

HOLD HARMLESS PROVISIONS

and

INSURANCE SPECIFICATIONS

in Contracts



Revised March 8, 2010

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CONTRACTUAL RISK TRANSFER

Introduction

A contract is an agreement between two or more parties which creates an obligation to do or not to do a particular thing. The document containing such an agreement is usually in writing, although a contract can be oral.

Contractual risk transfer is the process by which an organization assigns risk to independent contractors that it chooses to do business with. The guidelines in this document address hold harmless provisions and insurance provisions in contracts as a way to transfer risk and protect the state from tort liability. These guidelines are not a substitute for sound legal advice.

The Risk Management & Tort Defense Division recommends that each agency establish a process by which contracts are reviewed and approved by attorney or someone else who understands contracts and is familiar with the information provided in this document.

Contractual Risk Transfer

Contractual risk transfer is a method of allocating risk to independent contractors through hold harmless provisions and insurance specifications in contracts.

The question is often asked, why transfer contractual risk, why doesn't the state just assume it? A few of the more important reasons are summarized below:

1. The state is self-insured. Liability may fall upon the owner (i.e. the state) of a contract absent appropriate language.
2. The potential loss stemming from performance of many contracts is too large for the state to handle.
3. The contractor is in a better position to assimilate the loss because of:
 - Experience.
 - Financial capacity.
 - Position to control the work.

Contractual Transfer Concerns

There are a number of potential concerns, which may arise with respect to contracts or contractor insurance unless appropriate indemnity provisions and insurance specifications are established:

- Contractor purchases the wrong type of insurance.
- Contractor provides insurance which is excess of any other insurance, including the state's insurance.

- Contractor purchases `claims made' insurance coverage versus `occurrence' coverage.
- Contractor fails to specifically name the state as an `additional insured' under its insurance policy.
- Contractor's insurance lapses - In the event of contractor negligence, the contractor is rendered insolvent.
- Contractor's employees are injured and have no insurance.
- Inadequate contractor insurance limits. If the contractor has an aggregate insurance policy limit and prior losses, the state may not be protected in the event of contractor negligence.
- Insurance policy exclusions.
- Contractor failure/insolvency.
- Contractor's insurance company becomes insolvent.

Most of these concerns are avoided through appropriate contract language and are addressed in subsequent sections.

How is Risk Transferred?

Risk transfer can usually be accomplished in two ways. These methods are not mutually exclusive. Successful risk transfer includes a combination of both:

- Carefully worded hold harmless and indemnification language.
- Contractual requirements for the contractor to purchase insurance. Appropriate insurance coverage becomes especially important when the contractor has agreed to hold harmless, defend, and indemnify the state.

DEVELOPING CONTRACTS

This section provides a framework for developing contractual agreements. Agency contracts may differ substantially based upon type of contract, industry standards, or specific federal or state regulations.

For those agencies that do not have access to legal counsel, a sample contract may be found in the appendices.

Hold Harmless and Indemnification Clauses

A hold harmless and indemnification clause in a contract is a transfer mechanism where the contractor assumes, by contract, the liability associated with the work performed or services provided.

Hold harmless and indemnification agreements differ considerably in the way that they are worded and to the extent that they transfer liability. To be valid, a hold harmless and indemnification clause must be specific.

Hold harmless and indemnification agreements should have appropriate contract language and require the contractor to defend (pay legal costs) and indemnify (pay settlements or judgments) for activities of the contractor associated with performance of the contract.

Hold harmless and indemnification agreements are useful to clarify and pinpoint accountability. Their value without insurance or other secured financial transfer devices may be limited.

The type of hold harmless and indemnification clause obtained by each state agency will depend on negotiating abilities, skill in writing contracts, and the bargaining position of the parties.

A brief explanation of the various types of hold harmless and indemnification agreements is provided below: For sample language, please see the section entitled 'Sample Specifications, Page 8.

- **Limited Form** - Requires the contractor to be responsible for his/her own negligence.

Under a limited form hold harmless and indemnification agreement, the contractor agrees to hold harmless, defend, and indemnify the agency for liability arising out of the negligent acts or activities of the contractor.

