

2019 STATE CONTRACT SEMINAR

JULY 16, 2019

Hosted by the OAG, DOA, SBA, SBOA, OIG, AOS, & INPRS

WHERE DO I EVEN BEGIN?



**MISTY MERCER...
BACK IN THE DAY**



**STEPHANIE MULLANEY...
TODAY**



STATE CONTRACTS IN ONE SLIDE

They must be in writing.

Selection of the contractor or the grantee must be made in accordance with statute or regulation.

As required by IC 4-13-2-14.1, they must be approved by:

- IOT (if technology is involved)
- IDOA
- State Budget Agency
- Office of the Indiana Attorney General



They must contain certain provisions.

They cannot contain certain provisions.

Everything you generally need to know is found on IDOA's Contract Administration intranet page:

<http://intranet.idoa.state.in.us/contract/administration.stm>



INDIANA DEPARTMENT OF ADMINISTRATION

ERIN KELLAM, *DEPUTY COMMISSIONER PROCUREMENT*
TAMMY GLICKMAN, *DEPUTY GENERAL COUNSEL*

Role of IDOA

What are some of the things IDOA does?

- **Leasing Division**: Establishes uniform standards for determining amount and type of facilities needed by agencies; assign facilities in or on property owned or leased by the State; with the approval of the Governor, lease facilities for the use of agencies.
- **Public Works Division**: Manages almost all of the building construction and maintenance projects for the state of Indiana.
- **Procurement Division**: Acts as the purchasing agent for state agencies and sets policies and procedures for all state agency purchasing (except for INDOT, quasi-agencies, other elected offices). Procurement does advise those excepted.
- **Contracts**: Supervises and regulates the making of contracts and grants, negotiates contracts and assists to resolve contract/grant disputes as requested;
- **Division of Supplier Diversity**: Provide equal opportunity to Minority, Women and Veteran Business Enterprises in the state's procurement and contracting process.

Procurement and Contracts

Where do I start?

Procurement Training & Resources

<http://www.in.gov/idoa/2864.htm>

Electronic Contracting

<http://www.in.gov/idoa/2864.htm>

Stay informed... sign up for SEM Newsflash updates

<http://www.in.gov/idoa/2864.htm>

Can I just purchase whatever my agency needs?

- IDOA is the official procurement agent for all executive branch agencies. IC 5-22-4-1
- State agencies have delegated procurement authority under specific dollar amounts.
- Any amount over agency delegation - IDOA Procurement Division is responsible for the bidding process.

Request for Proposal (RFP) Process

What is an RFP?

- Primarily used for contracts above \$75,000
- Entire process can take 6-9 months
- Most often used for services
- Considers cost and quality
- Award based on most responsive/best value to the State
- Advertised in publications for 2 weeks
- “On the street” for 3-4 additional weeks
- Evaluation criteria is identified in the RFP
- See IC 5-22-9

Special Purchasing Methods

What is the process to request a Special Procurement?

- IC 5-22-10
- Send request via email - idoaspecprocreq@idoa.IN.gov
 - Include DWD and DOR clearances
 - Required for:
 - “Zero Dollar”
 - Amendments
 - Contract to exceed the 4 year limit (IC 5-22-17-4 and 25 IAC 1.1-1-16(c))

IDOA's Division of Supplier Diversity (DSD)

What does the DSD do?

- The Division was established in 1983 and is currently housed within the IDOA.
- Promote, monitor, and enforce the standards for certification of Minority and Women Business Enterprises.
- November 2018 – IVOSB is added to DSD's mission.
- Provide equal opportunity to Minority, Women and Veteran Business Enterprises in the state's procurement and contracting process.

M/W/VBE Participation Goals

Construction	Supplies	Professional Services	Weighted Average Goal
Minority 7%	Minority 4%	Minority 8%	Minority 6%
Women 5%	Women 9%	Women 8%	Women 7%
Veteran 3%	Veteran 3%	Veteran 3%	Veteran 3%

IDOA APPROVAL PROCESS

How can I make sure my contract/grant is approved by IDOA?

- Your procurement method is well documented and meets IDOA requirements (IC 5-22 and 25 IAC 1.1)
- You are using SCM
- You are using the TEMPLATES approved by IDOA & OAG, and maybe you have your contract or grant Form Approved 😊
- Changes to the boilerplate are clearly identified in **Section 50. State Boilerplate Affirmation Clause**

IDO A APPROVAL continued

Is there anything else I should check before submitting to IDOA?

- Are the exhibits properly labeled, referenced in the contract and attached?
- Are the deliverables clearly defined? (25 IAC 1.1-1-16(b))
- Does the Consideration (\$\$\$) add up correctly?
- Are all signatures present?
- Are all of the required clearances (SOS, DWD and DOR) uploaded into Supplemental Documents? (Sec. 10.C of the Contract, IC 5-22-16-4, and IC 4-13-2-14.5)

Helpful Tools for Contracting

Where can I find more information?

