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# **CONTRACT DRAFTING AND REVIEW MANUAL**

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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 assigned legal counsel, 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 assigned legal counsel 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.

The contract language provided in this manual is a basis for state contracts. Each contract to which an agency may enter is unique and may contain unique terms and conditions. Specifically, technology contracts, contracts for public improvements and leases will be more complex than the foundation language provided in this manual. Agencies should always seek review and input from their assigned legal counsel.

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 by the agency's assigned legal counsel 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 (e.g., a "boilerplate" or "form" contract provided by a vendor).**

**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.<sup>1</sup> 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.

**All of the contract provisions included in this manual are important. An agency should be reluctant to consider alternative language, removal of language, or additional language proposed by a vendor or contractor. Changes to the provisions of this manual should only be made in consultation with an agency's assigned legal counsel.**

## Role of the Agency

Once an agency determines that goods or services are needed from a specific contractor,<sup>2</sup> 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;

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<sup>1</sup> 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).

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

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.

### **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**

### **Contracts for Services**

The service contract must not make the contractor an "employee" of the state. See [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 Office of Management and Budget (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/>.

### **Information Technology Contracts**

Information technology contracts require numerous terms and conditions that are not applicable to contracts for services or contracts for goods. These contracts should be reviewed with an agency's assigned legal counsel, the OMB Procurement Office and the state's Information Technology Department (ITD) for sufficiency.

Major information technology projects require the appointment of an executive steering committee in accordance with N.D.C.C. § 54-59-32. It is imperative that agencies procuring large internet technology goods or services consult assigned legal counsel for determination as to the applicability of N.D.C.C. § 54-59-32.

Certain Information Technology contracts for goods and services are negotiated as Cooperative Purchasing Contracts and are managed by the State Procurement Office (SPO). Agencies should contact SPO to determine if an existing contract is in place before proceeding with the procurement process.

### **State Term Contracts and Cooperative Purchasing Contracts**

The OMB Procurement Office maintains certain "State Term Contracts" under its Cooperative Purchasing authority in accordance with N.D.C.C. § 54-44.4-13. This authority provides for the OMB Procurement Office to enter into agreements on behalf of multiple state agencies (and other specified entities) when similar goods or services are being procured by those agencies. A list of active State Term contracts is found at: <https://apps.nd.gov/csd/spo/services/bidder/listCurrentContracts.htm>.

## Contracts for Public Improvements

Because of the complexity involved in public improvement contracting, the industry standard of using contracts drafted by the American Institute of Architects (AIA) or the Engineers Joint Contract Documents Committee (EJCDC) should be acceptable to the agency. However, these contracts are drafted in favor of architects and engineers and contain terms and conditions to which a state agency is without authority to agree.

**It is imperative that these standard contracts be reviewed and supplemented with a state addendum that is prepared by the agency's assigned legal counsel or the Attorney General's office.**

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 subject to 10% of each estimate presented until the project is 50% complete, at which time retention is based on the contractor's performance. N.D.C.C. §§ 43-07-23, 48-01.2-13.

## 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 OMB. N.D.C.C. § 54-21-24.1. The standard lease form is included in the Appendix to this manual. See also [Landlord's Obligations](#) and [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 form may be found at: <http://www.nd.gov/fiscal/forms/>.

## Interagency Agreements

Interagency agreements are those executed between two or more state agencies. Because state agencies, by their very existence as such, are subject to a number of statutory requirements it is unnecessary to include all contract terms and conditions that would be included in a contract between a state agency and an outside vendor or entity. This manual contains a checklist found at [Appendix 6](#) detailing which clauses should be included in interagency agreements.

## 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 of North Dakota. 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. The Natural Resources and Indian Affairs Division of the Attorney General's office has an assistant attorney general who is available for consultation on these agreements.

## **CHAPTER 3 - PROCUREMENT AND PUBLIC IMPROVEMENTS**

### **Goods and Services**

Goods and services 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. § 48-01.2-02.1.
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 (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 Proposals and Invitations for Bid**

When preparing an RFP or invitation for bid (IFB), 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. Standard engineering and architectural contracts drafted by the Engineers Joint Contract Documents Committee (EJCDC) and American Institute of Architects (AIA) favor engineers and architects and contain terms to which a state agency may not agree. These standard contracts must be supplemented with a state addendum that is prepared in consultation with the agency's assigned legal counsel or with the Attorney General's office.

## CHAPTER 4 - CONTRACT FORMATION AND 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.

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.<sup>3</sup> Every review of a contract must include a determination whether the agency is authorized to enter into the proposed contract.

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

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<sup>3</sup> 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).

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.

Contracts that purport to limit or restrict a party's ability to enforce a right are considered void under N.D.C.C. § 9-08-05. It is not uncommon for a vendor to request that an agency limit the time period in which the agency may bring a claim against the contract. Agencies should not accept such limitations on enforcement of rights.

## **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 1](#) 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 assigned legal counsel.**

## **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. Superfluous

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.

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/legislative-drafting-manual>.

## CHAPTER 5 - CONTRACT CLAUSES

### Parties - 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 acting through its \_\_\_\_\_ [agency] ("STATE") 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, acting through its Commissioner of Labor ("STATE"), and ABC Company ("CONTRACTOR")." 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 ..."

### Recommended Language

#### PARTIES

The parties to this contract (Contract) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (CONTRACTOR);

### Scope of Work

#### 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.

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. If the Scope of Work is a lengthy

document, you may consider referencing the Scope of Work as a separate section at the end of the contract.

### **Recommended Language**

#### **SCOPE OF WORK**

CONTRACTOR, in exchange for the compensation paid by STATE under this Contract, shall provide the following services:

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### **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 monetary cap should be placed on the total amount, 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.

#### **Prepayment**

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.

#### **Taxpayer ID**

An agency should obtain the contractor's federal employer ID number by requiring this through the contract. Although this clause is not essential to the contract, it may save time for the agency.

#### **Payment of Taxes by State**

State has tax exempt status. Ensure that the State is not responsible for the payment of any taxes.

## **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.

## **Recommended Language**

### **COMPENSATION**

#### **Contractual Amount**

STATE shall pay for the accepted services provided by CONTRACTOR under this Contract an amount not to exceed \_\_\_\_\_ (Contractual Amount).

