation

Contracts are generally governed by the law in effect when the contract is formed. The language of a contract governs its interpretation if the language is clear and explicit and does not involve an absurdity. A contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting if that intent can be determined and is lawful. For written contracts, the intent of the parties must be determined from the writing alone if possible. A contract must be interpreted as a whole, giving effect to every clause, sentence, or provision consistent with the main purpose of the contract. Words in a contract are given their ordinary meaning unless used in a technical sense. See *generally* N.D.C.C. ch. 9-07.

If a contract is unambiguous, its interpretation is a question of law and extrinsic evidence, that is, information gathered from outside or beyond what is in the written contract, is not admissible to contradict contract terms. If a contract is ambiguous, extrinsic evidence can be used to clarify the parties' intent. Whether a contract is ambiguous is a question of law. A contract is ambiguous when rational arguments can be made for different positions about its meaning. If extrinsic evidence is used to interpret an ambiguous contract, the parties' intent is a question of fact.

Public Contracts

Contracts involving government agencies or officials are generally interpreted under the same rules as contracts between private parties. N.D.C.C. § 9-07-01. However, in public contracts, any ambiguity or uncertainty is presumed to be caused by the private party and is interpreted against the private party. N.D.C.C. § 9-07-19.

Form of Contract

A state agency contemplating entering into a contract should review the checklist attached as Appendix A before beginning the drafting process. State contracts should be in writing with numbered pages. Certain contracts are invalid unless they are in writing. See N.D.C.C. § 9-06-04. Numbering the separate clauses in a contract can make the agreement clearer and make internal cross-references easier. If the contract has been modified from an earlier draft, make sure to update any internal cross-references.

A written contract supersedes all oral negotiations that preceded or accompanied the execution of the contract. N.D.C.C. § 9-06-07.

If an agency receives a “boilerplate” or “form” contract from a contractor that does not contain the provisions this manual advises all agencies to use, **the agency should contact its attorney.**

Language

Definitions should be included for words and phrases that are unclear or are frequently used in the contract. If the same phrase identifying a thing or entity is used frequently throughout the contract, a shortened form should be indicated early in the document to avoid repetitive use of a needlessly long term or phrase.

Contract language does not have to be complicated or wordy to be effective. Certain words are sometimes used in contract drafting either because they sound or look legal and important, or because it has “always been done that way.” Occasionally some of this legalese may actually be needed, but generally it should be avoided. Surplus language should be removed unless it makes the contract clearer. Use certain words carefully.

The term “**shall**” describes what a party is required to do. Use “shall” when imposing a duty on a person or entity that is the subject of the sentence. Use “shall” in a mandatory or imperative sense. Example: “The licensee shall give the debtor a copy of the signed contract.”

The word “**must**” describes conditions that have to exist before something else happens. Use “must” in reference to a thing rather than a person and to express status requirements, i.e., statements about what people or things must be rather than what they must do. Examples: “The contract must contain two signatures.” “A candidate must be a resident of the county.”

Use "**may**" to confer a power, privilege, or right. Example indicating power: "The state may demand an extension of time." Example indicating privilege: "The state may renew the application." Example indicating right: "The state may appeal the decision."

Do not use "**such**" as a substitute for "the", "that", "it", "those", "them", or other similar words.

Omit needless words. Examples: Change "including, but not limited to" to simply "including." Change "until such time as" to "until."

Use "**which**" to introduce a nonrestrictive clause. Example: "The application, which need not be verified, must be signed by the applicant." Use which to modify a remote antecedent in a restrictive clause. Example: "An application to renew a license which has been rejected"

Use "**that**" to introduce a restrictive clause modifying the nearest antecedent. Example: "An application to renew a license that has been revoked"

Every two years, the Legislative Counsel publishes a Legislative Drafting Manual. This manual contains a chapter on style and grammar. While the manual is written as a resource to use for drafting legislation, it is an excellent resource for any type of writing. This manual is available at:

<http://www.legis.nd.gov/information/bills/draft-manual.html>.

CHAPTER 5 - RECOMMENDED CONTRACT CLAUSES AND ALTERNATIVES

A: IDENTIFYING THE PARTIES AND PURPOSE

Contracts frequently include "recitals" at the beginning of the agreement that identify the parties to the agreement and the purpose of the agreement. Although not legally required, recitals can effectively explain the agreement, which will help in understanding the remaining terms of the contract.

A contract should begin with a recital identifying the parties to the contract. Except for contracts between state agencies, the state, rather than a particular agency or official, is the real party to state contracts. For contracts between state agencies, separate terms describing each agency should be used. The state should be identified as follows: "This contract is between the State of North Dakota ("State") acting through its _____ [agency] and [ABC Company] ("Contractor")."

Use one word descriptive terms, introduced in the opening clause identifying the parties, to refer to the parties throughout the contract. Check to be sure that references to the parties are consistent throughout the contract. An example of an acceptable paragraph identifying the parties is: "This agreement is between the State of North Dakota ("State"), acting through its Commissioner of Labor, and ABC Company ("Company")." Note that when this is done the one word descriptive term is considered a proper noun and, in most cases, no longer needs to be preceded by the definite article "the." Example: "Contractor and State will ..." rather than "The Contractor and the State will ..."

All of the suggested contract provisions are very important. An agency should be reluctant to consider alternatives.

B: SCOPE OF AGREEMENT

Purpose

Describe the goods or services required under the contract in sufficient detail so that a failure of the contractor to meet the state's expectations will be a breach of contract. The goods or services are typically described in general terms in the contract itself or a more detailed description, sometimes called the "statement of work," may be attached as an exhibit to the contract and incorporated by reference.

Recommended Language

CONTRACTOR, agrees to provide the following services:

Note: If the description is too vague, it will be difficult for the state to enforce the contract or establish a breach of contract by the contractor.

C: TERM OF AGREEMENT

Purpose

Identify the time period during which the agency and contractor are subject to the contract's commitments. But a state agency generally lacks authority to commit funds beyond the term of the current biennium. In addition, for most contracts, an agency will want to prohibit the contractor from terminating the agreement on short notice.

A contract may extend beyond the current biennium if the agency has express authority to enter into the contract or if the termination clause in the contract allows the agency to terminate the contract if sufficient funds are unavailable, if the law regarding the contract is changed or without cause at any time. See **G:Termination**; and N.D.A.G. 77-1.

Recommended Language

The term of this contract is for [#] months, beginning on [Month, Day], 20[Year], and ending on [Month, Day], 20[Year].

D: COMPENSATION – PAYMENTS

Purpose

Identify the amount of money the state must pay pursuant to the contract. If a total number of goods or hours of service cannot be identified, a cap should be placed on the total number, which may not be exceeded without the written consent of the agency. Contracts requiring payment for each good or hour of service should not be open-ended and should instead identify the total number of goods or hours of service being purchased.

Recommended Language

STATE will pay for the services provided by CONTRACTOR under this contract an amount not to exceed _____ per _____, to be paid _____.

Interest Due on Overdue Payments

Although there is no need to include a provision governing interest in state contracts, state entities should be aware that interest must be paid on a payment due from the state if the payment is not made by the date specified in the contract or, if no date is specified, within 45 days of receipt of an invoice. N.D.C.C. § 13-01.1-02.

E: LANDLORD'S OBLIGATIONS

Purpose

Leases usually contain a clause identifying the duties owed by the landlord to the agency as a tenant. These duties will often include utilities, janitorial services, and grounds keeping. The inclusion of these items will largely depend upon how the agreement is negotiated. The list of duties identified below is not exhaustive or required, but is merely a suggested starting point, and the agency is encouraged to review the duties/requirements to ensure their needs are met. An agency should, however, make parking access a high priority for office space leases.

