

EXPLANATORY NOTES/GUIDELINES FOR CONTRACT PREPARATION

(1) BASIC REQUIREMENTS FOR MOST CONTRACTS

General Comments

The purpose of providing a sample contract as an attachment to this policy is to assist staff in preparation of contracts/agreements which are normally required when Government is to provide a service or requires the services of another.

Contracts covering issues of limited complexity may be written and executed without the assistance of Legal Services; however, where the arrangements are more complex and where risk exposure is substantial, assistance of Legal Services is recommended. Before entering into discussions with Legal Services, best efforts should be made to create an adequate agreement. This will save time and resources and permit staff to set out in an orderly fashion the requirements of the contractual arrangement.

It is necessary that staff review each section of the draft contract to determine the appropriateness of the section for the contract planned.

The user may amend, add, delete and renumber sections of the sample contract as appropriate for the circumstances.

Following is a brief explanation as to the purpose of each paragraph to aid staff in preparation of a contract (see sample contract and subsections - **Attachment 13.07-II**).

Introductory Statements

- (a) The date of the agreement (top of the first page) should be the date on which the last signature is affixed.
- (b) Agreements on behalf of Government must be “as represented by the Minister of” and must be executed by the responsible Minister or Deputy Minister.
 - The statement “*THIS AGREEMENT BETWEEN: GOVERNMENT OF PRINCE EDWARD ISLAND, as represented by the Minister of*” is to remain as is, regardless whether the contract is executed by the Minister or the Deputy Minister.
- (c) The drafter should ensure that the contracting party is properly named in the contract and where applicable, is a legal entity.
- (d) All agreements should be named for future reference.

(e) Additional WHEREAS's may be added as appropriate.

Note: In cases where Government is the Contractor (Party of the Second Part), most of the Sample Contract may be used; however, the drafter must ensure that the proper reference is made to the parties.

Definitions

Section 1 Definitions are not always required; however, definitions section may be used if it is necessary to clarify or limit the meaning of a word used in the agreement.

Covenants of the Contractor and Government

Section 2 A clear and accurate description of the work (services to be performed, conditions of receiving payment, etc.) is important. Where the definition of the work is more than a few lines, a detailed outline of the work expected should be included as a schedule to the agreement and incorporated as an integral part of the agreement. If the Department has received a detailed proposal from the Contractor, it may be appropriate to **edit** the original proposal and use the result as the definition of the work under a schedule.

Section 3 Subsection 3(a) sets out the term of the Contract.
Subsection 3(b) is to be used in situations when the Work has commenced prior to the signing of the contract.

Payments, Records, and Accounts

Section 4 A clear statement on the amount and manner of payment, including reference to dates, stages of work, hold-backs, etc. This section sets out some options to be considered. In the case of complex payment schedules, it may be useful to set out the payments in a schedule to the contract.

Subsection 4(d) is important to clarify the requirements of both parties to initiate payment. This is necessary to assist the employee who is responsible to monitor the agreement to collect or pay the money due.

Subsections 4(e) and (f) are self-explanatory depending on the situation.

Conditions of Agreement

Section 5 Subsections 5(a) and 5(b) refer to the principal of an "independent Contractor relationship", in that, the work is being performed by an independent Contractor and not as an employee of the Government. It is imperative that the working relationship be clearly understood by both

parties and the circumstances surrounding the implementation of the contract should not create an employer/employee relationship (see Section 13.03 – Employer/Employee Relationship for a detailed explanation).

Note: in subsection 5(b) the reference to the *Civil Service Act* is used to make a very clear statement that there is no employer/employee relationship between the Contractor and the Government and that, in particular, the *Civil Service Act* does not apply.

- Section 6 Subsections 6(a), (b), (c) and (d) clarify that the contract price set out in section 4 is the total value and the Contractor is responsible to do those items identified and assume the cost of the same. These sections set out the requirements of the Contractor to comply with legislation, submit appropriate taxes and do whatever else is required of independent Contractors to conduct business.
- Section 7 This section confirms for the Contractor that the Agreement is subject to Government's annual appropriations.