- **Intermediate Form** - Requires the contractor to be responsible for his/her own negligence or the joint negligence of the contractor and the agency.

Under an intermediate form agreement, the contractor agrees to hold harmless, defend, and indemnify the agency for all liability arising out of the project, except that arising out of the sole negligence of the agency.

- **Broad Form** - Requires the contractor to be responsible for all liability arising out of the project (including the sole negligence of the agency).

Under a broad form agreement, the contractor agrees to hold harmless, defend, and indemnify the agency for all liability arising out of the project.

The clause does not guarantee the following:

- That the contract itself is good, or that the courts will enforce the clause if it is against public policy.
- That the party who assumes the liability will be financially able to pay damages or respond.
- That the insurer of the assuming party will cover loss due to exclusions under the contractual liability coverage.

Examine Carefully

- The sole negligence of the contractor and the joint negligence of the contractor and the agency.
- All liability arising out of the project, not just bodily injury and property damage.
- Damages or injury to:

1. Contractor's employees and agents.
2. Contractor's property.
3. Third parties.

Contract hold harmless and indemnification language, in and of itself, is usually insufficient to protect the state in the event of a loss for the following reasons:

- ◆ Where the state and the contractor have both signed hold harmless and indemnification agreements or liability is in question, the courts may turn to the contractor's/contractee's insurance policies for recovery.
- ◆ In the event of a large loss, the contractor may become insolvent and in the absence of insurance, the courts may look to the state for recovery.

When transferring risk through the use of a hold harmless and indemnification clause, there are a number of points to discuss thoroughly before executing the contract. The major points are:

- Clearly delineate each party's obligations.
- Make certain that the other party has the financial ability to assume the liability, either through their own resources, or through insurance to back their commitment.

A hold harmless and indemnification agreement does not excuse the state from liability. The agreement simply provides a contractual right to pursue recovery from the other party assuming the liability.

CONTRACTOR INSURANCE

In addition to hold harmless and indemnification language, insurance is a vital mechanism whereby risk is transferred from the state to the contractor's insurer by requiring the contractor to purchase insurance coverage.

Insurance becomes especially important when the contractor has agreed to defend and indemnify the state. We have outlined on the next page some of the basic types of insurance that agencies should typically require of a contractor by contract type:

INSURANCE COVERAGE BY CONTRACT TYPE

Type of Contract	General Liability	Vehicle Liability	Professional Liability	Fire & Extended Coverage or All Risk	Workers' Compensation Coverage
Construction Contracts	✓	*	*	✓	✓
General Services Contract s (e.g. housekeeping, maintenance, etc.)	✓	*			✓
Lease (tenant of entire building or ground lease with building reverting to agency)	✓			✓	
Traditional professional service contracts (i.e. architects, accountants, engineers, doctors, lawyers, medical, etc.)	✓	*	✓		✓
Miscellaneous professional service contracts (i.e. non-traditional etc.)	✓	*	*		✓
Transportation contracts or where contract requires substantial use of automobile.	*	✓			✓

* Optional – where there is an exposure or risk that would warrant insurance.

✓ Usually required.

Where insurance is required of a contractor, it is important that agencies: 1) require the contractor to name the state as an `additional insured' where feasible; 2) obtain certificates of insurance - proof of contractor's insurance coverage; 3) specify via insurance/bid requirements what type of coverage is required given the risk; and 4) obtain

written copies of the endorsement and/or certificates of insurance from the contractor and/or its insurer prior to provision of a service and/or procurement of a product.

Additional Insured Provisions

Typically, the named insured in an insurance contract is the independent contractor.

An additional insured is a person or organization, other than the named insured, which is protected under the terms of the contract (i.e. the state).

State agencies should require each contractor to name the state as an additional insured, where feasible, in the contractor's certificates of insurance and under the contractor's insurance policy via endorsement to the policy.