The Contractual Amount is firm for the duration of the Contract and constitutes the entire compensation due CONTRACTOR for performance of its obligations under this Contract, unless amended, regardless of the difficulty, materials or equipment required, including fees, licenses, overhead, profit and all other direct and indirect costs incurred by CONTRACTOR, except as provided by an amendment to this Contract.

#### **Payment**

- 1) Payment made in accordance with this Compensation section shall constitute payment in full for the services and work performed and the deliverables and work(s) provided under this Contract and CONTRACTOR shall not receive any additional compensation hereunder.
- 2) STATE shall make payment under this Contract within forty-five (45) calendar days after receipt of an approved invoice.
- 3) Payment of an invoice by STATE will not prejudice STATE's right to object to or question that or any other invoice or matter in relation thereto. CONTRACTOR's invoice will be subject to reduction for amounts included in any invoice or payment made which are determined by STATE, on the basis of audits conducted in accordance with the terms of this Contract, not to constitute allowable costs. At STATE's sole discretion, all payments shall be subject to reduction for amounts equal to prior overpayments to CONTRACTOR.
- 4) For any amounts that are or will become due and payable to STATE by CONTRACTOR, STATE reserves the right to deduct the amount owed from payments that are or will become due and payable to CONTRACTOR under this Contract.

*Note: In the event that your contract will allow for separately billed travel expenses (i.e.: outside of fixed price contract), modify or delete the following clauses as applicable:*

## **Travel**

CONTRACTOR acknowledges travel costs are covered by the Contractual Amount and shall not invoice STATE for travel costs.

## **OR**

STATE shall reimburse CONTRACTOR for expenses related to travel at amounts not to exceed those outlined below:

1) **Lodging:** Reimbursement shall not exceed the then-current, published GSA rate for the travel location. Copies of receipts are required for lodging reimbursement. STATE shall not reimburse for incidental and miscellaneous expenses charged to the room, including, but not limited to, alcohol, telephone charges, or entertainment (e.g., movies, room service).

2) **Transportation:** Air travel shall be reimbursed by STATE at the actual cost of air fare for coach class travel only. CONTRACTOR shall make air travel arrangements at least fourteen (14) days in advance whenever possible. Reimbursement for rented, chartered, or contracted vehicle transportation shall be limited to reasonable rates as determined by STATE.

3) **Meals:** Meals shall be paid on a per diem basis for each day of travel at then-current, published GSA per diem rate for the travel location. Per diem for the first and last day of travel shall be paid at seventy-five percent (75%) of the GSA per diem rate. Requests for per diem payments must include the start and end dates of travel, the location where the services are performed, and the allowable per diem amount for each trip on the billing/invoice.

Payment for any travel expenses that exceed the travel budget as agreed upon by the parties must be approved by STATE's project manager.

## **PREPAYMENT**

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

## **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. STATE will furnish certificates of exemption upon request by the CONTRACTOR.

## **TAXPAYER ID**

CONTRACTOR'S federal employer ID number is: \_\_\_\_\_.

## **PURCHASING CARD**

STATE may make a payment using a government credit card. CONTRACTOR will accept a government credit card without passing the processing fees for the government credit card back to STATE.

## **Term of Contract**

### **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 [Termination](#); and N.D.A.G. 77-01. These options are generally titled: Extension, Renewal and Renegotiation. They are outlined below with brief descriptions as to their applicability.

**Any exercise of an Extension, Renewal, or Renegotiation requires a written contract amendment identifying the amended terms and conditions. Contract amendments should be drafted in consultation with an agency's assigned legal counsel.**

### **Term of Contract**

This clause identifies the start and end of the contract term. A contract may begin on a specified date or it may begin on the contract's Effective Date, which is a specific clause at the end of the contract.

## **No Automatic Renewal**

Contracts should only be considered renewed when the state agency specifically exercises a unilateral right to renew the contract or both parties mutually agree that the contract should be renewed. Any language referencing automatic renewal should be stricken from contracts.

## **Extension Option**

An extension option provides the state agency the unilateral right to extend the contract beyond the current contract term end date. Generally, extensions are exercised when additional time is needed to complete a contract or it is necessary to keep a contract in place and prevent a gap in coverage for goods or services while a new procurement process is conducted to retain a new vendor.

An extension provision is normally used for a one-time procurement. The extension provision allows you to amend the contract to allow additional time to complete the work or conduct a procurement process. Indicate the maximum number of days/months allowed, normally not exceeding 12 months.

## **Renewal Option**

A renewal option is normally used when a multi-year contract is anticipated. A renewal option provides the state agency the unilateral right to renew the contract beyond the current contract term end date. The renewal provision allows the contract to be renewed for additional contract terms after the completion of the initial contract period.

If a contract or lease 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.

## **Renegotiation Option**

A renegotiation option would normally be used for a strategic solution/product, for example a critical line-of-business application that is expected to be used for an extended period of time and where it is in the state's best interest to have the ability to renegotiate the contract. Renegotiation occurs after completion of the initial term and any extensions and renewals.

## Recommended Language

### Term of Contract

This Contract begins on *[Month, Day], 20[Year] or its effective date*, and ends on *[Month, Day], 20[Year]*.

### No Automatic Renewal

This Contract will not automatically renew.

### Extension Option

STATE reserves the right to extend the Contract for an additional period of time, not to exceed \_\_\_\_\_ months, beyond the current termination date of the Contract.

### Renewal Option

STATE may renew this Contract upon satisfactory completion of the initial Contract term. STATE reserves the right to execute up to \_\_\_\_\_ options to renew this Contract under the same terms and conditions for a period of \_\_\_\_\_ months each.

### Renegotiation Option

In view of the fact that it is unknown how long the products and services will be employed by STATE and that STATE will require ongoing maintenance and support of the products for as long as the system is operational, therefore after completion of the initial term of the Contract including any extensions and renewals, STATE and CONTRACTOR may renegotiate the Contract upon mutual agreement of the parties

## Time is of the Essence

**Time is of the essence is a clause rarely used in contracts.** However, there may be unique circumstances surrounding a contract where time is of the essence. An agency should consult with its assigned legal counsel to determine if time is of the essence.