Recommended Language

LANDLORD agrees:

1. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the premises.
2. To perform all required maintenance for the premises, including all janitorial services, which will be done on a daily basis, including furnishing of related supplies.
3. To keep the walkways and parking areas of the premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants, and trees on the premises.
4. That if other portions of the building are leased to other parties, LANDLORD shall not permit any activity to be conducted in other portions of the building or grounds that will materially interfere with STATE'S use and enjoyment of the premises.
5. That STATE may install items that it deems necessary for maximum and optimum use of the premises. STATE may, at any time, remove from the premises all fixtures and other equipment owned by STATE; provided the removal is completed before termination of this lease or any renewal or extension. STATE agrees to repair any damages that may be done to the premises resulting from the removal of the items, if any.
6. That STATE may place decorations, wall hangings, signs and directories upon entrance doors, in hallways leading to its premises, or doors and walls within the premises.
7. To furnish _____ automobile parking stalls for use by STATE, its agents or designees, in the lot provided for use by the building tenants.
8. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the premises.
9. To pay all real estate taxes and special assessments on the premises during the terms of the lease.

F: STATE'S OBLIGATIONS

Purpose

Similarly, many leases contain a clause that identifies the duties owed by the agency as a tenant to the landlord. These obligations will also depend, in large part, upon how the lease is negotiated. Obviously, an agency wishing to keep its costs down will want to limit the obligations it is willing to assume.

Recommended Language

STATE agrees:

1. To pay the rent when due;
2. To pay for its own telephone service;
3. To keep the premises in reasonable condition the same as at the commencement of the term or as it may be put by LANDLORD, except for reasonable use and wear, or damage by fire and unavoidable casualty;
4. Not to make any unlawful, improper, or offensive use of the premises, and to observe all the laws of the state of North Dakota and the ordinances of the city of _____ in force from time to time relating to the leased premises;
5. To permit LANDLORD at all reasonable times to enter and examine the premises and to make necessary repairs for the protection of the premises;
6. To surrender the premises to LANDLORD at the end of the term; and, in default of the payment of rent due or failure to perform its obligations under this lease, to surrender the premises upon demand by LANDLORD; and
7. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by STATE.

G: TERMINATION

1. SERVICE CONTRACT

Purpose

A termination clause identifies the circumstances under which the contract may be cancelled prior to the termination date specified in the contract.

Recommended Language

a. Termination without Cause

This contract may be terminated by mutual consent of both parties.

b. Termination for Lack of Funding or Authority

STATE by written notice of default to CONTRACTOR, may terminate the whole or any part of this contract under any of the following conditions:

1. If funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term.
2. If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this contract or are no longer eligible for the funding proposed for payments authorized by this contract.
3. If any license, permit, or certificate required by law or rule, or by the terms of this contract, is for any reason denied, revoked, suspended, or not renewed.

Termination of this contract under this subsection is without prejudice to any obligations or liabilities of either party already accrued prior to termination.

c. Termination for Cause.

STATE may terminate this contract effective upon delivery of written notice to CONTRACTOR, or any later date stated in the notice:

- (1) If CONTRACTOR fails to provide services required by this contract within the time specified or any extension agreed to by STATE; or
- (2) If CONTRACTOR fails to perform any of the other provisions of this contract, or so fails to pursue the work as to endanger performance of this contract in accordance with its terms.

The rights and remedies of STATE provided in this subsection are not exclusive and are in addition to any other rights and remedies provided by law or under this contract.

d. Termination for Convenience

The STATE may terminate this contract in whole or in part when it has determined that continuing the contract is no longer necessary or would not produce beneficial results commensurate with the further expenditure of public funds.

If a contractor is unwilling to agree to this provision, clauses authorizing termination if an agency's governing law or spending authority is changed will still be helpful.

2. LEASE**Purpose**

A lease should contain a termination clause so that the lease can be cancelled under the appropriate circumstances. An agency should not enter into a lease agreement that allows the landlord to terminate the lease with little or no notice to the agency.

Recommended Language

a. Termination of Lease

STATE has no obligation under this lease for the initial or succeeding terms if the North Dakota Legislature fails to appropriate to STATE sufficient funds to defray the full rental costs. STATE, without any liability, may terminate this lease by providing 30 days written notice, if its legislative appropriations are reduced or if its authority to spend its appropriations is reduced or limited by law or by reductions in federal or other grant funds to a point STATE, in its sole discretion, deems insufficient to pay the full rental cost for the remainder of the term of this lease. During the term of this lease or any renewal or extension, STATE may terminate this lease by providing 30 days written notice to LANDLORD, if LANDLORD fails to comply with any of its obligations under this lease, or if STATE determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other state or federal law or rules.

b. Termination of Lease in the Event of Destruction of Premises

If the leased premises are destroyed or damaged by fire or the elements to the extent they become untenable, then this lease will terminate immediately, unless LANDLORD, within 20 days of the happening of the event, gives written notice of intention to restore the building and fully restores the premises within a reasonable time. During the term between destruction and restoration of the premises rent will not be due, and if rent has already been paid, LANDLORD shall refund to STATE all that portion of the prepaid rent attributable to the time during which STATE was unable to use the premises for its intended use.

Approval

All leases must be approved by facility management. The procedure for completing a state office lease may be found at:

<http://www.state.nd.us/fac/forms/leaseprocedure.htm>.

H: DELAY OR DEFAULT FORCE MAJEURE (NATURAL DISASTER/ACTS OF GOD)

Purpose

This clause is necessary to identify the obligations of the contractor and expectations of the agency if timely performance of the contract is impossible or extremely difficult for reasons beyond the contractor's control. The clause should be written to balance the contractor's difficulties under the circumstances with the agency's need for the goods or services.

Recommended Language

CONTRACTOR shall not be held responsible for delay or default caused by fire, flood, riot, acts of God or war if the event is beyond CONTRACTOR'S reasonable control and CONTRACTOR gives notice to STATE immediately upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default.

Options

Immediate termination is an option, but an agency generally should consider giving a contractor a grace period to resume providing services or goods before terminating the agreement and finding a new contractor.

I: RENEWAL

Purpose

A renewal clause may be used if an agency is interested in continuing a contract for an additional period of time. If a contract is renewed, the agency should compare the cost of the goods or services in the contract to the current market for those goods or services. Continuing an existing contract can spare the agency time, but the agency also loses the opportunity to go through a competitive procurement process and obtain similar or better services or goods at similar or better prices. If renewal is expected or a possibility, parties to a contract should agree to the number of potential renewal terms in advance and in writing in the contract.

Recommended Language

This contract will not automatically renew. If STATE desires to renew, STATE will provide written notice to CONTRACTOR of its intent to renew this contract at least 60 days before the scheduled termination date.

Concern

Automatic renewals should be avoided unless the agency can terminate the contract on short notice without cause. Renewing the agreement should require a written notification from the agency to the contractor.

J: HOLDING OVER (LEASES)

Purpose

A hold over clause may be necessary if an agency wants to retain possession of a leased premises on a short term basis under the same lease terms. If an agency remains in possession of the premises after the expiration of the lease, and the lessor accepts rent from the agency, the parties are presumed to have renewed the lease on the same terms and for the same time, not exceeding one year. N.D.C.C. § 47-16-06.

Recommended Language

If STATE remains in possession of the premises after the lease expires, and LANDLORD accepts rent from it, the lease will be deemed renewed month to month.

Concern

An agency should be reluctant to consider alternatives to this language.

K: MERGER AND MODIFICATION

Purpose

This clause is necessary to confirm that the provisions of the contract supersede any prior oral negotiations and prevent subsequent unwritten communications from being considered amendments to the contract. The clause should also explain how the contract may be amended.

Recommended Language

This contract constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this contract. This contract may not be modified, supplemented or amended, in any manner, except by written agreement signed by both parties.

L: SEVERABILITY

Purpose

This clause should be included in a contract so that if one or more provisions in the contract are declared illegal, and performance of the contract without the illegal clause is possible, the remaining terms of the contract will remain enforceable. Contract termination could be an option if it suited the situation.

Recommended Language

If any term of this contract is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the parties are to be construed and enforced as if the contract did not contain that term.