The most common reasons for requiring the contractor to name the state as an additional insured are listed below:

- ✦ The contractor's obligations are not dismissed due to bankruptcy.
- ✦ Coverage is provided for the state's defense expenses and other claims costs.
- ✦ The insurer may not subrogate claims against the state.
- ✦ The contractual liability insurance affords a degree of indirect financial security to the state. (There is another entity, the insurer, to whom the state can go for coverage of claims and related expenses mentioned in the hold harmless agreement.)
- ✦ Being an additional insured is not a substitute for a hold harmless agreement because it protects only against perils covered in the insurance policy. Both are needed in the agreement for financial insured considerations.

How do state agencies request to be named as an additional insured under the contractor's policy? When executing bid specifications, under insurance coverage's required, request to be named as an additional insured (see sample specifications).

Certificates of Insurance

As previously stated, one-way to ensure compliance of the hold harmless clause is the financial strength of the party to whom the risk is transferred. This can be done by asking for a certificate of insurance.

The certificate of insurance provides evidence of contractor insurance and should indicate the type of coverage, limits of liability, and term of insurance. A certificate should be signed by an authorized agent of the insurer or an officer of the insurance company.

A certificate of insurance is not a contract--only evidence of coverage at the time the certificate is issued. Having a certificate is no guarantee that the policy is currently in force or that coverage is as requested.

In addition to certificates of insurance, state agencies should require and obtain copies of the appropriate endorsements or policy language prior to the provision of the service or procurement of the product.

Policing Certificates

The certificates of insurance supplied by many companies and insurers are not adequate. Following is a checklist of what a certificate should contain:

- * Limits of liability requested in the specifications.
- * A clear description of the general nature of the coverage and the extension endorsements, i.e. general liability, automobile liability, worker's compensation, employer's liability etc.
- * A statement that the policy will stay in force and that no material change will take place to the policy without prior written notification.
- * A statement that the state is named as an additional insured considerations.

DETERMINING APPROPRIATE INSURANCE REQUIREMENTS

In an effort to allow greater flexibility in establishing appropriate insurance requirements, the Risk Management & Tort Defense Division has developed the following guidelines in selecting insurance requirements for bids and proposals.

STEP ONE: Determine what type of insurance should be required.

There are primarily five separate types of insurance requirements that agencies should evaluate to fit specific insurance needs; General Liability, Automobile Liability, Professional Liability, Workers' Compensation, and Property.

For contracts that fall under the purview of the Montana Procurement Act, agencies should work with the State Procurement Bureau or agency legal counsel to determine which insurance types should be included in the solicitation document for all bids and proposals. The State Procurement Bureau will contact the Risk Management and Tort Defense Division (RMTD) if questions arise about coverages, endorsements, and/or certificates of insurance.

For all other proposals agencies should work with legal counsel and the Risk Management & Tort Defense Division directly. The five types of insurance are:

- **Commercial General Liability Insurance:** should be required when contractors perform work on state premises or property, other than the routine delivery of supplies. This coverage should also be required where bodily injury or property damage may occur as a result of the service being provided and in most traditional (i.e. accountants, architects, engineers, doctors, lawyers, etc.) professional liability contracts.
- **Automobile Insurance:** should be required if the contractor will be transporting state employees, state guests, state clients, or state products as part of the contract.
- **Professional Liability Insurance:** should be required in most traditional professional liability contracts (i.e. accountants, architects, doctors, engineers, lawyers, etc.) and in all other miscellaneous professional liability contracts where errors and omissions may result in significant economic damages for anyone who gives advice or provides services on which others have reason to rely and may be subject to legal action if the advice or service proves faulty.
- **Property Insurance:** should be required in any contract that involves renovation or construction of state buildings.
- **Workers' Compensation insurance or an exemption:** should be required in all contracts.

STEP TWO: Evaluate the risk associated with the contract.

The Risk Management and Tort Defense Division recommends that state contracts require limits of \$1,000,000 per occurrence /\$2,000,000 per aggregate since these limits most closely coincide with the state’s tort damage caps.