Generally, if time is not of the essence, reasonable delay in performance does not constitute a material breach; unreasonable delay constitutes a material breach.

Time is of the essence when a Contractor's service(s) must be performed within a specified time and that performance is essential to require performance on the part of the State (the Contractor needs to do their part in order to require the State to do its). The Contractor is not afforded any opportunity to cure a delay in performance and any

delay may be a material breach of the contractual terms and conditions. State must be prepared to terminate a contract if a material breach occurs and time is of the essence. Waiving "Time is of the Essence" for a Contractor's delay in performance at any time during the contract term may result in a waiver of all "Time is of the Essence" milestones unless otherwise agreed upon, in writing, by State and Contractor.

If it is determined that time is of the essence for a contract, the following recommended language should be used.

### **Recommended Language**

#### **TIME IS OF THE ESSENCE**

CONTRACTOR hereby acknowledges that time is of the essence for performance under this Contract.

### **Termination**

#### **Purpose**

A termination clause identifies the circumstances under which the contract may be cancelled prior to the termination date specified in the contract. Termination for Cause may be dependent upon whether or not time is of the essence, optional language is outlined below. State agencies should consult with assigned legal counsel to determine if time is of the essence before including the optional language for Termination for Cause.

### **Recommended Language**

#### **TERMINATION**

##### **Termination by Mutual Agreement**

This Contract may be terminated by mutual consent of both parties executed in writing.

##### **Termination without Cause**

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.

##### **Termination for Lack of Funding or Authority**

STATE by written notice 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.

#### **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.

### **Delay or Default Force Majeure (Natural Disaster/Acts of God)**

#### **Purpose**

This clause is necessary to identify the obligations of the parties and expectations of the parties if timely performance of the contract is impossible or extremely difficult for reasons beyond a party's control.

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.

## Recommended Language

### FORCE MAJEURE

Neither party shall be held responsible for delay or default caused by fire, riot, terrorism, acts of God or war if the event is beyond the party's reasonable control and the affected party gives notice to the other party immediately upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default.

## 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 contract.

### 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

*Note: This manual does not offer a sample clause to impose liquidated damages. A liquidated damages clause should not be used without the specific advice of the agency's assigned legal counsel.*

## Limitations of Liabilities

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, N.D.C.C. § 32-12.2-15 is relevant. An agency has limited authorization to agree to limit a contractor's liability for the lease or purchase of, or services related to software, communication, or electronic equipment and economic forecasting. An agency may not limit any direct loss to the state or loss resulting from property damage or personal injury. See N.D.C.C. § 32-12.2-15.

Since it is in the best interests of the state to remove all language that limits the liability of a contractor, 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. An agency should work with its assigned legal counsel to assist in removing any requirement that the state contractually limit the liability of a contractor.

N.D.C.C. § 32-12.2-15 requires the agency, in consultation with the OMB Risk Management Division and the Attorney General's office, to prepare written documentation before agreeing to any liability limitation. A Limitation of Liability Documentation Template is available from the OMB SPO at:  
[http://www.nd.gov/spo/agency/forms\\_templates/](http://www.nd.gov/spo/agency/forms_templates/)

***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 assigned legal counsel.***

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 ***"Guidelines to Managing Contractual Risk"*** at: <http://www.nd.gov/risk/publications/manuals-guides>.

## Indemnification

### 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.

Absent legislative authority or specific statutory authority, an agency may not agree to indemnify a party to a contract.

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 assigned legal counsel regarding any contract with a political subdivision.

## **Recommended Language**

*The Risk Management Division of the OMB 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. The Risk Management manual "Guidelines to Managing Contractual Risk" is at: <http://www.nd.gov/risk/publications/manuals-guides>.*

## **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 OMB 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 the Risk Management Manual "Guidelines to Managing Contractual Risk" at:*

<http://www.nd.gov/risk/publications/manuals-guides>.

## Works for Hire and Work Product

### Purpose

These clauses establish 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. The US Copyright Office has more information, at <http://www.copyright.gov/pubs.html> .

### Recommended Language

#### **WORKS FOR HIRE**

CONTRACTOR acknowledges that all work(s) under this Contract is "work(s) for hire" within the meaning of the United States Copyright Act (Title 17 United States Code) and hereby assigns to STATE all rights and interests CONTRACTOR may have in the work(s) it prepares under this Contract, including any right to derivative use of the work(s). All software and related materials developed by CONTRACTOR in performance of this Contract for STATE shall be the sole property of STATE, and CONTRACTOR hereby assigns and transfers all its right, title, and interest therein to STATE. CONTRACTOR shall execute all necessary documents to enable STATE to protect STATE's intellectual property rights under this section.

## WORK PRODUCT

All work product, equipment or materials created for STATE or purchased by STATE under this Contract belong to STATE and must be immediately delivered to STATE at STATE'S request upon termination of this Contract.

## 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

#### 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:

STATE	CONTRACTOR
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

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.

## 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 public 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 public records law. Further information regarding public records and meetings may be found at: <http://www.ag.nd.gov/OpenRecords/ORM.htm>.

## Recommended Language

### **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 public records law, [N.D.C.C. ch. 44-04](#). 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 Laws

### **Purpose**

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

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

An agency should consult with its assigned legal counsel 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(13)(c) which would subject the contractor to the open meetings laws.

## Recommended Language

### **COMPLIANCE WITH PUBLIC RECORDS LAWS**

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 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 public records law. CONTRACTOR agrees to contact STATE immediately upon receiving a request for information under the public records law and to comply with STATE's instructions on how to respond to the request.

## **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**

#### **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.

## **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.

In the event of an assignment request by the contractor, the agency should determine that the contractor being granted the assignment is not a contractor that has been barred from contracting with the state of North Dakota for procurement or bidder violations.

## **Recommended Language**

### **ASSIGNMENT AND SUBCONTRACTS**

CONTRACTOR may not assign or otherwise transfer or delegate any right or duty without STATE's express written consent. CONTRACTOR may, however, 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.