- **Professional Services Contract Manual**

<https://www.in.gov/idoa/3000.htm>

- **Current versions of contract, grant, amendment & renewal templates**

<https://www.in.gov/idoa/3000.htm>

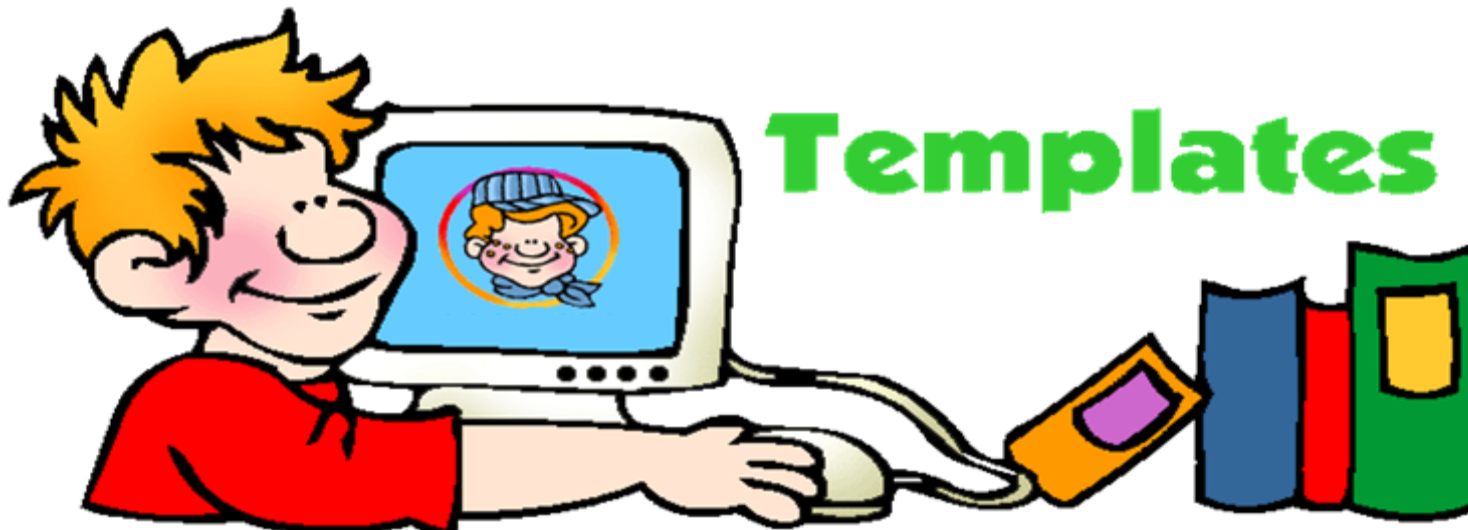
- **Delegation of Purchasing Authority Program (DPAP) Manual—updated regularly**

https://www.in.gov/idoa/files/ProcTraining_DPAPManual.pdf

Contracting Templates

Where can I find the contracting templates?

- All of the templates are in SCM (Supplier Contract Management)
- WORD versions of the most commonly used templates on IDOA's website - <https://www.in.gov/idoa/3000.htm>



INDIANA OFFICE OF TECHNOLOGY APPROVAL

HOW DO I KNOW IF IOT APPROVAL IS REQUIRED WHEN SETTING UP THE CONTRACT?

- IOT must review and approve all contracts involving information technology hardware: anything with a processor, including computers, tablets, scanners, printers, mobile or portable devices of all types, and peripherals.
- IOT must review and approve contracts involving software, software development, and software support and maintenance, all database or software as a subscription contracts, all contracts involving “the cloud”,
- IOT must review all contracts involving telecommunications.

WHAT IS IOT LOOKING FOR?

- IOT reviews to ensure that the IT products and services that you purchase are “compatible” with all IOT policies and standards, including accessibility standards as set forth in the contract boilerplate, and for “compatibility” with relevant state systems and programs. If a particular policy or standard is not applicable to your IT product or service, then your IT product or service is necessarily “compatible” with that policy or standard.
- IOT approval of Grants involving information technology is delegated IF the grant (1) has the standard boilerplate accessibility language, and (2) is accompanied by the delegation Memo posted with the templates on IDOA’s intranet site.

IOT – CLOUD CONTRACTS

I’VE BEEN TOLD A CONTRACT I’M DOING INVOLVES “THE CLOUD.” WHAT IS THAT – AND IS THERE ANYTHING SPECIAL I SHOULD BE AWARE OF?

“Cloud computing” is the practice of using a network of remote servers hosted on the Internet to store, manage, and process data, rather than a local server or a personal computer.

- IOT must approve all cloud contracts. **Agencies are urged to involve IOT in cloud projects as early as possible.**
- IOT has three different sets of cloud terms that are intended to protect the State and its data: one for SaaS, one for PaaS, and one for IaaS. They can be found with the contract templates on IDOA’s website at <https://www.in.gov/idoa/3000.htm>. IOT intends to consolidate all three into a single template during the summer.
- IOT’s cloud terms are commonly used with smaller or less sophisticated vendors that don’t have the security policies and protections of the Amazons and Microsofts; the State’s risk of harm or loss with such entities is greater. The terms should be included as an exhibit to any cloud contract unless you have explained to IOT in writing why your vendor cannot accept some or all of the terms. The greater the risk of harm associated with the deal, the more detailed your explanation should be.

INDIANA ATTORNEY GENERAL'S OFFICE

Susan Gard, *Deputy Attorney General, OAG*

Kevin McDowell, *Assistant Chief Counsel, OAG*



OFFICE OF THE ATTORNEY GENERAL (OAG)

I know what IDOA reviews for – what role does the OAG play in this process?

- The OAG reviews for form and legality: “The attorney general must review for form and legality contracts to which a state agency is a party” and, if the contract “does not meet the requirements of law”, the OAG must disapprove the contract in writing and “assist the agency to remedy defects that are found, if possible.” IC § 4-13-2-14.3
- The OAG has 45 days to review; if the OAG does not respond within 45 days of submission, the contract is deemed approved.
- The OAG is always the last step in the process – it will **always** be approving the final document to which all other parties have agreed.