However, RMTD recognizes that the state enters into contracts in which these standard levels of coverage may be excessive or inadequate. The size of the contract in and of itself should not determine coverage limits. RMTD has developed the following table as an aid in determining appropriate insurance requirements for various risk levels.

TYPE OF INSURANCE	LOW	MODERATE	HIGH
	(COMBINED SINGLE LIMITS, except for Auto)		
General Liability	\$300,000 per occurrence	\$500,000 per occurrence	\$1,000,000 per occurrence
	\$600,000 aggregate	\$1,000,000 aggregate	\$2,000,000 aggregate
Auto	Split limits of \$500,000 per person (personal injury), \$1,000,000 per accident occurrence (personal injury), and \$100,000 per accident occurrence (property damage); OR Combined single limits of \$1,000,000 per occurrence to cover to cover such claims as may be caused by any act, omission, or negligence of the Contractor or its officers, agents, representatives, assigns or subcontractors.		
Professional Liability	\$300,000 per occurrence	\$500,000 per occurrence	\$1,000,000 occurrence
	\$600,000 aggregate	\$1,000,000 aggregate	\$2,000,000 aggregate
Property	Replacement Cost usually	Replacement Cost	Replacement Cost
Workers’ Compensation	Statutorily Defined	“ “	“ “

Note: the level of risk may vary within the same contract if more than one type of insurance is required. The insurance limits stated in these specifications are recommended minimums and may need to be increased or reduced to reflect the risk associated with performance of the contract.

SAMPLE SPECIFICATIONS FOR STATE CONTRACTS

Common Provisions

(Please incorporate these into the RFP or bid document in the order in which they appear.)

I. Hold Harmless and Indemnification Clauses

The contractor shall protect, defend, and save the state, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, liabilities, demands, causes of action, and judgments (including the cost of defense and reasonable attorney fees) arising in favor of or asserted by third parties on account of damage to property, personal injury, or death which injury, death, or damage, arises out of services performed or omissions of services or in any way results from the negligent acts or omissions of the contractor, its agents, agents, or subcontractors, except the sole negligence of the state.

II. Insurance

(Insert for commercial general liability and automobile liability only)

Contractor shall maintain for the duration of the contract, at its cost and expense, insurance against claims for injuries to persons or damages to property, including contractual liability, which may arise from or in connection with the performance of the work by the contractor, agents, employees, representatives, assigns, or subcontractors. This insurance shall cover such claims as may be caused by any negligent act or omission.

Note: Since contractual liability is not covered in certain professional liability contracts, at the discretion of the agency, the terms contractual liability and contractor as denoted above may need to be deleted from certain professional liability contracts.

III. Primary Insurance

The contractor's insurance coverage shall be primary insurance as respect to the State, its officers, officials, employees, and volunteers and shall apply separately to each project or location. Any insurance or self-insurance maintained by the State, its officers, officials, employees or volunteers shall be excess of the contractor's insurance and shall not contribute with it.

IV. Insurance requirements

Insert the appropriate insurance requirement below based upon the type of contract. See Page 4 for an explanation of insurance by type of contract. Limits will depend upon the risk associated with performance of the contract, Page 6.

(Insert for commercial general liability only)

Specific Requirements for Commercial General Liability: The contractor shall purchase and maintain Occurrence coverage with combined single limits for bodily injury, personal injury, and property damage of _____ per occurrence and _____ aggregate per year to cover such claims as may be caused by any act,

omission, or negligence of the contractor or its officers, agents, representatives, assigns or subcontractors.

(Insert for commercial general liability only)

Additional Insured Status: The State, its officers, officials, employees, and volunteers are to be covered as additional insured's; for liability arising out of activities performed by or on behalf of the contractor, including the insured's general supervision of the contractor; products and completed operations; premises owned, leased, occupied, or used.

(Insert for automobile liability only)

Specific Requirements for Automobile Liability: The contractor shall purchase and maintain occurrence coverage with limits of _____ per person (personal. injury), _____ per accident (pers. injury), _____ per accident (prop. damage) to cover such claims as may be caused by any act, omission, or negligence of the contractor or its officers, agents, representatives, assigns or subcontractors.