M: ASSIGNMENT AND SUBCONTRACTS

Purpose

This clause allows an agency to maintain control over its choice of the contractor who will provide the goods or services under the contract. A contractor will often bid on a project with the intent of having a subcontractor complete the work. This ultimately may result in inflated costs to the agency; or, if a contract is awarded based on the qualifications of the contractor, but the contractor delegates or transfers those duties to another person who may lack those qualifications, the agency's expectations are frustrated. The clause should identify the obligations of the contractor under the agreement that may be assigned (transferred) or delegated to another person.

There may be times when assignment or subcontracts are appropriate. Therefore, an agency can permit assignment, but should require the contractor to obtain the agency's consent before the assignment. For subcontracts, the consent of the agency can be omitted as a requirement but the contract should provide that the contractor remains responsible for the acts of any subcontractors.

Recommended Language

CONTRACTOR may not assign or otherwise transfer or delegate any right or duty without STATE'S express written consent. However, CONTRACTOR may enter into subcontracts provided that any subcontract acknowledges the binding nature of this contract and incorporates this contract, including any attachments. CONTRACTOR is solely responsible for the performance of any subcontractor. CONTRACTOR does not have authority to contract for or incur obligations on behalf of STATE.

N: NOTICE

Purpose

All contracts should contain a notice provision identifying the representative of each contracting party to whom notices required under the contract must be provided. Contractual notice requirements, however, do not replace or supersede any other statutory notice requirement.

Recommended Language

All notices or other communications required under this contract must be given by registered or certified mail and are complete on the date mailed when addressed to the parties at the following addresses:

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

O: APPLICABLE LAW AND VENUE

Purpose

This clause is necessary to identify the law governing the contract and the court or courts in which contract disputes may be heard. The goal of this provision is to have a contract interpreted according to North Dakota law and any dispute resolved in North Dakota state courts.

Absent legislative authority, an agency may not agree to submit to the jurisdiction of the federal courts. N.D. Const. art. I, § 9. If an agency were to agree to federal court jurisdiction, the state's 11th Amendment immunity may be waived. Generally, the federal courts lack jurisdiction because a state is not considered a citizen for purposes of diversity jurisdiction.

In addition, the Attorney General's office generally discourages state agencies from agreeing to have contracts interpreted by or to be subject to the jurisdiction of another state's courts. An agency should consult with its attorney about such a clause, especially since the agency and its attorney may be completely unfamiliar with the laws

of another state. The cost of travel to the other state and hiring an attorney licensed in that state are also concerns the agency should consider.

If a contractor is unwilling to agree to be bound by North Dakota law or to be subject to the jurisdiction of North Dakota courts, an agency should propose removing any reference to choice of law or venue in the contract. General choice of law principles would then determine the appropriate governing law and jurisdiction for contract disputes.

Recommended Language

This contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this contract must be adjudicated exclusively in the state District Court of Burleigh County, North Dakota.

P: SPOILIATION (DESTRUCTION OR SEVERE MODIFICATION OF EVIDENCE)

Purpose

This clause is included in a contract to require a contractor to be responsible for preventing spoliation (destruction or severe modification of evidence), particularly when the scene of an accident or claim is beyond the state's control. It also identifies responsibilities for controlling the scene of an accident or potential claim and for preserving any relevant evidence of the circumstances surrounding the accident or potential claim.

Determining the cause of an accident is important for future loss prevention and for determining responsibility for the accident. Spoliation can interfere with proper investigation of an accident, jeopardize or nullify applicable insurance coverage, and even result in a separate lawsuit against the party responsible for the spoliation. However, controlling the scene of an accident and preservation of evidence should not take priority over public safety.

A similar clause may be used in service contracts as well as leases. This clause is not required by law and may be omitted when services are provided in locations that are under the state's control.

For further information on spoliation, consult the Risk Management Manual of the Risk Management Division of OMB. The manual can be found at:
<http://www.nd.gov/risk/publications/manual.html>.

Recommended Language

CONTRACTOR (or LANDLORD) shall promptly notify STATE of all potential claims that arise or result from this contract. CONTRACTOR (or LANDLORD) shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and

grants to STATE the opportunity to review and inspect the evidence, including the scene of the accident.

Q: LIQUIDATED DAMAGES

Purpose

A liquidated damages clause is used to compensate a party for losses caused by the other party, depending upon the language of the contract. The clause should determine the amount of damages in advance, if a party breaches the agreement.

Concern

Contracts may not include a penalty for nonperformance. N.D.C.C. § 9-08-03. Contracts may not include a liquidated damages provision that fixes the amount of damages in the event of nonperformance unless three facts exist:

1. at the time the contract was made, the damages in the event of nonperformance would be difficult to accurately estimate;
2. there was a reasonable effort by the parties to fix their compensation under the contract; and
3. the amount of liquidated damages set by the parties is reasonable and not disproportionate to the damages reasonably to be anticipated.

N.D.C.C. § 9-08-04, *Eddy v. Lee*, 312 N.W.2d 326 (N.D. 1981). These requirements are more liberally applied in public contracts.

Liquidated damages provisions that may be enforced against the state are strongly discouraged. A state agency must have the ability to terminate agreements not only for cause or mutual consent, but also if funding is reduced or for another legitimate reason without incurring additional liability.

Recommended Language

An agency should discuss proposed liquidated damage clauses with the agency's attorney. However, what follows is a liquidated damages clause that has been used in certain Game and Fish Department contracts:

Because of the difficulties that would arise in determining the STATE's damages upon CONTRACTOR's breach, the parties, after careful consideration, agree that if CONTRACTOR fails to abide by this contract, CONTRACTOR shall pay damages to the STATE equal to the full amount of consideration paid by STATE pro-rated over the number of years the STATE has received benefits under this contract. STATE shall also receive an additional 25% of total net payments to cover the administrative costs of the STATE. Alternatively, STATE may seek to enforce CONTRACTOR's obligations under this contract by legal action in a court of competent jurisdiction. It is expressly agreed that in the event of suit or other legal process to enforce any part of this contract, CONTRACTOR agrees to pay all of STATE's attorney's fees and expenses.

R: INDEMNITY AND LIMITATIONS OF LIABILITIES

Purpose

These clauses are often the most contentious in any contract. The purpose of the clauses is to allocate responsibility for risks of liability and costs of legal defense that may arise out of an agreement. The clauses ensure that the party exercising control over the activities governed by the contract, and in the best position to implement safety and loss control practices, retains as much risk of liability and costs of legal defense as is commercially reasonable. Note, when contracting with political subdivisions, an agency's ability to limit its liability is statutorily constrained. N.D.C.C. § 32-12.2-13. An agency should consult with its attorney regarding any contract with a political subdivision.

Recommended Language

The Risk Management Division of the Office of Management and Budget has sample indemnity and limitation of liability language that should be used in each contract with the state. Depending upon the type of contract, different provisions may be used. It is therefore imperative that you review the language provided by the Risk Management Division and determine which clause is best suited for your particular situation. Please review the risk management manual available at:

<http://www.nd.gov/risk/publications/manual.html>.

Purchase or Lease of Software, Communications, or Electronic Equipment (N.D.C.C. § 32-12.2-15)

For agencies asked to agree to limit the liability of a contractor, section 32-12.2-15, N.D.C.C. is relevant. It provides that contracts for the purchase or lease of software, communications, or electronic equipment may include terms that limit the liability of a contractor to the state if the Attorney General and the director of OMB agree that it is in the state's best interest. Absent this written approval, or specific statutory authority, an agency may not limit the liability of a contractor to the state.

Since it is in the best interests of the state to remove all language that limits the liability of a contractor or places an indemnity burden upon the state, it is recommended that such language is removed from all contracts. If a contractor is unwilling to remove such language, any contract requiring the state to limit the liability of a contractor is reviewed by a committee. A request to this committee should be a last resort. By law, the committee may only approve requests to limit the liability of a contractor if it is in the best interest of the state, and this is rarely the case. Please work with your attorney to assist you in removing any requirement that the state contractually limit the liability of a contractor.

This manual does not offer a sample clause for an agency to use to limit the liability of a contractor or third party because these clauses should not be used without the specific advice of the agency's attorney.