OAG Review – Behind the Scenes

- The Advisory Section of the OAG is responsible for all matters relating to contracts.
- Molly Skarbeck is Advisory's Contract Manager. All SCM contracts route to her first. Molly then deals them out like a deck of cards to the Deputy Attorneys General ("DAGs") who review and approve them.
- 11 DAGS review contracts and requests for form approval – in addition to all of their other duties. They strive to have contract approvals done within 2 weeks.
- The Advisory Chief Counsel Approves Contracts over \$10 Million and approves contracts for outside counsel
- All of the OAG reviewers check to make sure that referenced Exhibits are attached, that the term and consideration amounts are consistent, and – in the case of an amendment – that the underlying contract has not already expired.

TEMPLATES - I

I know from law school what a contract is and what it should contain, but I'd really feel better seeing what some other state contracts look like. Any suggestions?

Uniformity and Consistency are Key to the Success of the State Contracting Process. Well over 10,000 contracts and grants flow through the system each year.

The reviewing agencies **CANNOT** do their jobs quickly and efficiently without considerable standardization.

The OAG and IDOA have developed templates to be used as the basis for contracts or grants.



TEMPLATES II

Updated templates are automatically loaded into SCM. They can be viewed in Word format on IDOA's contract management website: <http://www.in.gov/idoa/3000.htm>

Standard templates include those for:

- Professional Services
- Grants
- Educational Institution Contracts
- Amendments
- Addendums
- Outside Counsel Contracts

ALWAYS USE THE CURRENT TEMPLATES!

You may customize a template for use by your agency, but please coordinate with IDOA and OAG.



THE ADDENDUM TEMPLATE

WHAT IS THE ADDENDUM TEMPLATE USED FOR?

- A vendor may present its form contract for the State to sign. This is particularly common in technology contracts.

NEVER SIGN THE VENDOR'S FORM CONTRACT USE THE STATE'S ADDENDUM

- The Vendor's form contract always has clauses that are in the Vendor's best interest, not the State's; it likely contains clauses that are not legal in State contracts (*i.e.*, governing law, indemnity, arbitration, payment of fees and costs).
- Regardless of what the Vendor's Account Executive says, the Vendor's boilerplate terms are negotiable

More about the Addendum

WHAT SHOULD I BE AWARE OF IN THE ADDENDUM?

- It must **always** take precedence over the form contract. The first paragraph provides: *“Any inconsistency, conflict, or ambiguity between this Addendum and the Form Contract shall be resolved by giving precedence and effect to this Addendum.”*
- It has a list of terms and conditions that the State cannot agree to and that the Vendor must agree are deleted from its form contract.
- The Addendum has terms and conditions that are required by law to be in contracts to which the State is a party or in which public funds are spent.
- Always take the time to read the vendor’s form contract; it often has business terms that are important for your client to be aware of.



AMENDMENTS

Our contractor has changed its name and asked that all future payments be made payable to the new name. Is there anything I need to do?

Any time you are modifying a contract to change the amount of consideration, to change the term, to change the scope of work, to change the name of the vendor:

DO AN AMENDMENT AND ROUTE IT THROUGH THE APPROVAL PROCESS.

The current amendment template will also include any mandatory clauses resulting from statutory changes.

An expired contract cannot be amended; a new contract must be done. A contract is deemed expired if the amendment is not signed by the vendor on or before the expiration date.



STATE BOARD OF ACCOUNTS

Beth Kelley, *State Audit Director*

Grant Agreements

- How do I know if I should use the Grant Agreement Template or the Professional Services Contract Template?
 - Professional Services Contract Manual
 - www.in.gov/idoa/3000.htm
 - Characteristics of a **Grant**
 - Transfer of money, property, or anything of value to a recipient for a specific purpose.
 - The State's role in how that purpose is achieved is passive – meaning the recipient decides how to accomplish the purpose.
 - Example – The ISHD gives \$20,000 to ABC Not for Profit to administer a program to educate the communities on how vaccines work.

Grant Agreements

- How do I know if I should use the Grant Agreement Template or the Professional Services Contract Template?
 - Characteristics of a **Contract**
 - Buy or lease property or service for the direct benefit of the State.
 - The State maintains control over how service is performed and what property is purchased.
 - Example – The Indiana Department of Correction contracts with Ray's Trash Service to provide trash removal service at the correctional facilities.
 - Subrecipient and Contractor Determination Form
 - Checklist to help you make the determination

Grant Agreements

- I have a Grant Agreement with the City of Greenwood. Why do I need to tell them the funding source in Section 1 of the Grant Agreement?
 - Grantees use that information for their reporting purposes.
 - Federal Source versus State Source
 - Audit requirements
 - Important that the grant information included in the grant agreement matches the funding source that is used in Peoplesoft.

Grant Agreements

- I have a Grant Agreement with ABC Not for Profit to give them \$20,000 to administer a program to educate the community about vaccines. Since it's only for \$20,000, do I need to leave Exhibit C in the agreement?
 - Exhibit C informs the recipient of their requirements to file an E-1 with SBOA.
 - Dollar amount doesn't matter.
 - Only dollars given as a grant not as a vendor
 - Only Non-Governmental units

HOW IS THE STATE DIFFERENT FROM A PRIVATE CONTRACTOR?

WHY ARE WE SO RIGID ON CONTRACT TERMS AND CONDITIONS AND HOW ARE CONTRACTS PROCESSED? HOW DO I EXPLAIN THIS TO THE VENDOR?