(Insert for automobile only)

Additional Insured Status: The State, its officers, officials, employees, and volunteers are to be covered as additional insured's for automobiles leased, hired, or borrowed by the contractor.

(Insert for professional liability only)

Specific Requirements for Professional Liability: The contractor shall purchase and maintain Occurrence coverage with combined single limits for each wrongful act of _____ per occurrence and _____ aggregate per year to cover such claims as may be caused by any act, omission, negligence of the contractor or its officers, agents, representatives, assigns or subcontractors. Note: If occurrence coverage is unavailable or cost-prohibitive, the state will accept 'claims made' coverage provided the following conditions are met: 1) the commencement date of the contract must not fall outside the effective date of insurance coverage and it will be the retroactive date for insurance coverage in future years. 2) The claims made policy must have a three-year tail for claims that are made (filed) after the cancellation or expiration date of the policy.

(Insert for workers' compensation insurance only)

Contractors are required to maintain workers' compensation insurance or an independent contractor's exemption covering the contractor and/or employees while performing work for the State of Montana in accordance with §39-71-120/401/405, Montana Code Annotated. Neither the contractor nor its employees are employees of the state. This insurance/exemption must be valid for the entire contract period.

(Insert for property insurance only new structures only)

At its sole cost and expense, the contractor shall keep the building and all other improvements on the premises insured throughout the term of the agreement against the following hazards:

- Loss or damage by fire and such other risks (including earthquake damage for those areas with a shaking level at 10g or above as indicated on the seismic map, <http://rmtd.mt.gov/aboutus/publications/files/NEHRP.pdf>) in an amount sufficient to permit such insurance to be written at all times on a replacement cost basis. This may be insured against by attachment of standard form extended coverage endorsement to fire insurance policies.
- Loss or damage from leakage or sprinkler systems now or hereafter installed in any building on the premises.

- Loss or damage by explosion of steam boilers, pressure vessels, and oil or gasoline storage tanks, or similar apparatus now or hereafter installed in a building or buildings on the premises.

(Insert for property insurance only with existing structures for renovations)

- The contractor shall purchase and maintain Builder’s Risk/Installation insurance on a “special causes of loss” form (so called “all risk”) for the cost of the work and any subsequent modifications and change orders. The contractor is not responsible for insuring the existing structure for Builder’s Risk/Installation insurance.
- At its sole cost and expense, the contractor shall insure all property construction on the premises throughout the term of the agreement against the following hazards:
 - a. Loss or damage by fire and such other risks (including earthquake damage for those areas with a shaking level at 10g or above as indicated on the seismic map at <http://rmtd.mt.gov/aboutus/publications/files/NEHRP.pdf>) in an amount sufficient to permit such insurance to be written at all times on a replacement cost basis. This may be insured against by attachment of standard form extended coverage endorsement to fire policies.
 - b. Loss or damage from leakage or sprinkler systems now or hereafter installed in any building on the premises.
 - c. Loss or damage by explosion of steam boilers, pressure vessels, oil or gasoline storage tanks, or similar apparatus now or hereafter installed in a building or buildings on the premises.

V. Deductibles and Self-Insured Retentions

Any deductible or self-insured retention must be declared to and approved by the state agency. At the request of the agency, either: 1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the state, its officers, employees, or volunteer; or 2) at its own expense, the contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

VI. Certificates of Insurance

Insurance is to be placed with an insurer with a Best’s rating of no less than A-. All certificates and endorsements are to be received by the state prior to the provision of a service or purchase of a product. The state reserves the right to require complete copies of insurance policies at all times.

APPENDICES

GLOSSARY

ADDITIONAL INSURED - A person other than the named insured who is protected under the terms of the contract. Usually, additional insured's are added by endorsement or referred to in the wording of the definition of "insured" in the policy itself.

AGGREGATE LIMIT - Usually refers to liability insurance and indicates the amount of coverage that the insured has under the contract for a specific period of time, usually the contract period, no matter how many separate accidents may occur.

BODILY INJURY LIABILITY - A legal liability that may arise as a result of the injury or death of another person.