Other than those contracts approved under the process outlined in N.D.C.C. § 32-12.2-15, the Risk Management Fund will not cover claims against the state that arise by an indemnity or limitation of liability provision included in a state contract. See N.D.C.C. ch. 32-12.2.

For further information on indemnity and limitations of liability, consult the Risk Management Manual at: <http://www.nd.gov/risk/publications/manual.html>.

S: INSURANCE

Purpose

Insurance clauses are necessary to ensure that sufficient coverage is in place to cover all claims against the contractor, and any claims and costs that the state might incur. Thus, it is important to identify the types and amounts of insurance coverage that will be maintained by the parties to the contract. An agency should make sure that the insurance coverage required by a contract will cover the types of claims that may arise under that specific contract.

The benefit of requiring a contractor to indemnify the state or have certain levels of insurance coverage, or both, can be easily neutralized if the details of the contractor's insurance policy are written in a way to effectively exclude from coverage the very claims the state wants to be covered by the policy. For example, an insurance policy offers little protection if it is offered by an insolvent insurer or if the policy has an unusually high deductible.

It is common for a contracting party to omit or remove any clause requiring that the state be named as an additional insured. However, agencies should be aware of the significant risk this poses to the state and decreased protection from liability. Without an additional insured endorsement, the insurance coverage will generally cover claims against the contractor but disregard claims against the state. An attempt to seek indemnity from the contractor personally may be unsuccessful because the contractor may have insufficient assets to fulfill the contractor's duty to indemnify the state.

Required Coverages

The Risk Management Division of the Office of Management and Budget has sample insurance language that should be used in each contract with the state. Depending upon the type of contract, different provisions may be used. It is therefore imperative that you review the language provided by the Risk Management Division, and determine, which clause is best suited for your particular situation. Please review Section 5 of the Risk Management Manual, available at: <http://www.nd.gov/risk/publications/manual.html>.

T: ATTORNEY FEES AND COSTS

Purpose

An attorney fees and costs clause should be used to allocate responsibility for paying attorneys fees and costs incurred by a prevailing party in litigation to enforce a contract. This type of clause would also be helpful if the state needed to recoup its legal expenses for suing a contractor to enforce its contractual responsibilities.

A reciprocal provision in favor of the contractor should be avoided. **This type of expense would not be covered by the North Dakota Risk Management Fund and could only be paid pursuant to an appropriation.**

Recommended Language

In the event a lawsuit is instituted by STATE to obtain performance due under this contract, and STATE is the prevailing party, CONTRACTOR shall, except when prohibited by N.D.C.C. § 28-26-04, pay STATE'S reasonable attorney fees and costs in connection with the lawsuit.

U: ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

Purpose

Occasionally a party will propose a clause that requires contractual disputes to be resolved through alternative dispute resolution. This is a voluntary method of resolving disputes. Although alternative dispute resolution may be helpful and a cost-effective alternative to litigation, the Attorney General does not recommend this type of dispute resolution.

In addition, unless an agency has specific authorization by law, the agency has questionable legal authority to waive the state's right to have disputes resolved in a court. If alternative dispute resolution must be used, it should be voluntary so the agency can choose to go to court if the parties cannot reach a settlement that is authorized by law.

Recommended Language

STATE does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolution. The parties have the right to enforce their rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

V: CONFIDENTIALITY

Purpose

Confidentiality clauses are often used by parties to ensure that certain information remains confidential. A clause should explain the obligations of the parties in

maintaining, releasing, and discarding information that is confidential. Regardless of what the contract says, however, all parties must follow applicable confidentiality laws.

Contractors frequently ask a contracting agency to keep all information provided by a contractor confidential. The open records law does not allow an agency to deny a request for records unless the records are closed or confidential under a specific law. Accordingly, a state agency cannot agree to keep records confidential that are subject to the open records law. Further information regarding open records and meetings may be found at: <http://www.ag.nd.gov/OpenRecords/ORM.htm>.

Recommended Language

CONTRACTOR shall not use or disclose any information it receives from STATE under this contract that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this contract or as authorized in advance by STATE. STATE shall not disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota open records law, N.D.C.C. § 44-04-18. The duty of STATE and CONTRACTOR to maintain confidentiality of information under this section continues beyond the term of this contract.

W: COMPLIANCE WITH OPEN RECORDS LAW

Purpose

A state contract should contain a clause notifying a contractor that the contract may, depending on the circumstances, be subject to the state open records law as a result of the contract and advise the contractor of its responsibilities under the open records law.

As previously indicated, the parties must comply with the open records laws even if this clause is omitted. Including this clause in the contract will put contractors on notice regarding the requirements of the open records laws and prevent misunderstandings about how the law may apply to certain records.

An agency should consult with its attorney to determine whether a contract should also include language notifying a contractor that it could be considered a public entity under N.D.C.C. ch. 44-04 and N.D.C.C. § 44-04-17.1(12)(c) which would subject the contractor to the open meetings laws.

Recommended Language

CONTRACTOR understands that, except for disclosures prohibited in this contract, STATE must disclose to the public upon request any records it receives from CONTRACTOR. CONTRACTOR further understands that any records that are obtained or generated by CONTRACTOR under this contract, except for records that are confidential under this contract, may, under certain circumstances, be open to the public upon request under the North Dakota open records law. CONTRACTOR agrees to

contact STATE immediately upon receiving a request for information under the open records law and to comply with STATE'S instructions on how to respond to the request.

X: WORK PRODUCT, EQUIPMENT, AND MATERIALS

Purpose

This clause establishes ownership of work product, materials, and equipment purchased or created under the contract. The reason for this is so that the public entity gets full value for the amount of public funds expended to purchase or create documents, materials, or equipment under the contract.

If a contractor is allowed to retain valuable property that was purchased or created at state expense, the agency should determine whether the contract price should be adjusted to reflect the value retained by the contractor. For more information see: <http://www.copyright.gov/circs/circ09.pdf>.

Recommended Language

All work product, equipment or materials created or purchased under this contract belong to STATE and must be delivered to STATE at STATE'S request upon termination of this contract. CONTRACTOR agrees that all materials prepared under this contract are "works for hire" within the meaning of the copyright laws of the United States and assigns to STATE all rights and interests CONTRACTOR may have in the materials it prepares under this contract, including any right to derivative use of the material. CONTRACTOR shall execute all necessary documents to enable STATE to protect its rights under this section.

Y: INDEPENDENT ENTITY

Purpose

When the state hires a contractor, a contract should clearly indicate that the contractor is not acting as a state employee in performing the contract. Otherwise, the state might be required to deduct certain amounts from payments to the contractor and comply with other laws governing employer-employee relationships.

A contract should indicate that the contractor retains sufficient control and discretion over carrying out the activities in the contract that the contractor will not be considered a state employee.

Recommended Language

CONTRACTOR is an independent entity under this contract and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. CONTRACTOR retains sole and absolute discretion in the manner and

means of carrying out CONTRACTOR'S activities and responsibilities under this contract, except to the extent specified in this contract.

Z: NONDISCRIMINATION – COMPLIANCE WITH LAWS

Purpose

A nondiscrimination clause should be used because the public's confidence in its government could be undermined if contractors for the state are allowed to discriminate or violate the laws that other members of the public are expected to follow.

Recommended Language

CONTRACTOR agrees to comply with all laws, rules, and policies, including those relating to nondiscrimination, accessibility and civil rights. CONTRACTOR agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes, unemployment compensation, and workers' compensation premiums. CONTRACTOR shall have and keep current at all times during the term of this contract all licenses and permits required by law.

AA: STATE AUDIT

Purpose

A state audit clause informs a contractor that all records regarding a contract may be subject to audit. N.D.C.C. § 54-10-19.

Recommended Language

All records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this contract are subject to examination by the North Dakota State Auditor or the Auditor's designee. CONTRACTOR shall maintain all of these records for at least three years following completion of this contract.

BB: PREPAYMENT

Purpose

In general, agencies should avoid prepayment for goods or services and include a clause indicating that payment will be made after services are received. This office and the State Auditor discourage the use of prepayment provisions. An agency should not only avoid paying public funds before verifying the quality or sufficiency of the goods or services being purchased, but should reconsider doing business with a contractor whose financial condition is so marginal that it needs an infusion of cash in order to proceed with the project. An agency should strongly consider requiring the contractor to post a performance bond if the contractor requires a prepayment. If language is necessary to address this situation, the following clause could be used.