- The State is a sovereign. It has the power to do everything necessary to govern itself, including making and applying its own laws and controlling its own affairs.
- Vendors doing work for the State are paid using public funds – taxpayer dollars. The General Assembly has determined how vendors must be selected and set an approval process that must be followed in order to commit public funds. It has also determined that specific terms or conditions relating to state contracts are in the best interest of the public. For example --
 - Contract claims against State must be tried to the court, not a jury (IC § 34-13-1 (b)), are appealed directly to the Indiana Supreme Court (IC § 34-13-1-5), and judgments against the state accrue interest at 6% (IC § 34-13-1-6).

PROVISIONS THE STATE CANNOT AGREE TO

How do I know what the State cannot agree to?

- The Addendum has a list provisions (lettered A – N following paragraph 3) frequently found in Vendor contracts that are NOT acceptable to the State.
- These same provisions cannot be added into a State contract.

What explanation can I give a vendor for why some of these provisions cannot be part of a contract with the State?



Governing Law

The Vendor's headquarters are in Illinois. Why can't we agree to litigate disputes there? It isn't that far.

Indiana is a sovereign state. Our contracts are governed by Indiana law. We do not submit to the jurisdiction or governing law of another State.*

- See generally IC § 34-13-3-1 [contracts] and IC § 34-13-3-2 [torts], which provide that these statutes authorizing suit against the State ... *“shall not be construed as:*
 - (1) a waiver of the eleventh amendment to the Constitution of the United States;*
 - (2) consent by the state of Indiana or its employees to be sued in any federal court; or*
 - (3) consent to be sued in any state court beyond the boundaries of Indiana.”*
- This clause may only be deleted “by mutual agreement of the parties” if the agreement is with another state.

*See IC § 5-33.5 for agreements with federally-recognized Indian tribes.



Confidential Contracts

The vendor wants to keep its pricing and terms confidential. Why can't we agree?

The State can only agree to keep information received under a contract confidential to the extent that the information is confidential under the Indiana Access to Public Records Act (APRA), IC § 5-14-3

Pricing and terms of a contract with the State are not a “trade secret” exempt from disclosure under the Access to Public Records Act.

Public Contracts are posted on the State's website as required by IC § 5-14-3.5-2.



Payment Terms

The Vendor wants a down payment of 25% when the contract is signed. After that, it wants payment 10 days after invoice, with interest at 18% on late payments. Is that a problem?

- Unless authorized by statute, we can't spend public funds until we have received the goods or services. IC § 4-13-2-20 lists specific exceptions under which payment in advance may be made.
- IC § 5-17-5-1 provides that payments are timely if made within thirty-five (35) days of:
 - (A) receipt of goods and services; or
 - (B) receipt of a properly completed claim.
- The State pays interest only at rates authorized by statute: 1% per month on invoices paid after 35 days (IC § 5-17-5-1), 6% per annum on unpaid judgments (IC § 34-13-1-6).

Dispute Resolution

The vendor wants to arbitrate disputes – why can't we agree to that?

- Agency budgets do not typically have funds appropriated to pay for mediation or arbitration. The templates have a provision for resolution of disputes through IDOA.
- Arbitration can subject the state to a non-judicial judgment.
- While the State can and will agree to court-ordered mediation, it is not something that can be agreed to in a contract.
- But see IC § 5-33.5 if the agreement is with a federally-recognized Indian Tribe.



Why can't the State agree to indemnify, defend and hold harmless the vendor?

- These concepts involve an allocation of financial risk in a tort action. The Indiana Tort Claims Act (IC § 34-13-3) defines claims for which the State is immune, has a particular procedure to be followed in making a claim, and sets limits on recovery against the State. It also has a continuing appropriation to pay judgments or settlements against the State.
- Indiana Constitution, Article 10, Section 3, provides “**no money shall be drawn from the Treasury, but in pursuance of appropriations made by law.**” Money is not appropriated to pay the costs, judgments, or other expenses of non-state entities.
- There is confusion over the use of the word “indemnity” as opposed to assuming responsibility for one’s own negligence. The State **can** agree to be responsible for its own negligence or other tort liabilities for which it is legally responsible.

The Vendor wants us to provide insurance. Where do I get a copy of our policy?

Laws prohibit the State from purchasing insurance:

- **IC 4-13-1-17. Insurance; loss or damage to property**
 - (a) A state agency may not purchase insurance to cover loss or damage to property.
- **IC 34-13-3-20. Liability insurance; prohibitions***
 - (b) The state may not purchase insurance to cover the liability of the state or its employees.

If a Vendor seeks either indemnity or insurance coverage from the State for a potential claim arising in tort, it must look to the Indiana Tort Claims Act, IC § 34-13-3, and the Vendor should familiarize itself with the procedures and liability limitations set forth in that Act.

* There are narrow exceptions – read the statute.

Statute of Limitations and Time to Bring a Claim

The Vendor has asked for all claims to be made within 6 months and suit to be filed within 1 year. What's wrong with that?

- The General Assembly has set how long a person has to bring a suit on a contract: 2, 6, or 10 years depending on the contract. See IC § 34-11-2, et. seq.
- The OAG (which will either commence or defend the suit) will rely on the statute and cannot review each individual contract to see if the statute of limitations has been modified.
- The State Board of Accounts needs time to complete its audit (which may be every two years in some cases) and determine if there are irregularities.

Payment of Taxes, Court Costs, and Attorney Fees

The Vendor wants us agree to pay taxes on the purchase. Does the State do that?