BROAD FORM PROPERTY DAMAGE - An endorsement to a general liability policy that deletes the exclusion referring to property in the care, custody, or control of the insured and replaces it with a less restrictive exclusion.

CLAIMS-MADE COVERAGE - A policy written on this basis covers only those claims, which occur during the policy period and are reported during the policy period; however, when the insured renews the claims made form, coverage for prior acts is provided back to the retroactive date (the effective date of the original claims made policy with the same insurer).

CERTIFICATE OF INSURANCE - A form, which verifies that a policy has been written and states the coverage in general, often used as proof of insurance in loan transactions and for other legal requirements.

COMBINED SINGLE LIMIT - A single limit of protection for both bodily injury and/or property damage, contrasted with split limits, where specific limits apply to bodily injury or property damage separately.

COMPREHENSIVE GENERAL LIABILITY POLICY - This policy covers the insured against liability for all general liability exposures, unless excluded by the policy. Examples of exposures covered are premises and operations, products and completed operations, independent contractors, and designated contractors.

HOLD HARMLESS AGREEMENT - A contractual arrangement whereby one party assumes the liability inherent in a situation thereby is relieving the other party of responsibility.

INSURED - The party to an insurance arrangement whom the insurer agrees to indemnify for losses, provide benefits for, or render services to.

LIMITS OF LIABILITY - The maximum amount for which an insurer is liable as set forth in the contract.

NAMED INSURED - The party whose name appears on the face of the insurance policy.

OCCURRENCE COVERAGE - A liability provision which specifies that coverage applies to all injuries arising out of occurrences during the policy period regardless of when the claim is made.

REPLACEMENT COST - The price of purchasing or constructing a new item of property to replace an older, used item of property.

SAMPLE CONTRACT
(INSERT PROJECT TITLE)
(INSERT CONTRACT NUMBER)

1. PARTIES

THIS CONTRACT is entered into by and between the State of Montana **(insert agency name)**, (hereinafter referred to as “the State”), whose address and phone number are **(insert address)**, **(insert phone number)** and **(insert name of contractor)**, (hereinafter referred to as the “Contractor”), whose address and phone number are **(insert address)** and **(insert phone number)**.

THE PARTIES AGREE AS FOLLOWS:

2. EFFECTIVE DATE, DURATION, AND RENEWAL

2.1 Contract Term. This contract shall take effect on **(insert date)**, 20**()**, **(or upon contract execution)** and terminate on **(insert date)**, 20**()**, unless terminated earlier in accordance with the terms of this contract. (Section 18-4-313, MCA)

2.2 Contract Renewal. This contract may, upon mutual agreement between the parties and according to the terms of the existing contract, be renewed in **(insert number)**-year intervals, or any interval that is advantageous to the State. This contract, including any renewals, may not exceed a total of **(insert number)** years. (State contracts generally may not exceed a total of seven years.)

Section 3 is optional depending on the project.

3. COST/PRICE ADJUSTMENTS

Cost Increase by Mutual Agreement. After the initial term of the contract, each renewal term may be subject to a cost increase by mutual agreement.

OR

Cost Increase by Fixed Amount. After the initial term of the contract, each renewal term may be subject to a cost increase of **(insert %)** %, not to exceed **(insert %)** %, for the entire term of the contract.

OR

Pricing Adjustments per Increase in CPI. Annual pricing adjustments to contract renewals following the contract term, if applicable, shall not exceed 75% the rate of increase in the cost of living as reflected in the Federal Bureau of Labor Statistics, Consumer Price Index (CPI) for all Urban Consumers (1982-84=100; through November 1991 = 137.8) or any other index which may be substituted in the future. The CPI for the last 12-month period of the contract will be the CPI base on which later adjustments are computed. Each time an adjustment is made, the earlier CPI base will be replaced by the adjusted CPI base. The percentage of adjustment to contract prices shall in no event exceed the percentage change in the index.