Recommended Language

STATE will not make any advance payments before performance by CONTRACTOR under this contract.

CC: TAXPAYER ID**Purpose**

An agency should obtain the contractor's federal employer ID number by requiring this through the contract. This eliminates the need to obtain a contractor's identification number after the contract is executed to complete mandatory tax filings. Although this clause is not essential to the contract, it may save time for the agency.

Recommended Language

CONTRACTOR'S federal employer ID number is: _____.

DD: PAYMENT OF TAXES BY STATE**Purpose**

Ensure that the State is not responsible for the payment of any taxes.

Recommended Language

State is not responsible for and will not pay local, state, or federal taxes. State sales tax exemption number is E-2001, and certificates will be furnished upon request by the purchasing agency.

EE: EFFECTIVE DATE OF AGREEMENT**Purpose**

All contracts should contain an effective date which will indicate when work on the contract should begin, and when the terms of the contract are enforceable.

Recommended Language

This contract is not effective until fully executed by both parties.

FF: SIGNATURES**Purpose**

The signatures on the contract should match the parties identified in the introduction to the contract. When contracting with a corporation or business, the person who signs the contract should be an officer or other person with authority to act for the corporation or business. If the person is not an officer with apparent authority, insist on a board resolution, power of attorney from an officer, or some documentation showing that the person is authorized to act on behalf of the corporation or business.

All signatures must be dated and written in ink, preferably in blue ink for easy identification of an original signature. The official title or position of the individuals executing the contract should appear below each signature line. For leases and other contracts with a party who does not sign the contract in front of an employee of the agency, the signature should be notarized.

Electronic signatures are provided for in N.D.C.C. ch. 9-16. The Information and Technology Division ("ITD") has created guidelines for their use by state agencies. Accordingly, an agency considering using an electronic signature should consult these guidelines if a contractor asks it to accept an electronic signature.

<http://www.nd.gov/itd/records/e-signatureguidelines.pdf>

APPENDIX

A – CHECK LISTS

B – SAMPLE FORMS

CONTRACT CHECKLIST

- ☐ 1. Does the state agency or official have the authority to enter into the contract?
 - Have sufficient funds been budgeted?
- ☐ 2. Does the other party have the authority to enter into the contract?
- ☐ 3. Has the proposed contract been reviewed by the agency's attorney?
- ☐ 4. Is the contract in writing with all pages numbered?
 - If there are any exhibits or attachments referred to in the contract, are all the documents attached?
- ☐ 5. Are all payment amounts and dates correct?
- ☐ 6. Are there any handwritten changes or other alterations to the contract?
 - If so, have all the changes or alterations been initialed by all signers?
- ☐ 7. Are the parties identified in the introductory paragraph or first clause?
 - Except for contracts between state agencies, the state, rather than a particular agency or official, is the real party to state contracts.
- ☐ 8. Has the agreement been checked for the following ambiguities and inconsistencies:
 - If recitals are used, are they unambiguous and consistent with the terms of the contract?
 - Are all references to parties, exhibits and other things internally consistent?
- ☐ 9. Are all terms unambiguous or clearly defined?
 - Is the contract written in plain English using the present tense and the active voice?
 - Are the terms "shall," "may," and "must" used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
 - Is the connective "and" used properly in the conjunctive?
 - Is "or" used properly in the disjunctive?
 - Is it clear to what any modifier or dependent clause refers?
 - Where particulars are listed, is it clear whether the list is exhaustive?
- ☐ 10. If the contract contains a "liquidated damages" provision, are damages otherwise difficult to estimate in the event of a breach?
- ☐ 11. Are signatures dated and written in blue ink?
- ☐ 12. Is the name and title or position of each person signing the document listed below the signature line?
 - Do all signatures match the typed or printed names?
- ☐ 13. If contracting with a corporation:
 - Has at least one officer of the corporation signed the document?

- If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- ☐ 14. Does the contract specify both the date on which it begins and the date on which it ends?
- ☐ 15. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term, a provision terminating the contract without penalty if sufficient funds are not appropriated or otherwise made available, or a provision permitting termination without cause upon notice to the other party?
- ☐ 16. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- ☐ 17. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed as required by law?
- ☐ 18. Does the document include clauses regarding:
 - Force majeure – Delay or Default;
 - Applicable law;
 - Merger;
 - Assignment and delegation;
 - Subcontracting;
 - Modification;
 - Nondiscrimination and compliance with laws;
 - Severability;
 - Attorneys fees;
 - Notices;
 - Ownership of work product, equipment, or materials;
 - Spoliation; and
 - Tax identification number.
- ☐ 19. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the contract are assigned among the parties?
- ☐ 20. Is approval needed from the Attorney General and the director of the OMB?
- ☐ 21. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
 - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

LEASE CHECKLIST

- ☐ 1. Have OMB and the Office of Attorney General approved the lease?
- ☐ 2. Does the lease adequately describe the premises?
- ☐ 3. Is the lease term limited to the current biennium? If the lease continues for longer than current biennium, are there sufficient funds appropriated to pay the rent as it is due?
- ☐ 4. If a lease requires expenditure of state funds beyond the current biennium, is there express authority and funding for a longer term, a provision terminating the lease without penalty if sufficient funds are not appropriated or otherwise made available, or a provision permitting termination without cause upon notice to the other party?
- ☐ 5. Regardless of the specified term of the lease, does the lease include an acceptable termination clause permitting the state to terminate the lease at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- ☐ 6. Are the terms and amount of payment stated and correctly calculated?
 - If based on square footage, is the square footage also stated?
- ☐ 7. Is the responsibility for utilities, repairs and maintenance, janitorial service, snow removal, etc. clearly stated?
 - Is there a clause governing availability of parking?
 - Is the landlord's responsibility for fire or other insurance stated?
 - Is there a clause governing events of damage or destruction to property?
- ☐ 8. Is there a clause concerning accessibility requirements and compliance with ADA?
- ☐ 9. Is the lease in writing with all pages numbered?
 - If there are any exhibits or attachments referred to in the lease, are all the documents attached?
- ☐ 10. Are the parties identified in the introductory paragraph or first clause?
- ☐ 11. Are signatures dated and written in blue ink?
- ☐ 12. Is the name and title of position of each person signing the lease listed below the signature line?
 - Do all the signatures match the typed or printed names?
- ☐ 13. If leasing from a corporation:
 - Has at least one officer of the corporation signed the document?
 - If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- ☐ 14. Does the lease specify both the date on which it begins and the date on which it ends?
- ☐ 15. Can the state terminate the lease if it is unable to fulfill any term of the lease, or if the landlord fails to fulfill its obligations under the lease, or if the

state determines it must relocate to comply with the Americans with Disabilities Act of 1990 or any rules adopted under the Act, or with any other state or federal laws or rules?