- The State is exempt from most state and many federal taxes (see, e.g., IC § 6-2.5-5-16 exempting the State from paying sales tax). If the vendor's form contract requires you to furnish a copy of our tax exemption certificate in order for the transaction to be considered tax exempt – *be sure that certificate is in fact provided to the Vendor.*

The Vendor asks that the prevailing party pay the other's costs and reasonable attorney fees. Can we agree to do that?

- The State cannot agree to any provision requiring the State of Indiana to pay penalties, liquidated damages, interest or attorney's fees. IC § 34-52 sets out the limited circumstances in which fees and other expenses may be awarded against the State.

REQUIRED CONTRACT PROVISIONS

Our templates have a LOT of boilerplate clauses. Some of them I can understand from going to law school. But some of them seem a bit unusual.

Our statutes and executive orders require that some clauses be in every contract to which the State is a party or in which public funds are being spent.

What explanation can I give a vendor for why some of these provisions cannot be part of a contract with the State?



Funding Cancellation

What is the Funding Cancellation clause about? Does that mean a vendor won't get paid?

Financial Management Circular 2007-1 (which derives from IC § 5-22-17-5) requires the clause to be in every contract that the Budget Agency approves.

“Funds not appropriated or not available; cancellation of contract

(a) When the fiscal body of the governmental body makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of a contract, the contract is considered canceled.”

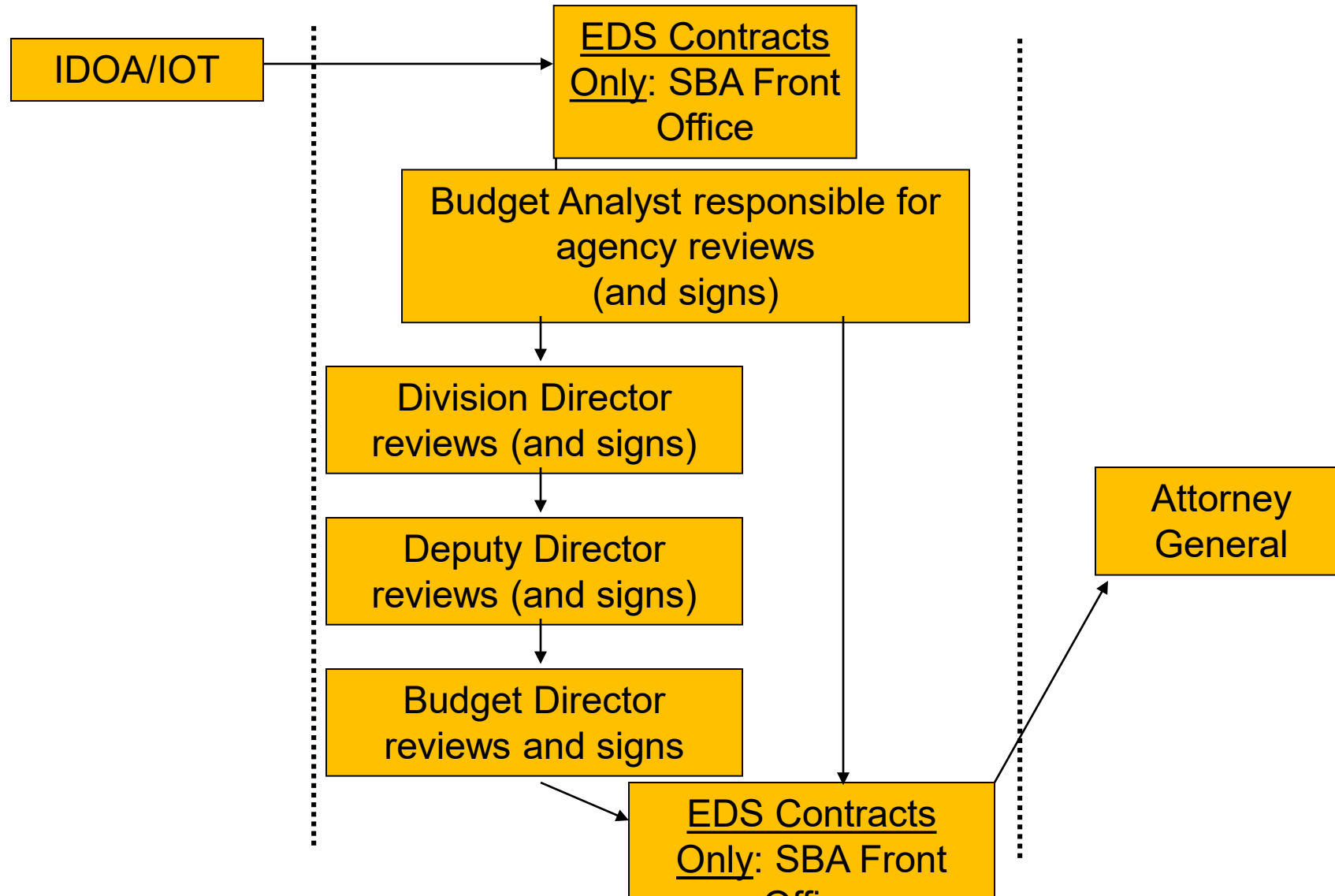
It does not mean the vendor won't be paid for work already performed or goods provided. It means that the vendor cannot claim damages for early termination or anticipated income if there is no money available going forward.

The federal government and most states have similar provisions.

STATE BUDGET AGENCY

Sola Egunyomi, *Assistant Director, State Budget Agency.*

How does the Contract approval process work at SBA?





What are the “Fiscal Issues” SBA is looking for in a contract?