Reports

- Section 8 The type and timing of reports are sometimes tied into the payments referred to in section 4. Subsection 7(a) and (b), or other paragraphs, are quite helpful to identify the various segments, milestones and final completion of the work.

Administration

- Section 9 This section is only necessary when the work is being undertaken in Government facilities or the Government wishes to specify where the work is to be performed.
- Section 10 Sets out the manner of supervision, inspection etc. by Government and the reporting requirements (if applicable) by the Contractor.

Termination

- Sections 11 & 12 Set out the manner and conditions for terminating the contract. It is necessary that the complete paragraph be used as it clarifies the process for termination and specifically refers to the possibility of reduced contract price.

Confidentiality and Copyright

- Section 13 A reasonably standard confidentiality clause, the use of which will depend on the work to be undertaken.
- Section 14 Subsections 14(a), (b) and (c) normally refer to contracts which result in a Work Product that may have a future value to Government. The most common use of this section involves computer programs.

Conflict of Interest

- Section 15 The Contractor warrants that as at the date of this Agreement, no conflict of interest, or any circumstance that might interfere with independent and objective exercise of judgment, exists or is likely to arise in relation to execution of this Agreement or its subject matter. The Contractor shall immediately notify Government, in writing, if any such actual or potential conflict of interest should arise at any time during the Term. In the event Government discovers or is notified by the Contractor of an actual or potential conflict of interest, Government, in its sole discretion, may either:
- (a) allow the Contractor to resolve the actual or potential conflict to the satisfaction of Government; or
 - (b) terminate the Agreement in accordance with the Termination section of this Agreement.

Freedom of Information and Protection of Privacy Act

- Section 16 Any information provided on this contract may be subject to release under the *Freedom of Information and Protection of Privacy Act*. You will be consulted prior to the release of any information.
- Section 17 Contractors whose work for Government involves the collection or use of personal information are subject to the *Freedom of Information and Protection of Privacy Act*. Personal information may not be released to any third party or unauthorized individual.

Indemnification and Insurance

- Section 18 The Hold Harmless and Indemnity Clause is standard and should be included in all contracts and provides protection that should the Government be sued for something that the Contractor should be liable for, then the Government should have protection from the Contractor.

Indemnification Clause

The Contractor shall indemnify and hold harmless Government, its agents, representatives and employees from and against all claims, demands, losses, costs, damages, actions, suits or proceedings of every nature and kind whatsoever arising out of or resulting from the performance of Work (herein called the "Claim"), provided that any such Claim is caused in whole or in part by any act, error or omissions, including, but not limited to, those of negligence, of the Contractor or anyone directly or indirectly employed by the Contractor or anyone for whom the Contractor may be liable.

Section 19 This section includes some examples of insurance. Any questions concerning insurance coverage requirements of the contract should be directed to the Risk Management and Insurance Section of the Treasury Board Secretariat. Exceptions to minimum insurance coverage requirements may occur with prior discussion with Risk Management and Insurance and with the approval of the Deputy or CEO of the contracting Department or Organization.

When contracting for professional services, professional liability coverage is required. Professional services would include services provided by firms/individuals which require a high level of capability or expertise in a professional, scientific, technical and/or managerial field such as consultants, architects, engineers, IT specialists.

General

Section 20 Requirement for written consent by Government before assignment of contract to others by the Contractor.

Section 21 The agreement is binding on all parties to the contract.

Section 22 The agreement is subject to the laws of Prince Edward Island.

Section 23 Reflects that this contract including schedules is the entire agreement and any changes must be in writing and signed by both parties to this agreement.

Section 24 The headings are inserted in this Agreement for reference only and shall not form part of the Agreement.

Section 25 Provisions shall survive the termination or expiry of this Agreement.