- ☐ 16. Does the document include clauses regarding:
 - Force majeure – Delay or Default;
 - Applicable law;
 - Merger;
 - Assignment and delegation;
 - Subcontracting;
 - Modification;
 - Nondiscrimination and compliance with laws;
 - Severability;
 - Attorneys fees;
 - Notices;
 - Ownership of work product, equipment, or materials;
 - Spoliation; and
 - Tax identification number.
- ☐ 17. Is there an acceptable indemnification and hold harmless provision indicating how risks arising from the lease are assigned among the parties?
- ☐ 18. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
 - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

JOINT POWERS AGREEMENT CHECKLIST

- ☐ 1. Are the parties to the agreement and its purpose clearly stated?
- ☐ 2. Is the purpose of the agreement one which state law authorizes to be carried out through a joint powers agreement?
- ☐ 3. Does one of the parties to the agreement possess the power or function to be jointly or cooperatively exercised?
- ☐ 4. Does each state agency or official have the authority to enter into the agreement?
 - Have sufficient funds been budgeted?
- ☐ 5. Is the agreement in writing with all pages numbered?
 - If there are any exhibits or attachments referred to in the agreement, are all the documents attached?
- ☐ 6. Are there any handwritten changes or other alterations to the agreement?
 - If so, have all the changes or alterations been initialed by all signers?
- ☐ 7. Are the parties identified in the introductory paragraph or first clause?
- ☐ 8. Has the agreement been checked for ambiguities and inconsistencies:
 - If recitals are used, are they consistent with the terms of the agreement?
 - Are all references to parties, exhibits and other things internally consistent?
- ☐ 9. Are all terms unambiguous or clearly defined?
 - Is the agreement written in plain English using the present tense and the active voice?
 - Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
 - Is the connective “and” used properly in the conjunctive?
 - Is “or” used properly in the disjunctive?
 - Is it clear to what any modifier or dependent clause refers?
 - Where particulars are listed, is it clear whether the list is exhaustive?
- ☐ 11. Are signatures dated and written in blue ink?
- ☐ 12. Is the name and title or position of each person signing the document listed below the signature line?
 - Do all signatures match the typed or printed names?
- ☐ 14. Does the agreement specify both the date on which it begins and the date on which it ends?
- ☐ 16. Regardless of the specified term of the agreement, does the agreement include an acceptable termination clause permitting either party to terminate at an earlier date without incurring additional liability if adequate funds are not appropriated or available?

- ☐ 19. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the agreement are assigned among the parties?
- ☐ 20. Is approval needed from the Attorney General?
- ☐ 21. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
 - ☐ Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?
- ☐ 22. Are all applicable provisions of N.D.C.C. § 54-40.3-01(1)(a-i) addressed?

54-40.3-01. Joint powers agreements - General authority.

1. Any county, city, township, city park district, school district, or other political subdivision of this state, upon approval of its respective governing body, may enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them. Any political subdivision of this state may enter into a joint powers agreement with a political subdivision of another state or political subdivision of a Canadian province if the power or function to be jointly administered is a power or function authorized by the laws of this state for a political subdivision of this state and is authorized by the laws of the other state or province. A joint powers agreement may provide for:

- a. The purpose of the agreement or the power or function to be exercised or carried out.
- b. The duration of the agreement and the permissible method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of any property upon the partial or complete termination.
- c. The precise organization, composition, and nature of any separate administrative or legal entity, including an administrator or a joint board, committee, or joint service council or network, responsible for administering the cooperative or joint undertaking. Two or more political subdivisions which enter into a number of joint powers agreements may provide a master administrative structure for the joint administration of any number of those agreements, rather than creating separate administrative structures for each agreement. However, no essential legislative powers, taxing authority, or eminent domain power may be delegated by an agreement to a separate administrative or legal entity.
- d. The manner in which the parties to the agreement will finance the cooperative or joint undertaking and establish and maintain a budget for that undertaking. The parties to the agreement may expend funds pursuant to the agreement, use unexpended balances of their respective current funds, enter into a lease-option to buy and contract for deed agreements between themselves and with private parties, accumulate funds from year to year for the provision of services and facilities, and otherwise share or contribute property in accordance with the agreement in cooperatively or jointly exercising or carrying out the power or function. The agreement may include the provision of personnel, equipment, or property of one or more of the parties to the agreement that may be used instead of other financial support.
- e. The manner of acquiring, holding, or disposing of real and personal property used in the cooperative or joint undertaking.
- f. The acceptance of gifts, grants, or other assistance and the manner in which those gifts, grants, or assistance may be used for the purposes set forth in the agreement.
- g. The process to apply for federal or state aid, or funds from other public and private sources, to the parties for furthering the purposes of the agreement.
- h. The manner of responding for any liability that might be incurred through performance of the agreement and insuring against that liability.
- i. Any other necessary and proper matters agreed upon by the parties to the agreement.

CONSTRUCTION CONTRACT CHECKLIST

- ☐ 1. Have all required bonds been provided in a legally enforceable form?
 - If required, is a proper performance bond attached?
- ☐ 2. Are the terms of the bond adequate to guarantee all payments required by the contract?
- ☐ 3. Does the bond guarantee payment of interest on bills and claims not paid within 90 days?
- ☐ 4. Does the bond include a guarantee of payment of workers' compensation premiums?
- ☐ 5. Have all necessary licenses and permits been verified?
- ☐ 6. Are copies of the contractor's license or renewal certificate and contractor's bond attached?
- ☐ 7. Has a certificate been filed with the state by the contractor showing payment of state taxes?
- ☐ 8. Unless prohibited by law, does the contract include clauses requiring preference for North Dakota residents, with first preference given to veterans, and for materials produced in the state?
- ☐ 9. Does the state agency or official have the authority to enter into the contract?
 - Have sufficient funds been budgeted?
- ☐ 10. Does the other party have the authority to enter into the contract?
- ☐ 11. Has the proposed contract been reviewed by the agency's attorney?
- ☐ 12. Is the contract in writing with all pages numbered?
 - If there are any exhibits or attachments referred to in the contract, are all the documents attached?
- ☐ 13. Are there any mistakes in addition or other mistakes in connection with payment amounts or other numbers?
- ☐ 14. Are there any handwritten changes or other alterations to the contract?
 - If so, have all the changes or alterations been initialed by all signers?
- ☐ 15. Are the parties identified in the introductory paragraph or first clause?
- ☐ 16. Has the agreement been checked for the following ambiguities and inconsistencies:
 - If recitals are used, are they unambiguous and consistent with the terms of the contract?
 - Are all references to parties, exhibits and other things internally consistent?
- ☐ 17. Are all terms unambiguous or clearly defined?
 - Is the contract written in plain English using the present tense and the active voice?

- Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
 - Is the connective “and” used properly in the conjunctive?
 - Is “or” used properly in the disjunctive?
 - Is it clear to what any modifier or dependent clause refers?
 - Where particulars are listed, is it clear whether the list is exhaustive?
- ☐ 18. If the contract contains a “liquidated damages” provision, are damages otherwise difficult to estimate in the event of a breach?
- ☐ 19. Are signatures dated and written in blue ink?
- ☐ 20. Is the name and title or position of each person signing the document listed below the signature line?
- Do all signatures match the typed or printed names?
- ☐ 21. If contracting with a corporation:
- Has at least one officer of the corporation signed the document?
 - If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- ☐ 22. Does the contract specify both the date on which it begins and the date on which it ends?
- ☐ 23. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term, a provision terminating the contract without penalty if sufficient funds are not appropriated or otherwise made available, or a provision permitting termination without cause upon notice to the other party?
- ☐ 24. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- ☐ 25. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed, bonded, or permitted as required by law or otherwise noncompliant with the law?
- ☐ 26. Does the document include clauses regarding:
- Force majeure – Delay or Default;
 - Applicable law;
 - Merger;
 - Assignment and delegation;
 - Subcontracting;
 - Modification;
 - Nondiscrimination and compliance with laws;
 - Severability;
 - Attorneys fees;
 - Notices;
 - Spoliation; and

- Tax identification number.
- ☐ 27. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the contract are assigned among the parties?
- ☐ 28. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
 - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

PERSONAL SERVICE CONTRACT CHECKLIST

- ☐ 1. Is there a provision governing access to records?
 - If so, is it consistent with the state's open records law?
- ☐ 2. Is there a provision indicating that the agency is not intending to create an employer-employee relationship?
- ☐ 3. Does the contract permit termination upon written notice to the other party without cause or additional liability?
- ☐ 4. If the agreement is with an Indian tribe:
 - Was notice of the agreement published?
 - Have all required hearings been held?
 - Has the agreement been approved by the Governor and the governing body of the tribe?
- ☐ 5. For owner-architect agreements, has any standard form been amended after consultation with the agency's attorney?
- ☐ 6. Is the contract one that requires competitive bids?
 - If so, has the contract been awarded following competitive bids as required by law?
- ☐ 7. Does the state agency or official have the authority to enter into the contract?
 - Have sufficient funds been budgeted?
- ☐ 8. Does the other party have the authority to enter into the contract?
- ☐ 9. Is the contract in writing with all pages numbered?
 - If there are any exhibits or attachments referred to in the contract, are all the documents attached?
- ☐ 10. Are all payment amounts and dates correct?
- ☐ 11. Are there any handwritten changes or other alterations to the contract?
 - If so, have all the changes or alterations been initialed by all signers?
- ☐ 12. Are the parties identified in the introductory paragraph or first clause?
- ☐ 13. Has the contract been checked for ambiguities and inconsistencies:
 - If recitals are used, are they consistent with the terms of the contract?
 - Are all references to parties, exhibits and other things internally consistent?
- ☐ 14. Are all terms unambiguous or clearly defined?
 - Is the contract written in plain English using the present tense and the active voice?
 - Are the terms "shall," "may," and "must" used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
 - Is the connective "and" used properly in the conjunctive?
 - Is "or" used properly in the disjunctive?