- Financial impact of the contract to the agency
 - Total cost of contract, fiscal year by fiscal year impact, funding sources, etc.
 - **Impact of contract to the agency’s budget and spending plan, CFO sign off**
 - Cost per unit, per hour, per product, etc.
 - SBA will work with agency financial staff or controllers to understand the financial impact of the contract



What are the specific clauses SBA requires in a Contract?

■ Funding cancellation

- **FMC 2007-1** requires that all contracts contain the following language:

“When the Director of the State Budget Agency makes a written determination that funds are not appropriated or otherwise available to support the continuation of performance of this contract, the contract shall be canceled. A determination by the Director of the State Budget Agency that funds are not appropriated or otherwise available to support the continuation of performance shall be final and conclusive.”

- **IC 5-22-17-5**

Funds not appropriated or not available; cancellation of contract

Sec. 5. (a) When the fiscal body of the governmental body makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of a contract, the contract is considered canceled.

(b) A determination by the fiscal body that funds are not appropriated or otherwise available to support continuation of performance is final and conclusive.

As added by P.L.49-1997, SEC.1.



Specific key clauses (To be continued)

- Other Key Clauses SBA Considers.
 - Termination for convenience (While not mandatory, inclusion of this clause is highly recommended)
 - Out clause (normally with leases)
 - Performance measures, outcomes, service levels, penalties
 - Consideration and Term (make sure they are clear and match the EDS, other attachments)
 - Renewal Options, Payments (35 days in arrears)



How can I expedite the contract review process?

- Large policy or dollar amount contracts coming through for approval
 - If the agency has a high priority contract coming through, or will be coming through for approval, advanced notice and information is helpful to SBA
 - Working with SBA staff before a major contract, or high priority contract, comes through for approval can cut down on review time in SBA



How is the MOU review process different from the Contract review process?

- A Memorandum of Understanding (MOU) between two state agencies must be reviewed and approved by SBA
- SBA review and approval of MOUs are required by FMC 2009-2
- The same policies concerning approval of contracts by SBA apply to MOUs

Drug-Free Workplace

Why do we have to use this Drug-Free Workplace language? Can the vendor substitute the federal language it typically uses?

- The language is taken directly from Executive Order 90-5, which is available on-line on IDOA's contract management webpage along with the contract templates. It applies to "private legal entities receiving grant or contract funds" from the State and applies to the Contractor's workers in Indiana.
- Federal language may not be substituted; sometimes you may need to include both.
- Only the first paragraph is required when the contract is under \$25,000.



Telephone Privacy

The vendor doesn't do telemarketing and doesn't think this clause is necessary.

If the vendor is being paid, this clause must be in the contract.

"IC § 5-22-3-7. Prospective contractors required to make certifications concerning deceptive acts and telephone privacy; sanctions

(a) This section applies to every use of funds by a governmental body. ...

*(b) A prospective contractor **may not contract with a governmental body unless the prospective contractor includes the following certifications as terms of the contract with the governmental body: ...***"



Non-Discrimination

The vendor has different language it uses and is required by federal law. Why isn't that enough?

- Indiana Code § 22-9-1-10 requires the language in the boilerplate to be in “[e]very contract to which the state or any of its political or civil subdivisions is a party.”
- Federal non-discrimination contract provisions may be different or more expansive. It is not unusual to use both clauses in a contract involving federal funds





The vendor's quote doesn't include the cost of enrolling in this program. Plus, they check their employees another way.

IC § 22-5-1.7-11 provides (in part)

"A state agency ... may not enter into or renew a public contract for services with a contractor unless ... the public contract contains ... a provision requiring the contractor to enroll in and verify the work eligibility status of all newly hired employees of the contractor through the E-Verify program ..."

- E-Verify is **fast, free and easy to use** – and it's the nationally recognized method for employers to ensure a legal workforce. It is required only in contracts for services.
- Use of E-Verify is required in federal contracts for services. If your vendor verifies eligibility at all, they are likely already using E-Verify.
- You can see if your vendor is enrolled by visiting the e-verify website:

<https://www.e-verify.gov/about-e-verify/e-verify-data/how-to-find-participating-employers>

Non-Collusion and Acceptance Affirmation

What is this clause all about?

This provision, derived from Indiana Code § 5-22-16-6, must be in every contract, grant, addendum, and amendment.

The Contractor affirms, under the penalties of perjury, that the person signing has the authority to bind the Contractor, and affirms that the Contractor has not engaged in anticompetitive or other illegal activity in procuring the contract.



FORM APPROVALS

The person that gave me this contract to work on said to get it right because there will be 25 more just like it.

- If you will have a number of contracts or grants and all that will change is the name of the contractor, address, dollar amount, and start date, seek form approval from the OAG.
- Form-approved contracts do not have to be circulated to the OAG for individual approval, and you know in advance that the contracts or grants using this form will NOT be rejected for form or legality.
- The form approval request sheet is on IDOA's contract management website:
https://www.in.gov/idoa/files/Form%201028_Form%20Approval%20Request%20Sheet.pdf
- In FY 2019, the OAG form-approved 73 different contracts and grants.
- Please review the form BEFORE it is submitted to make sure it has all of the up-to-date clauses, statutory citations or references if applicable. If there will be exhibits or attachments, please submit a pro-forma or a sample.

PRE-REVIEW

I have a contract that my predecessor left me to finish. It looks okay, but there are some provisions I'm just not sure about.

If you have a contract that is out-of-the ordinary, doesn't use the standard template, has terms or conditions that you are not comfortable with, ask the approving agencies to pre-review.