## **Spoliation (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 Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB. The manual can be found at: <http://www.nd.gov/risk/publications/manuals-guides>.

## Recommended Language

### **SPOILIATION (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 the accident.

## Merger and Modification – Conflict in Documents

### 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. This clause also outlines the controlling order (i.e., order of precedence) for documents in the event there is a conflict between the terms and conditions contained within the documents. The clause should also explain how the contract may be amended.

## Recommended Language

### **MERGER AND MODIFICATION – CONFLICT IN DOCUMENTS**

This Contract, including the following documents, 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.

Notwithstanding anything herein to the contrary, in the event of any inconsistency or conflict among the documents making up this Contract, the documents must control in this order of precedence:

- a. The terms of this Contract as may be amended;
- b. STATE's Solicitation Amendment #1 to Request for Proposal ("RFP") number \_\_\_\_\_ dated \_\_\_\_\_;
- c. STATE's Request for Proposal ("RFP") number \_\_\_\_\_, dated \_\_\_\_\_;
- d. CONTRACTOR's proposal dated \_\_\_\_\_ in response to RFP number \_\_\_\_\_.

- e. All terms and conditions contained in any end user agreements (e.g., automated click-throughs, shrink wrap, or browse wrap) are specifically excluded and null and void, and shall not alter the terms of this Contract.

## **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**

#### **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.

## **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 (i.e., applicable law) and any dispute resolved in North Dakota state courts (i.e., venue).

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

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 must consult with the Office of Attorney General and the OMB, Risk Management Division. Subjecting the agency to another state's laws or jurisdiction or that of a foreign country may not be in the agency's or the state's best interests and any risks involved must be weighed against those interests through legal consultation.

## Recommended Language

### 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. Each party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens*.

## Alternative Dispute Resolution – Jury Trial

### Purpose

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

If alternative dispute resolution must be used, it should be voluntary and the decision (or outcome) should not be binding on the agency. The agency should not waive its right to go to court if the parties cannot reach a settlement that is authorized by law.

## Recommended Language

### 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.

## 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 is not allowed without an appropriation. **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**

### **ATTORNEY FEES**

In the event a lawsuit is initiated 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.

## **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**

### **NONDISCRIMINATION – 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, 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**

### **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**

### **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, the Auditor's designee, or Federal auditors. CONTRACTOR shall maintain all of these records for at least three (3) years following completion of this Contract and be able to provide them

at any reasonable time. STATE, State Auditor, or Auditor's designee shall provide reasonable notice.

## **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**

#### **EFFECTIVENESS OF CONTRACT**

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

## **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 state's ITD has created guidelines for state agencies. Accordingly, an agency considering using an electronic signature should consult these guidelines if a contractor asks it to accept an electronic signature. The ITD guidelines are available at : <http://www.nd.gov/itd/standards/records-management/electronic-signature-guidelines>.

## CHAPTER 6 – LEASE CLAUSES

This chapter covers Leases of real property. Leases for equipment are covered under contracts for goods.

### Parties - Identifying the Parties and Purpose

A lease should begin with a recital identifying the parties to the lease. The state should be identified as follows: “This contract is between the State of North Dakota acting through its \_\_\_\_\_ [agency] (“STATE”) and [ABC Company] (“LANDLORD”).”

Use one word descriptive terms, introduced in the opening clause identifying the parties, to refer to the parties throughout the lease. Check to be sure that references to the parties are consistent throughout the lease.

#### Recommended Language

##### PARTIES

The parties to this lease (Lease) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (LANDLORD);

### Scope of Lease

#### Purpose

Describe the property to be leased in sufficient detail so that there is no confusion as to the precise location.

#### Recommended Language

##### 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 *<city>*, county of *<county>* and state of North Dakota:

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*[Insert property description of the premises to be leased by agency.]*

## Term of Lease

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

A lease may extend beyond the current biennium if the agency has express authority to enter into the lease or if the termination clause in the lease allows the agency to terminate the lease if sufficient funds are unavailable, if the law regarding the contract is changed or without cause at any time.

### Recommended Language

#### TERM OF LEASE

The term of this Lease is for a period of **<number>** months, commencing on **<day>** day of **<month>**, **<year>**, and terminating on the **<day>** day of **<month>**, **<year>**.

## Holding Over

### 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.

### Concern

An agency should be reluctant to consider alternatives to this language and should only do so after consulting with its assigned legal counsel.

### Recommended Language

#### 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 month to month.

## Rental Payments

### Purpose

Identify the amount of money the state must pay pursuant to the lease. The lease should indicate the amount per square foot for the specific location being leased and provide a total amount per annum that the agency will pay landlord for rent.

This clause should be specific as to when rental payments will be due to landlord and where rental payments may be made to landlord.

### Recommend Language

#### RENTAL PAYMENTS

STATE will pay rent for the premises, consisting of *<number>* square feet, at *<amount>* per square foot per annum, or *<amount>* per annum.

Rent will be paid in advance by the 10th day of each month in an amount of *<amount>* which is 1/12 of the annual amount, commencing on the *<day>* day of *<month>*, *<year>* and continuing monthly thereafter for the term of this Lease.

Rent is payable at the address of LANDLORD, *<insert landlord's address>*, unless STATE is notified otherwise in writing by LANDLORD.

## 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'S OBLIGATIONS

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 and repairs, including all janitorial services, which will be done on a daily basis, including furnishing of related supplies.
3. To perform all maintenance and repairs requested by STATE which are related to use and habitability of the premises.
4. 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.
5. 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.
6. 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.
7. 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.
8. To furnish \_\_\_\_\_ automobile parking stalls for use by STATE, its agents or designees, in the lot provided for use by the building tenants.
9. 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.
10. To pay all real estate taxes and special assessments on the premises during the terms of the lease.

## **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'S OBLIGATIONS**

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.

## **Termination of 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**

#### **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.

## **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.

## **Merger and Modification**

### **Purpose**

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

### **Recommended Language**

#### **MERGER AND MODIFICATION**

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

## **Severability**

### **Purpose**

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

### **Recommended Language**

#### **SEVERABILITY**

If any term of this Lease 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 Lease did not contain that term.