- Is it clear to what any modifier or dependent clause refers?
- Where particulars are listed, is it clear whether the list is exhaustive?
- ☐ 15. If the contract contains a “liquidated damages” provision, are damages otherwise difficult to estimate in the event of a breach?
- ☐ 16. Are signatures dated and written in blue ink?
- ☐ 17. Is the name and title or position of each person signing the document listed below the signature line?
 - Do all signatures match the typed or printed names?
- ☐ 18. If contracting with a corporation:
 - Has at least one officer of the corporation signed the document?
 - If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- ☐ 19. Does the contract specify both the date on which it begins and the date on which it ends?
- ☐ 20. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term, a provision terminating the contract without penalty if sufficient funds are not appropriated or otherwise made available, or a provision permitting termination without cause upon notice to the other party?
- ☐ 21. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- ☐ 22. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed as required by law?
- ☐ 23. Does the document include clauses regarding:
 - Force majeure – Delay or Default;
 - Applicable law;
 - Merger;
 - Assignment and delegation;
 - Subcontracting;
 - Modification;
 - Nondiscrimination and compliance with laws;
 - Severability;
 - Attorneys fees;
 - Notices;
 - Ownership of work product, equipment, or materials;
 - Spoliation; and
 - Tax identification number.
- ☐ 24. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the contract are assigned among the parties?

- 25. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
 - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

SAMPLE PERSONAL SERVICE CONTRACT

The parties to this contract are the State of North Dakota, acting through its [agency name] (STATE) and [contractor's legal name] (CONTRACTOR);

SCOPE OF SERVICE

CONTRACTOR, in exchange for the compensation paid by STATE under this contract, agrees to provide the following services:

[State what is to be done under the contract. This may be a brief statement, or may require an attachment setting out the scope of services in great detail.]

TERM OF CONTRACT

The term of this contract is for [#] months, beginning on [Month, Day], 20[Year], and ending on [Month, Day], 20[Year].

COMPENSATION

STATE will pay for the services provided by CONTRACTOR under this contract an amount not to exceed _____ per _____, to be paid _____.

TERMINATION OF CONTRACT

- a. Termination without cause. This contract may be terminated by mutual consent of both parties.
- b. Termination for lack of funding or authority. STATE by written notice of default to CONTRACTOR, may terminate the whole or any part of this contract, under any of the following conditions:
 - (1) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term.
 - (2) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this contract or are no longer eligible for the funding proposed for payments authorized by this contract.
 - (3) If any license, permit, or certificate required by law or rule, or by the terms of this contract, is for any reason denied, revoked, suspended, or not renewed.

Termination of this contract under this subsection is without prejudice to any obligations or liabilities of either party already accrued prior to termination.

- c. Termination for cause. STATE may terminate this contract effective upon delivery of written notice to CONTRACTOR, or any later date stated in the notice:

- (1) If CONTRACTOR fails to provide services required by this contract within the time specified or any extension agreed to by STATE; or
- (2) If CONTRACTOR fails to perform any of the other provisions of this contract, or so fails to pursue the work as to endanger performance of this contract in accordance with its terms.

The rights and remedies of STATE provided in this subsection are not exclusive and are in addition to any other rights and remedies provided by law or under this contract.

FORCE MAJEURE

CONTRACTOR shall not be held responsible for delay or default caused by fire, flood, riot, acts of God or war if the event is beyond CONTRACTOR'S reasonable control and CONTRACTOR gives notice to STATE immediately upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default.

RENEWAL

This contract will not automatically renew. If STATE desires to renew, STATE will provide written notice to CONTRACTOR of its intent to renew this contract at least 60 days before the scheduled termination date.

MERGER AND MODIFICATION

This contract constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this contract. This contract may not be modified, supplemented or amended, in any manner, except by written agreement signed by both parties.

SEVERABILITY

If any term of this contract is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms is unaffected, and, if possible, the rights and obligations of the parties are to be construed and enforced as if the contract did not contain that term.

ASSIGNMENT AND SUBCONTRACTS

CONTRACTOR may not assign or otherwise transfer or delegate any right or duty without STATE'S express written consent. However, CONTRACTOR may enter into subcontracts provided that any subcontract acknowledges the binding nature of this contract and incorporates this contract, including any attachments. CONTRACTOR is solely responsible for the performance of any subcontractor. CONTRACTOR does not have authority to contract for or incur obligations on behalf of STATE.

NOTICE

All notices or other communications required under this contract must be given by registered or certified mail and are complete on the date mailed when addressed to the parties at the following addresses:

or

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

APPLICABLE LAW AND VENUE

This contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this contract must be adjudicated exclusively in the State District Court of Burleigh County, North Dakota.

SPOLIATION – NOTICE OF POTENTIAL CLAIMS

CONTRACTOR shall promptly notify STATE of all potential claims that arise or result from this contract. CONTRACTOR shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect the evidence, including the scene of an accident.

INDEMNITY

[Please see the contract drafting manual or the risk management manual to choose the best indemnity provision for your contract.]

INSURANCE

[Please see the contract drafting manual or the risk management manual to choose the best insurance provision for your contract.]

ATTORNEY FEES

In the event a lawsuit is instituted by STATE to obtain performance due under this contract, and STATE is the prevailing party, CONTRACTOR shall, except when prohibited by N.D.C.C. § 28-26-04, pay STATE'S reasonable attorney fees and costs in connection with the lawsuit.

ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

STATE does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolution. The parties have the right to enforce their rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

CONFIDENTIALITY

CONTRACTOR shall not use or disclose any information it receives from STATE under this contract that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this contract or as authorized in advance by STATE. STATE shall not disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota open records law, N.D.C.C. § 44-04-18. The duty of STATE and CONTRACTOR to maintain confidentiality of information under this section continues beyond the term of this contract.

COMPLIANCE WITH PUBLIC RECORDS LAW

CONTRACTOR understands that, except for disclosures prohibited in this contract, STATE must disclose to the public upon request any records it receives from CONTRACTOR. CONTRACTOR further understands that any records that are obtained or generated by CONTRACTOR under this contract, except for records that are confidential under this contract, may, under certain circumstances, be open to the public upon request under the North Dakota open records law. CONTRACTOR agrees to contact STATE immediately upon receiving a request for information under the open records law and to comply with STATE'S instructions on how to respond to the request.

WORK PRODUCT, EQUIPMENT AND MATERIALS

All work product, equipment or materials created or purchased under this contract belong to STATE and must be delivered to STATE at STATE'S request upon termination of this contract. CONTRACTOR agrees that all materials prepared under this contract are "works for hire" within the meaning of the copyright laws of the United States and assigns to STATE all rights and interests CONTRACTOR may have in the materials it prepares under this contract, including any right to derivative use of the material. CONTRACTOR shall execute all necessary documents to enable STATE to protect its rights under this section.

INDEPENDENT ENTITY

CONTRACTOR is an independent entity under this contract and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. CONTRACTOR retains sole and absolute discretion in the manner and means of carrying out CONTRACTOR'S activities and responsibilities under this contract, except to the extent specified in this contract.