- Make us your accomplice; it will save rejection or delay at the end of the process.



RUSH REVIEW

OMG! We just finished very long negotiations with a vendor, and now we need the contract approved ASAP so they can start work.

- When there is a **legitimate** need, you may request a rush process.
- When requesting a rush, notify the agencies by email **AFTER** your agency has signed the contract

contracts@idoa.in.gov

iotcontract@iot.in.gov.

[your agency budget analyst]@sba.in.gov]

contracts@atg.in.gov

- The e-mail must contain the EDS or SCM number and the reason why the contract needs to be rushed.
 - Contracts are not tracked by vendor or by dollar amount; we can do nothing without a contract tracking number.



WHAT ABOUT “QUASIS”?

(BODIES CORPORATE AND POLITIC)

Somebody told me a commission is a “quasi.” What is that?

The term “body corporate and politic” is used, but not defined, in the Indiana Code. The Indiana Code does not use the term “quasi governmental.”

Bodies C&P typically are described as not being a “state agency” but “performing essential governmental functions.”

- They typically have the statutory authority to incur debt, and typically maintain checking accounts outside of the Treasurer’s office.
- Unless an authorizing statute says otherwise, they do not have to use IDOA for procurement, and their contracts are not reviewed by the Budget Agency.
- They are exempt from the State’s public purchasing statutes (IC § 5-22-1-2(4))
- The OAG recommends that they adhere to the State’s boilerplate to the greatest extent possible.

NON-DISCLOSURE AGREEMENTS

The vendor is going to disclose some of its proprietary computer code during our evaluation of its product. They want us to sign a non-disclosure agreement. Does that have to go through the approval process?

If no money is changing hands, these agreement are not usually circulated for review and approval. However, you should modify the agreement as necessary (interlineation is typically acceptable to the vendor):

- Always add the modifier “subject to the Indiana Access to Public Records Act, IC § 5-14-3” to the definition of confidential information or what you agree to keep confidential. The standard agreements are typically very broad and attempt to cover documents clearly disclosable.
- Change governing law to “Indiana”
- Change the court of jurisdiction to “court of competent jurisdiction located in Indiana”
- Delete any provision for fees and costs to be assessed against the state
- Delete any provision regarding arbitration.

DATA SHARING AGREEMENTS

I have been asked to look at a data sharing agreement. How do we handle those?

- If a vendor is buying State data and paying for it, use a contract template and circulate it for approval.
- If your agency is buying data and paying for it with public funds, use a contract template and circulate it for approvals. Involve IOT early in the process if State data will be retained and stored in the cloud.
- MOUs are frequently used when 2 agencies are sharing data. SCM has a template for MOUs, and these must be approved by the Budget Agency.
- Data sharing or data exchange agreements with another governmental entity (federal, another state, or local) where no fund transfer is involved may not need to be routed for approval.
- If you are asked to sign a Form Contract, read it closely to make sure it does not contain forbidden clauses, and that the person signing it has the actual authority to bind the State.

INTERLOCAL COOPERATION AGREEMENTS

Both my agency and a federal agency have power and authority over certain land. Our powers are different, but it would be helpful if we could set out who will be doing what and cooperate. What do I do?

- Ind. Code § 36-1-7 allows for powers that can be exercised by two or more governmental entities to be jointly exercised or for that power to be exercised by one entity on behalf of another.
- Interlocal Cooperation Agreements are frequently used for cooperative purchasing, mutual defense, economic development projects that cross state lines, and some projects with the federal government.
- A written agreement is required; some of them need the approval of the Attorney General.
- Most states have similar statutes.
- Contact the Advisory Section of the Office of the Attorney General with any questions.

FEDERALLY RECOGNIZED INDIAN TRIBES

I'm supposed to do an agreement with the Pokagon Band of the Potawatomi Tribe near South Bend. Is that any different from a regular contract?

- This past legislative session, the General Assembly enacted IC § 5-33.5 covering cooperative agreements with federally-recognized Indian tribes. At the present time, the Pokagon Band of Potawatomi is the only such tribe in Indiana.
- The Tribe is a federally-recognized sovereign. In a cooperative agreement, the State may (among other things) waive its sovereign immunity and agree to arbitration.
- Cooperative Agreements with the Tribe are being coordinated by Sara Gonso Tait of the Indiana Gaming Commission. Contact her directly for guidance:

stait@igc.in.gov

[317-233-0046](tel:317-233-0046)

OUTSIDE COUNSEL CONTRACTS

My agency needs an attorney to represent it in a matter before a federal regulatory agency. Do I just use the Professional Services template?

- By statute, an agency cannot hire outside counsel without the advance written consent of the Indiana Attorney General.

Ind. Code § 4-6-5-3 Written consent; employment of attorneys or special general counsel

No agency, except as provided in this chapter, shall have any right to name, appoint, employ, or hire any attorney or special or general counsel to represent it or perform any legal service in behalf of the agency and the state without the written consent of the attorney general.

- The application for requesting consent is found on IDOA's Contract Management webpage. It may also be accessed here: <https://www.in.gov/attorneygeneral/3442.htm>
- You do not need to submit an IDOA special procurement request for outside counsel.
- There is a specific template to use for outside counsel contracts. It is available on IDOA's Contract Management webpage and in SCM.

Before The Break . . .



SOMETIMES
THEY COME
BACK

AFTER THE BREAK . . .