## Assignment – Sale of Premises

### Purpose

This clause allows an agency to maintain its status as tenant if the landlord sells the premises to a third party. This clause also restricts the agency from assigning or subleasing the premises to a third party without the landlord’s written consent.

### Recommended Language

#### **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

### Purpose

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

### Recommended Language

#### **NOTICE**

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

<b>STATE</b>	<b>LANDLORD</b>
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

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

### Purpose

This clause is necessary to identify the law governing the lease and the court or courts in which lease disputes may be heard. The goal of this provision is to have a lease interpreted according to North Dakota law (i.e., applicable law) and any dispute resolved in North Dakota state courts (i.e., venue).

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

If a landlord is unwilling to agree to be bound by North Dakota law or to be subject to the jurisdiction of North Dakota courts, an agency must consult with the Office of Attorney General and the OMB, Risk Management Division. Subjecting the agency to another state's laws or jurisdiction or that of a foreign country may not be in the agency's or the state's best interests and any risks involved must be weighed against those interests through legal consultation.

### Recommended Language

#### **APPLICABLE LAW AND VENUE**

This **Lease** is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Lease must be adjudicated exclusively in the state District Court of *<applicable county>* County, North Dakota. Each party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens*.

## Alternative Dispute Resolution – Jury Trial

### Purpose

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

If alternative dispute resolution must be used, it should be voluntary and the decision (or outcome) should not be binding on the agency. The agency should not waive its right to go to court if the parties cannot reach a settlement that is authorized by law.

## **Recommended Language**

### **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.

## **Spoliation (Destruction or Severe Modification of Evidence)**

### **Purpose**

This clause is included in a lease to require a landlord 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.

For further information on spoliation, consult the Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB. The manual can be found at: <http://www.nd.gov/risk/publications/manuals-guides>.

## **Recommended Language**

### **SPOLIATION – PRESERVATION OF EVIDENCE**

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.

## Indemnification

### Purpose

These clauses are often the most contentious in any lease. 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 lease, 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.

Absent legislative authority or specific statutory authority, an agency may not agree to indemnify a party to a lease.

Note, when leasing 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 assigned legal counsel regarding any lease with a political subdivision.

### Recommended Language

*The Risk Management Division of the OMB has sample indemnity and limitation of liability language that should be used in each lease with the state. Depending upon the type of lease, 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. The Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB can be found at: <http://www.nd.gov/risk/publications/manuals-guides>.*

## Insurance

### Purpose

Insurance clauses are necessary to ensure that sufficient coverage is in place to cover all claims against the landlord, 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 lease. An agency should make sure that the insurance coverage required by a lease will cover the types of claims that may arise under that specific lease.

The benefit of requiring a landlord to indemnify the state or have certain levels of insurance coverage, or both, can be easily neutralized if the details of the landlord'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 landlord but disregard claims against the state. An attempt to seek indemnity from the landlord personally may be unsuccessful because the landlord may have insufficient assets to fulfill the landlord's duty to indemnify the state.

## Required Coverages

*The Risk Management Division of the OMB has sample insurance language that should be used in each lease with the state. Depending upon the type of lease, 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. The Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB can be found at: <http://www.nd.gov/risk/publications/manuals-guides>.*

## 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 lease says, however, all parties must follow applicable confidentiality laws.**

Landlords frequently ask a contracting agency to keep all information provided by a landlord confidential. The public 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 public records law. Further information regarding public records and meetings may be found at: <http://www.ag.nd.gov/OpenRecords/ORM.htm>.

### Recommended Language

#### **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.

## **Compliance with Public Records Laws**

### **Purpose**

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

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

An agency should consult with its assigned legal counsel to determine whether a lease should also include language notifying a landlord 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(13)(c) which would subject the landlord to the public meetings laws.

### **Recommended Language**

#### **COMPLIANCE WITH PUBLIC RECORDS LAWS**

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

## **State Audit**

### **Purpose**

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

## Recommended Language

### STATE AUDIT

All records, regardless of physical form, and the accounting practices and procedures of LANDLORD relevant to this Lease are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors. LANDLORD shall maintain all of these records for at least three (3) years following completion of this Lease and be able to provide them at any reasonable time. STATE, State Auditor, or Auditor's designee shall provide reasonable notice.

## Effective Date of Lease

### Purpose

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

## Recommended Language

### 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, OMB, as required in N.D.C.C. § 54-21-24.1.

## Approval

**All leases must be approved by OMB Facility Management** and be reviewed by the Attorney General's office in compliance with N.D.C.C. § 54-21-24.1 and Facility Management lease procedures. The procedure for completing a state office lease may be found at: <http://www.state.nd.us/fac/forms/leaseprocedure.htm>.

## **APPENDIX**

1. Contract Checklist
2. Template, Contract
3. Lease Checklist
4. Template, Lease
5. Construction Contract Checklist
6. Interagency Agreement Checklist
7. Joint Power Agreement Checklist

**CONTRACT CHECKLIST**

- 1. Does the state agency or official have the authority to enter into the contract?
- 2. Does the state agency have an appropriation for the subject matter of the contract?
- 3. Does the other party have the authority to enter into the contract?
- 4. Has the proposed contract been reviewed by the agency's assigned legal counsel?
- 5. Is the contract in writing with all pages numbered?
  - Does the contract contain any exhibits or attachments?
  - Are all the documents appropriately numbered or labeled and attached?
- 6. Are all payment amounts and dates correct?
- 7. Are there any handwritten changes or other alterations to the contract?
  - If so, have all the changes or alterations been initialed by all signers?
- 8. Are the parties properly identified in the introductory paragraph or first clause?
- 9. 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?
  - Are all references to other clauses, attachments or other applicable documents correct?
- 10. 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?
- 11. If the contract contains a "liquidated damages" provision, was it drafted and approved by the agency's assigned legal counsel?
- 12. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 13. Is the name and title or position of each person signing the document listed below the signature line?

- 14. Do all signatures match the typed or printed names?
  - 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?
- 15. Does the contract specify both the date on which it begins and the date on which it ends?
- 16. 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?
- 17. 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?
- 18. 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?
- 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?