NONDISCRIMINATION AND COMPLIANCE WITH LAWS

CONTRACTOR agrees to comply with all laws, rules, and policies, including those relating to nondiscrimination, accessibility and civil rights. CONTRACTOR agrees to timely file all required reports, make required payroll deductions, and timely pay all

taxes and premiums owed, including sales and use taxes and unemployment compensation and workers' compensation premiums. CONTRACTOR shall have and keep current at all times during the term of this contract all licenses and permits required by law.

STATE AUDIT

All records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this contract are subject to examination by the North Dakota State Auditor or the Auditor's designee. CONTRACTOR shall maintain all such records for at least three years following completion of this contract.

PREPAYMENT

STATE will not make any advance payments before performance by CONTRACTOR under this contract.

TAXPAYER ID

CONTRACTOR'S federal employer ID number is: _____.

PAYMENT OF TAXES BY STATE

State is not responsible for and will not pay local, state, or federal taxes. State sales tax exemption number is E-2001, and certificates will be furnished upon request by the purchasing agency.

EFFECTIVENESS OF CONTRACT

This contract is not effective until fully executed by both parties.

CONTRACTOR

STATE OF NORTH DAKOTA

Acting through its

(agency)

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____

SAMPLE LEASE FOR OFFICE SPACE

The parties to this lease are _____, the owner of the premises described in Paragraph 1 (LANDLORD), and the State of North Dakota, acting through its _____ (agency) (STATE).

SCOPE OF LEASE

LANDLORD, in consideration of the rent to be paid and the covenants to be performed by STATE, hereby leases to STATE the following described premises situated in the city of _____, county of _____ and state of North Dakota:

[Insert property description]

TERM OF LEASE

The term of this lease is for a period of _____ months, commencing on the _____ day of _____, 20____, and terminating on the _____ day of _____, 20____.

RENTAL PAYMENTS

STATE will pay rent for the premises, consisting of _____ square feet, at \$_____ per square foot per annum, or \$_____ per annum. Rent will be paid in advance by the 10th day of each month in a monthly amount of \$_____, which is 1/12 of the annual amount, commencing on the _____ day of _____, 20____, and continuing monthly thereafter for the term of this lease. Rent is payable at the address of LANDLORD, which is _____, unless STATE is notified otherwise in writing by LANDLORD.

LANDLORD'S OBLIGATIONS

LANDLORD agrees:

- a. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the premises.
- b. To perform all required maintenance for the premises, including all janitorial services, which will be done on a daily basis, including furnishing of related supplies.
- c. To keep the walkways and parking areas of the premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants and trees on the premises.
- d. That if other portions of the building are leased to other parties, LANDLORD shall not permit any activity to be conducted in other portions

of the building or grounds that will materially interfere with STATE'S use and enjoyment of the premises.

- e. That STATE may install items that it deems necessary for maximum and optimum use of the premises. STATE may, at any time, remove from the premises all fixtures and other equipment owned by STATE; provided the removal is completed before termination of this lease or any renewal or extension. STATE agrees to repair any damages that may be done to the premises resulting from the removal of the items, if any.
- f. That STATE may place decorations, wall hangings, signs and directories upon entrance doors, in hallways leading to its premises, or doors and walls within the premises.
- g. To furnish _____ automobile parking stalls for use by STATE, its agents or designees, in the lot provided for use by the building tenants.
- h. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the premises.
- i. To pay all real estate taxes and special assessments on the premises during the term of the lease.

STATE'S OBLIGATIONS.

STATE agrees:

- a. To pay the rent when due.
- b. To pay for its own telephone service.
- c. To keep the premises in reasonable condition the same as at the commencement of the term or as it may be put by LANDLORD, except for reasonable use and wear, or damage by fire and unavoidable casualty.
- d. Not to make any unlawful, improper, or offensive use of the premises, and to observe all the laws of the State of North Dakota and the ordinances of the city of _____ in force from time to time relating to the leased premises.
- e. To permit LANDLORD at all reasonable times to enter and examine the premises and to make necessary repairs for the protection of the premises.

- f. To surrender the premises to LANDLORD at the end of the term; and, in default of the payment of rent due or failure to perform its obligations under this lease, to surrender the premises upon demand by LANDLORD.
- g. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by STATE.

TERMINATION OF LEASE

STATE has no obligation under this lease for the initial or succeeding terms if the North Dakota Legislature fails to appropriate to STATE sufficient funds to defray the full rental costs. STATE, without any liability, may terminate this lease by providing thirty (30) days written notice, if its legislative appropriations are reduced or if its authority to spend its appropriations is reduced or limited by law or by reductions in federal or other grant funds to a point STATE, in its sole discretion, deems insufficient to pay the full rental cost for the remainder of the term of this lease. During the term of this lease or any renewal or extension, STATE may terminate this lease by providing thirty (30) days written notice to LANDLORD, if LANDLORD fails to comply with any of its obligations under this lease, or if STATE determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other state or federal law or rules.

TERMINATION OF LEASE IN THE EVENT OF DESTRUCTION OF PREMISES

If the leased premises are destroyed or damaged by fire or the elements to the extent they become untenable, then this lease will terminate immediately, unless LANDLORD, within twenty (20) days of the happening of the event, gives written notice of intention to restore the building and fully restores the premises within a reasonable time. During the term between destruction and restoration of the premises rent will not be due, and if rent has already been paid LANDLORD shall refund to STATE all that portion of the prepaid rent attributable to the time during which STATE was unable to use the premises for its intended use.

HOLDING OVER

If STATE remains in possession of the premises after the lease expires, and LANDLORD accepts rent from it, the lease will be deemed renewed on a month-to-month basis.

MERGER AND MODIFICATION

This contract constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this contract. This contract may not be modified, supplemented or amended, in any manner, except by written agreement signed by both parties.

SEVERABILITY

If any lease term or provision is declared by a court of competent jurisdiction to be illegal or unenforceable, the validity of the remaining terms are unaffected, and the

rights and obligations of the parties will be construed and enforced as if the lease did not contain that term.

ASSIGNMENT – SALE OF PREMISES

This lease must not be assigned or subleased by STATE without LANDLORD'S written consent. This lease does not terminate if the premises are sold, but continues throughout the entire term.

NOTICE

Whenever the term "written notice" or "in writing" is used in this lease, mailing of the notice must be by certified mail sent to:

or

Notice provided under this provision does not meet the notice requirements for monetary claims against the State under N.D.C.C. § 32-12.2-04.

APPLICABLE LAW

This lease is governed by and construed in accordance with the laws of the State of North Dakota. Any action commenced to enforce this lease must be adjudicated exclusively in the State District Court of _____ County, North Dakota

SPOILIATION – NOTICE OF POTENTIAL CLAIMS

LANDLORD shall promptly notify STATE of all potential claims that arise from or result from this lease. LANDLORD shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect the evidence, including the scene of an accident.

INDEMNITY

[Please see the risk management manual to choose the best indemnity provision for your contract.]

INSURANCE

[Please see the risk management manual to choose the best insurance provision for your contract.]

CONFIDENTIALITY

The LANDLORD acknowledges that the STATE possesses substantial amounts of information at the leased premises that is confidential pursuant to state law. The LANDLORD, if it views, comes into possession of, or otherwise becomes knowledgeable of confidential information located at the leased premises, shall maintain the confidentiality of that information and shall refrain from redisclosing that information to any third party. The LANDLORD shall require, by contract, any agent it retains to fulfill its obligations otherwise set out in this lease to similarly maintain the confidentiality of any information it views, comes into possession of or otherwise becomes

knowledgeable of. Those indemnity provisions otherwise set out in the lease agreement specifically apply to this confidentiality requirement.

EFFECTIVENESS OF LEASE

This lease is not binding on STATE until it is reviewed by the Office of Attorney General and approved by the Facility Management Division, Office of Management and Budget, as required in N.D.C.C. § 54-21-24.1.

LANDLORD

STATE OF NORTH DAKOTA
Acting through its

(agency)

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____

FORM APPROVED BY ATTORNEY GENERAL:

BY: _____

DATE: _____

APPROVED BY FACILITY MANAGEMENT:

BY: _____

DATE: _____