Section 26 Provisions which are deemed invalid shall be considered separately from the Agreement. Any invalid provisions do not affect enforceability of the entire Agreement.

NOTES:

- (1) A portion of the body of the agreement should be on the same page as the execution clauses.
- (2) Initialing and dating of each page of the contract by the signatories to the contract is not required but is helpful to verify that no changes have been made in the contract since signing. Strikeovers should be initialed by the signatories.

(2) EXPLANATORY NOTES FOR PREPARATION OF DRAFT STANDING ORDER CONTRACT

In situations where a single Contractor is to perform similar contractual services from time to time, and such times and purposes cannot be determined with regularity in advance, it is advisable for the Department to enter into a modified standard contract for a defined period of time, e.g., one year. The modifications would be to add where appropriate in the standard contract:

- (a) “Whereas _____ wishes to engage the services of _____ to perform additional services during the term of this contract, such work performed will be authorized by both parties to the contract and appended to this master contract as a schedule to this contract.”
- (b) “It is mutually agreed that such schedules will form part of this master contract and all items contained in the master contract are binding to the additional scheduled work.”
- (c) When additional schedules are added from time to time, they should include all items relating to the work to be performed, payment terms, timing of work and payments, etc., and the following clause to tie the schedule to the master contract:

“It is mutually agreed by both parties that this schedule forms an integral part of the (name of contract) contract between _____ and _____ dated the _____ day of _____, 20____, and that all facets of the above-noted master contract are binding to this schedule.”

Each schedule shall be signed by both signatories to the Master Contract or such other party as may be delegated in writing by the signatory to the Master Contract.

Ideally, the per unit rate negotiated for the service, and any additional services, is included in the Master Contract. However, where the per unit rate is not indicated in the Master Contract or the proposed rate for the additional service exceeds the original rate negotiated, the additional schedule will require the signature of the original signatory to the contract.

(3) EXPLANATORY NOTES FOR PREPARATION OF A DRAFT DOCTOR'S CONTRACT FOR SERVICES TO A HEALTH CARE FACILITY:

When contracting with medical doctors, some or all of the following specialized clauses should be added/substituted to the standard contract:

- (a) WHEREAS the Government operates _____ known as _____, in _____, which accommodates up to _____ residents.
- (b) AND WHEREAS the Government is desirous of securing the services of the Physician to provide medical services to residents and advice to staff of the _____ Manor.
- (c) i) The Physician certifies and agrees to provide written verification prior to execution of this Agreement, that they are registered and licensed with the College of Physicians and Surgeons of Prince Edward Island and are a member of the Medical Society of Prince Edward Island.
- ii) The Physician must have and maintain their admitting privileges to the _____ Hospital.
- iii) The Physician agrees to maintain Professional Malpractice Liability Insurance with limits of not less than \$5,000,000 for any one occurrence, and agrees to provide written proof of such insurance prior to execution of this Agreement. This insurance shall be with an insurer and in a form acceptable to the Government, and the Government shall have the right, but not the obligation, to review this insurance to determine its acceptability. Acceptance by Government of such insurance coverage shall not be construed as a waiver of any conditions of this Agreement.
- (d) In the event that the Physician cannot perform any of the services described in Schedule "A" at any time during the term of this Agreement, the Physician agrees to:
- i) notify the Government immediately;
- ii) recommend to the Government a replacement physician to perform the services described in Schedule "A";
- iii) provide the Government with written verification of the registration and licensing of the replacement physician with the College of Physicians and Surgeons of Prince Edward Island;

- iv) provide the Government with written proof that the replacement physician has current professional malpractice liability insurance coverage of at least \$5,000,000 per occurrence.
- v) certify to the Government that the replacement physician has current admitting privileges at _____ Hospital;
- vi) provide the documentation described in (iii) and (iv) hereof and obtain the approval of Government prior to permitting the replacement physician to perform any of the services described in Schedule “A” hereof;
- vii) be solely and completely responsible for the payment of the replacement physician for any and all services performed by the replacement physician.