## TEMPLATE, CONTRACT

The parties to this contract (Contract) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (CONTRACTOR);

### SCOPE OF WORK

CONTRACTOR, in exchange for the compensation paid by STATE under this Contract, shall provide the following services:

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*[Describe what is to be done under the contract. 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. If the Scope of Work is a lengthy document, you may consider referencing the Scope of Work as a separate exhibit at the end of the contract.]*

### COMPENSATION

#### Contractual Amount

STATE shall pay for the accepted services provided by CONTRACTOR under this Contract an amount not to exceed *<amount>* (Contractual Amount).

The Contractual Amount is firm for the duration of the Contract and constitutes the entire compensation due CONTRACTOR for performance of its obligations under this Contract, unless amended, regardless of the difficulty, materials or equipment required, including fees, licenses, overhead, profit and all other direct and indirect costs incurred by CONTRACTOR, except as provided by an amendment to this Contract.

#### Payment

- 1) Payment made in accordance with this Compensation section shall constitute payment in full for the services and work performed and the deliverables and work(s) provided under this Contract and CONTRACTOR shall not receive any additional compensation hereunder.

- 2) STATE shall make payment under this Contract within forty-five (45) calendar days after receipt of a correct invoice.
- 3) Payment of an invoice by STATE will not prejudice STATE's right to object to or question that or any other invoice or matter in relation thereto. CONTRACTOR's invoice will be subject to reduction for amounts included in any invoice or payment made which are determined by STATE, on the basis of audits conducted in accordance with the terms of this Contract, not to constitute allowable costs. At STATE's sole discretion, all payments shall be subject to reduction for amounts equal to prior overpayments to CONTRACTOR.
- 4) For any amounts that are or will become due and payable to STATE by CONTRACTOR, STATE reserves the right to deduct the amount owed from payments that are or will become due and payable to CONTRACTOR under this Contract.

**Note: In the event that your contract will allow for separately billed travel expenses (i.e.: outside of fixed price contract). Modify or delete the following clauses as applicable:**

#### **Travel**

CONTRACTOR acknowledges travel costs are covered by the Contractual Amount and shall not invoice STATE for travel costs.

#### **OR**

STATE shall reimburse CONTRACTOR for expenses related to travel at amounts not to exceed those outlined below:

- 1) **Lodging:** Reimbursement shall not exceed the then-current, published GSA rate for the travel location. Copies of receipts are required for lodging reimbursement. STATE shall not reimburse for incidental and miscellaneous expenses charged to the room, including, but not limited to, alcohol, telephone charges, or entertainment (e.g., movies, room service).
- 2) **Transportation:** Air travel shall be reimbursed by STATE at the actual cost of air fare for coach class travel only. CONTRACTOR shall make air travel arrangements at least fourteen (14) days in advance whenever possible. Reimbursement for rented, chartered, or contracted vehicle transportation shall be limited to reasonable rates as determined by STATE.
- 3) **Meals:** Meals shall be paid on a per diem basis for each day of travel at then-current, published GSA per diem rate for the travel location. Per diem

for the first and last day of travel shall be paid at seventy-five percent (75%) of the GSA per diem rate. Requests for per diem payments must include the start and end dates of travel, the location where the services are performed, and the allowable per diem amount for each trip on the billing/invoice.

Payment for any travel expenses that exceed the travel budget as agreed upon by the parties must be approved by STATE's project manager.

### **Prepayment**

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

### **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. STATE will furnish certificates of exemption upon request by the CONTRACTOR.

### **Taxpayer ID**

CONTRACTOR'S federal employer ID number is: \_\_\_\_\_.

### **Purchasing Card**

STATE may make a payment using a government credit card. CONTRACTOR will accept a government credit card without passing the processing fees for the government credit card back to STATE.

## **TERM OF CONTRACT**

This Contract begins on *[Month, Day], 20[Year] or its effective date*, and ends on *[Month, Day], 20[Year]*.

### **No Automatic Renewal**

This Contract will not automatically renew.

***Note: Any exercise of an Extension, Renewal, or Renegotiation requires a written contract amendment identifying the amended terms and conditions. Contract amendments should be drafted in consultation with an agency's assigned legal counsel.***

## **Extension Option**

*Note: An Extension provision is a brief period of time used to wrap up ongoing work that could not be completed by the end of the contract. It may also be used when all renewal options have been exercised and additional time is needed to close out the Contract.*

STATE reserves the right to extend the Contract for an additional period of time, not to exceed \_\_\_\_\_ months, beyond the current termination date of the Contract.

## **Renewal Option**

*Note: A Renewal provision is normally used when a multi-year contract is anticipated. The renewal provision allows the contract to be renewed for additional terms after the completion of the initial contract period.*

STATE may renew this Contract upon satisfactory completion of the initial Contract term. STATE reserves the right to execute up to \_\_\_\_\_ options to renew this Contract under the same terms and conditions for a period of \_\_\_\_\_ months each.

## **Renegotiation Option**

*Note: A Renegotiation option would normally be used for a strategic solution/product, for example a critical line-of-business application that is expected to be used for an extended period of time and where it is in the state's best interest to have the ability to renegotiate the contract. Renegotiation occurs after completion of the initial term and any extensions and renewals.*

In view of the fact that it is unknown how long the products and services will be employed by STATE and that STATE will require ongoing maintenance and support of the products for as long as the system is operational, therefore after completion of the initial term of the Contract including any extensions and renewals, STATE and CONTRACTOR may renegotiate the Contract upon mutual agreement of the parties.

## **TIME IS OF THE ESSENCE**

*Note: Generally, if time is not of the essence, reasonable delay in performance does not constitute a material breach; unreasonable delay constitutes a material breach. If time is not of the essence, DELETE this clause.*

CONTRACTOR hereby acknowledges that time is of the essence for performance under this Contract unless otherwise agreed to in writing by the parties.

## **TERMINATION**

### **Termination by Mutual Agreement**

This Contract may be terminated by mutual consent of both parties executed in writing.

### **Termination without Cause**

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.

### **Termination for Lack of Funding or Authority**

STATE by written notice 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.

### **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**

Neither party shall be held responsible for delay or default caused by fire, riot, terrorism, acts of God or war if the event is beyond the party's reasonable control and the affected party gives notice to the other party immediately upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default.