- **Important Information for Non-Attorneys & Attorneys Alike**
- **Post-Employment Conflicts of Interests and Contracts (Civil And Criminal Law Concerns)**
- **Tax or Pension Repercussions From Certain Post-Employment Relationships**



INDIANA OFFICE OF INSPECTOR GENERAL

**State Employees
Contracting with the State**



PARTS I AND II

PART I: STATE EMPLOYEES RETIRING TO BECOME CONTRACTORS TO THE STATE

Jen Cooper; State Ethics Director, OIG

Kendra Leatherman; Legislative Director, Auditor's Office

Anthony Green; General Counsel INPRS

PART II: OTHER CONTRACTS BETWEEN STATE EMPLOYEES AND THE STATE

Jen Cooper; State Ethics Director, OIG

Tiffany Mulligan; Chief Legal Counsel, OIG

What are the implications when a state employee retires to become a contractor with the State?



■ **Issues under the Code of Ethics**

■ Conflicts of Interests – Decisions and Votes

IC 4-2-6-9

■ Conflicts of Interests – Financial Interest in a Contract

IC 4-2-6-10.5

■ **Issues under the Criminal Code**

■ Criminal Conflicts of Interests IC 35-44.1-1-4

■ Profiteering from Public Service IC 35-44.1-1-5

■ Conflicts of Interests – Decisions and Votes

IC 4-2-6-9



- Conflicts of Interests – Financial Interest in a Contract
IC 4-2-6-10.5



- Criminal Conflicts of Interests

IC 35-44.1-1-4

- Profiteering from Public Service

IC 35-44.1-1-5



- Worker Determinations by the IRS
 - Employees vs. Contractors
- How Arise:
 - Individual Receives a 1099 & W-2 from same FEIN in the calendar year—RED FLAG!
 - Retired or former employees as contractors
 - Contractor Asks IRS to treat them as employee
 - Contractor realizes when filing taxes, has not withheld sufficient tax

- How IRS Treats Worker Determinations
 - Assume Individual is employee unless agency can affirmatively prove otherwise
 - Legal arguments are useful, but not considered
 - IRS uses the SS-8 form to make their determinations
 - State has never won a worker determination appeal
- How AOS Flags potential issues
 - Payments to former employees
 - AOS Audit specialists will alert agency to potential issue.
 - Payroll Manager and Legal Counsel should review the situation

- Losing Worker Determinations: Takeaways
 - Cannot avoid paying federal payroll taxes if individual is employee
 - Agency will be required to pay both employer and employee portion of FICA taxes
 - Agency could also be liable for back INPRS contributions

- How to Avoid Trouble with the IRS
 - Hiring Individuals as Employees
 - INPRS Considerations
 - Duty and Control Test before hiring individual
 - Is agency controlling the work?
 - Does the individual have a financial stake in the contract?
 - Individual Working for more than just the state?
 - Understand How IRS uses SS-8 Questionnaire
 - Review the questionnaire when making determination
 - Read and understand IRS Publication 15-A

- Issues under IRS code:
 - Prior to 2007, IRS required “**bona fide separation of service**” from an employer in order for an individual to receive a retirement benefit with very few exceptions. However, the IRS **did not define** period required for separation.
 - After 2007, IRS loosened language to allow individuals to receive a retirement benefit at “**normal retirement age**” without separating from service if state statutes allowed.

- Issues under INPRS statutes:
 - IC 5-10.2-4-1(d) – A member is eligible for normal or early retirement if their retirement date is “**after the cessation** of the member’s service”.
 - Two exceptions – Elected Official and Millie Morgan
 - IC 5-10.2-3-6.5 – A member may withdraw part or all of their ASA if “[t]he member has not performed any service in a position covered by the applicable fund or for the same employer for **at least 30 days** after the date the member terminated employment.”

- Discussions about re-employment as an employee or contractor prior to retirement?
 - IC 5-10.2-4-8(g): “[I]f, on or before the date the member **files an application** for retirement benefits under this article, a member has a **formal or informal agreement** with an employer covered by this article to become **reemployed in a position covered** by this article after the member's retirement, regardless of the time frame between the member's retirement and the member's reemployment, the member's application for retirement benefits is void.”

- What are the consequences?
 - If a member:
 - received their pension benefit without a cessation of service,
 - received part or all of their ASA without 30 days of separation, or
 - had a formal or informal arrangement to return to work as an employee prior to submitting their retirement application,
- INPRS would stop all pension benefits and recoup all funds distributed to the member to comply with IRS and Indiana law.

Current state employees:
Navigating through conflicts of
interests related to contracts



■ **Issues under the Code of Ethics**

■ Conflicts of Interests – Decisions and Votes

IC 4-2-6-9

■ Conflicts of Interests – Financial Interest in a Contract

IC 4-2-6-10.5

■ Outside Employment/Moonlighting IC 4-2-6-5.5

■ Use of State Property IC 4-2-6-17

■ Ghost Employment 42 IAC 1-5-13

■ **Issues under the Criminal Code**

- Criminal Conflicts of Interests IC 35-44.1-1-4
- Profiteering from Public Service IC 35-44.1-1-5



Agency Contact Information

GENERAL QUESTIONS RELATING TO THE PRESENTATIONS: oageducation@atg.in.gov

AGENCY INQUIRIES MOVING FORWARD SHOULD BE DIRECTED TO:

OAG: susan.gard@atg.in.gov or contracts@atg.in.gov

DOA: tglickman@idoa.in.gov, or contracts@idoa.in.gov

SBA: OIEgunyomi@sba.IN.gov

SBOA: bkelly@sboa.in.gov

OIG: info@ig.in.gov