## **INDEMNITY**

[Please see *The Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB* found at: <http://www.nd.gov/risk/publications/manuals-guides>.]

## **INSURANCE**

[Please see *The Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB* found at: <http://www.nd.gov/risk/publications/manuals-guides>]

## **WORKS FOR HIRE**

CONTRACTOR acknowledges that all work(s) under this Contract is "work(s) for hire" within the meaning of the United States Copyright Act (Title 17 United States Code) and hereby assigns to STATE all rights and interests CONTRACTOR may have in the work(s) it prepares under this Contract, including any right to derivative use of the work(s). All software and related materials developed by CONTRACTOR in performance of this Contract for STATE shall be the sole property of STATE, and CONTRACTOR hereby assigns and transfers all its right, title, and interest therein to STATE. CONTRACTOR shall execute all necessary documents to enable STATE to protect STATE's intellectual property rights under this section.

## **WORK PRODUCT**

All work product, equipment or materials created for STATE or purchased by STATE under this Contract belong to STATE and must be immediately delivered to STATE at STATE'S request upon termination of this Contract.

## **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:

<b>STATE</b>	<b>CONTRACTOR</b>
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

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.

### **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 public records law, [N.D.C.C. ch. 44-04](#). 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 LAWS**

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 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 public records law. CONTRACTOR agrees to contact STATE immediately upon receiving a request for information under the public records law and to comply with STATE's instructions on how to respond to the request.

### **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.

## **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.

## **SPOILIATION – PRESERVATION OF EVIDENCE**

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.

## **MERGER AND MODIFICATION, CONFLICT IN DOCUMENTS**

*Note: For brevity, only four documents have been included. Please make sure you list all documents to be considered including amendments to the RFP or proposal, Best and Final Offers, Questions and Answers to the RFP, etc. In addition, make sure the order of these documents always has STATE's documents first, and CONTRACTOR's documents last, in order to ensure that STATE's documents always take precedence. Consult with your Attorney General counsel if you have questions on the order of precedence.*

This Contract, including the following documents, 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.

Notwithstanding anything herein to the contrary, in the event of any inconsistency or conflict among the documents making up this Contract, the documents must control in this order of precedence:

- a. The terms of this Contract as may be amended;
- b. STATE's Solicitation Amendment #1 to Request for Proposal ("RFP") number \_\_\_\_\_ dated \_\_\_\_\_;
- c. STATE's Request for Proposal ("RFP") number \_\_\_\_\_, dated \_\_\_\_\_;
- d. CONTRACTOR's proposal dated \_\_\_\_\_ in response to RFP number \_\_\_\_\_.
- e. All terms and conditions contained in any end user agreements (e.g., automated click-throughs, shrink wrap, or browse wrap) are specifically excluded and null and void, and shall not alter the terms of this Contract.

## **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.

## **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. Each party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or forum non conveniens.

## **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.

## **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.

## **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, the Auditor's designee, or Federal auditors. CONTRACTOR shall maintain all of these records for at least three (3) years following completion of this

Contract and be able to provide them at any reasonable time. STATE, State Auditor, or Auditor's designee shall provide reasonable notice.

**EFFECTIVENESS OF CONTRACT**

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

<b>CONTRACTOR</b>	<b>STATE OF NORTH DAKOTA</b>
<i>&lt;insert business&gt;</i>	Acting through its <i>&lt;insert agency&gt;</i>
BY: <i>&lt;Signature&gt;</i>	BY: <i>&lt;Signature&gt;</i>
<i>&lt;Printed Name&gt;</i>	<i>&lt;Printed Name&gt;</i>
<i>&lt;Title&gt;</i>	<i>&lt;Title&gt;</i>
Date:	Date:

**LEASE CHECKLIST**

- 1. Have OMB and the Office of Attorney General approved the lease?
- 2. Does the lease adequately describe the premises?
- 3. If a lease requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term?
- 4. 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?
- 5. Are the terms and amount of payment stated and correctly calculated?
  - If based on square footage, is the square footage also stated?
- 6. 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?
- 7. Is there a clause concerning accessibility requirements and compliance with ADA?
- 8. Is the lease in writing with all pages numbered?
  - Does the contract contain any exhibits or attachments?
  - Are all the documents appropriately numbered or labeled and attached?
- 9. Are the parties identified in the introductory paragraph or first clause?
- 10. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 11. 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. Is there an acceptable indemnification and hold harmless provision indicating how risks arising from the lease are assigned among the parties?
- 17. 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?

## TEMPLATE, LEASE

### PARTIES

The parties to this lease (Lease) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (LANDLORD);

### 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 *<city>*, county of *<county>* and state of North Dakota:

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*[Insert property description of the premises to be leased by agency.]*

### TERM OF LEASE

The term of this Lease is for a period of *<number>* months, commencing on *<day>* day of *<month>*, *<year>*, and terminating on the *<day>* day of *<month>*, *<year>*.

### 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.

### RENTAL PAYMENTS

STATE will pay rent for the premises, consisting of *<number>* square feet, at *<amount>* per square foot per annum, or *<amount>* per annum.

Rent will be paid in advance by the 10th day of each month in an amount of *<amount>* which is 1/12 of the annual amount, commencing on the *<day>* day of *<month>*, *<year>* and continuing monthly thereafter for the term of this Lease.

Rent is payable at the address of LANDLORD, *<insert landlord's address>*, unless STATE is notified otherwise in writing by LANDLORD.

## LANDLORD'S OBLIGATIONS

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 and repairs, including all janitorial services, which will be done on a daily basis, including furnishing of related supplies.
3. To perform all maintenance and repairs requested by STATE which are related to use and habitability of the premises.
4. 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.
5. 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.
6. 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.
7. 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.
8. To furnish \_\_\_\_\_ automobile parking stalls for use by STATE, its agents or designees, in the lot provided for use by the building tenants.
9. 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.
10. To pay all real estate taxes and special assessments on the premises during the terms of the lease.

## **STATE'S OBLIGATIONS**

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.
7. 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, 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.

## **MERGER AND MODIFICATION**

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

## **SEVERABILITY**

If any term of this Lease 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 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**

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

<b>STATE</b>	<b>LANDLORD</b>
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

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 Lease is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Lease must be adjudicated exclusively in the state District Court of <applicable county> County, North Dakota. Each party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens*.

## **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.

## **SPOILIATION – PRESERVATION OF EVIDENCE**

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 Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB* found at: <http://www.nd.gov/risk/publications/manuals-guides>.

## **INSURANCE**

[Please see *The Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB* found at: <http://www.nd.gov/risk/publications/manuals-guides>.

## **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.

**COMPLIANCE WITH PUBLIC RECORDS LAWS**

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

**STATE AUDIT**

All records, regardless of physical form, and the accounting practices and procedures of LANDLORD relevant to this Lease are subject to examination by the North Dakota State Auditor, the Auditor’s designee, or Federal auditors. LANDLORD shall maintain all of these records for at least three (3) years following completion of this Lease and be able to provide them at any reasonable time. STATE, State Auditor, or Auditor’s designee shall provide reasonable notice.

**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, OMB, as required in N.D.C.C. § 54-21-24.1.

LANDLORD	STATE OF NORTH DAKOTA
<insert business>	Acting through its <insert agency>
BY: <Signature>	BY: <Signature>
<Printed Name>	<Printed Name>
<Title>	<Title>
Date:	Date:

REVIEWED BY ATTORNEY GENERAL	APPROVED BY OMB FACILITY MANAGEMENT
BY: <Signature>	BY: <Signature>
<Printed Name>	<Printed Name>
<Title>	<Title>
Date:	Date:

**CONSTRUCTION CONTRACT CHECKLIST**

- 1. If using an AIA, EJCDC, or other contractor-provided contract, has an appropriate addendum been drafted by the agency's assigned legal counsel?
- 2. Have all required bonds been provided in a legally enforceable form?
  - If required, is a proper performance bond attached?
- 3. Are the terms of the bond adequate to guarantee all payments required by the contract?
- 4. Does the bond guarantee payment of interest on bills and claims not paid within 90 days?
- 5. Does the bond include a guarantee of payment of workers' compensation premiums?
- 6. Have all necessary licenses and permits been verified?
- 7. Are copies of the contractor's license or renewal certificate and contractor's bond attached?
- 8. Has a certificate been filed with the state by the contractor showing payment of state taxes?
- 9. 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?
- 10. Does the state agency or official have the authority to enter into the contract?
  - Have sufficient funds been appropriated?
- 11. Does the other party have the authority to enter into the contract?
- 12. Has the proposed contract been reviewed by the agency's assigned legal counsel?
- 13. 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?
- 14. Are there any mistakes in addition or other mistakes in connection with payment amounts or other numbers?
- 15. Are there any handwritten changes or other alterations to the contract?
  - If so, have all the changes or alterations been initialed by all signers?
- 16. Are the parties identified in the introductory paragraph or first clause?
- 17. 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?
- 18. 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?
19. If the contract contains a “liquidated damages” provision, are damages otherwise difficult to estimate in the event of a breach?
20. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
21. 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?
22. 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?
23. Does the contract specify both the date on which it begins and the date on which it ends?
24. 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?
25. 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?
26. 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?
28. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the contract are assigned among the parties?
29. 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?

**INTERAGENCY AGREEMENT CHECKLIST**

- 1. Does the state agency or official have the authority to enter into the contract?
  - If necessary, have sufficient funds been appropriated?
- 2. Are the following Contract clauses included:
  - Parties
  - Scope of Work (each Party's obligation)
  - Compensation (if applicable)
    - Contractual Amount
    - Payment
    - Travel
  - Term of Contract
  - If applicable:
    - No Automatic Renewal
    - Extension Option
    - Renewal Option
    - Renegotiation Option
  - Termination (ensure the termination rights are reciprocal between the state agencies)
    - Termination by Mutual Agreement
    - Termination without Cause
    - Termination for Lack of Funding or Authority
    - Termination for Cause
  - Force Majeure
  - Works for Hire (if applicable)
  - Work Product (if applicable)
  - Notice
  - Spoliation
  - Merger and Modification
  - Severability
  - Effectiveness of Contract
- 3. The following Contract clauses may be omitted from Interagency Agreements:
  - Compensation (if applicable)
    - Prepayment
    - Payment of Taxes by STATE
    - Taxpayer ID
  - Time is of the Essence
  - Indemnity
  - Insurance
  - Confidentiality
  - Compliance with Public Records Laws
  - Independent Entity
  - Assignment and Subcontracts

- Applicable Law and Venue
  - Alternative Dispute Resolution – Jury Trial
  - Nondiscrimination and Compliance with Laws
  - State Audit
4. Has the proposed contract been reviewed by the agency's assigned legal counsel?
5. 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?
6. Are there any mistakes in addition or other mistakes in connection with payment amounts or other numbers?
7. Are there any handwritten changes or other alterations to the contract?
- If so, have all the changes or alterations been initialed by all signers?
8. Are the parties identified in the introductory paragraph or first clause?
9. 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?
10. 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?
11. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
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. Does the contract specify both the date on which it begins and the date on which it ends?
14. Are termination clauses reciprocal to the state agencies?

**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?
- 5. Does each state agency have an appropriation for the subject matter of the contract?
- 6. Is the contract in writing with all pages numbered?
  - Does the contract contain any exhibits or attachments?
  - Are all the documents appropriately numbered or labeled and attached?
- 7. Are all payment amounts and dates correct?
- 8. Are there any handwritten changes or other alterations to the contract?
  - If so, have all the changes or alterations been initialed by all signers?
- 9. Are the parties properly identified in the introductory paragraph or first clause?
- 10. 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?
  - Are all references to other clauses, attachments or other applicable documents correct?
- 11. 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?
- 12. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 13. Is the name and title or position of each person signing the document listed below the signature line?

- 14. Does the agreement specify both the date on which it begins and the date on which it ends?
- 15. 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?
- 16. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the agreement are assigned among the parties?
- 17. Is approval needed from the Attorney General?
- 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?
- 19. Are all applicable provisions of N.D.C.C. § 54-40.3-01(1)(a-i) addressed?