OR

Price Adjustments Negotiated Based on Changes in Contractor's Costs. Price adjustments may be permitted at the time of contract renewal through a process of negotiation with the Contractor and the State. Any price increases must be based on demonstrated industry wide or regional increases in the Contractor's costs. Publications such as the Federal Bureau of Labor Statistics and the Consumer Price Index (CPI) for all Urban Consumers may be used to

determine the increased value.

4. SERVICES AND/OR SUPPLIES

Contractor agrees to provide to the State the following **(insert a detailed description of the supplies, services, etc., to be provided to correspond to the requirements specified in Section 3, Scope of Project).**

5. CONSIDERATION/PAYMENT

5.1 Payment Schedule. In consideration for the **(insert supplies or services)** to be provided, the State shall pay according to the following schedule: **(insert pay schedule).**

5.2 Withholding of Payment. The State may withhold payments to the Contractor if the Contractor has not performed in accordance with this contract. Such withholding cannot be greater than the additional costs to the State caused by the lack of performance.

Section 6 is to be used as needed depending on the project. Call SPB for assistance at (406) 444-2575.

6. PREVAILING WAGE REQUIREMENTS

6.1 Montana Resident Preference. The nature of the work performed, or services provided, under this contract meets the statutory definition of a "public works contract" in section 18-2-401, MCA. Unless superseded by federal law, Montana law requires that contractors and subcontractors give preference to the employment of Montana residents for any public works contract in excess of \$25,000 for construction or nonconstruction services in accordance with sections 18-2-401 through 18-2-432, MCA, and all administrative rules adopted in relation to these statutes.

Unless superseded by federal law, each contractor shall ensure that at least 50% of a contractor's workers performing labor on a construction project are bona fide Montana residents.

The Commissioner of the Montana Department of Labor and Industry has established the resident requirements in accordance with sections 18-2-403 and 18-2-409, MCA. Any and all questions concerning prevailing wage and Montana resident issues should be directed to the Montana Department of Labor and Industry.

6.2 Standard Prevailing Rate of Wages. In addition, unless superseded by federal law, all employees working on a public works contract shall be paid prevailing wage rates in accordance with sections 18-2-401 through 18-2-432, MCA, and all associated administrative rules. Montana law requires that all public works contracts, as defined in section 18-2-401, MCA, in which the total cost of the contract is in excess of \$25,000, contain a provision stating for each job classification the standard prevailing wage rate, including fringe benefits, travel, per diem, and zone pay that the contractors, subcontractors, and employers shall pay during the public works contract. **Note to agencies: Per 18-2-417, MCA, any public works contract that, by the terms of the original contract, calls for more than 30 months to perform must include the following provision:**

The standard prevailing rate of wages paid to workers under this contract must be adjusted 12 months after the date of the award of the public works contract per section 18-2-417, MCA. The amount of the adjustment must be a 3% increase. The adjustment must be made and applied every 12 months for the term of the contract. This adjustment is the sole responsibility of the contractor and no cost adjustment in this contract will be allowed to fulfill this requirement.

Furthermore, section 18-2-406, MCA, requires that all contractors, subcontractors, and employers who are performing work or providing services under a public works contract post in a prominent and accessible site on the project staging area or work area, no later than the first day of work and continuing for the entire duration of the contract, a legible statement of all wages and fringe benefits to be paid to the employees in compliance with section 18-2-423, MCA.

Section 18-2-423, MCA, requires that employees receiving an hourly wage must be paid on a weekly basis. Each contractor, subcontractor, and employer must maintain payroll records in a manner readily capable of being certified for submission under section 18-2-423, MCA, for not less than three years after the contractor's, subcontractor's, or employer's completion of work on the public works contract. **Note to agencies: If this contract is to be performed in more than one district, the highest rate for the craft, classification, or type of worker must be included in the bid specifications and contract provision per ARM 24.17.144. In this case, complete and include the following statement.** The Commissioner of the Montana Department of Labor and Industry has established the standard prevailing rate of wages in accordance with sections 18-2-401 and 18-2-402, MCA, for _____ to be \$ _____ per hour, plus a benefit rate of \$ _____.

OR

If more than one craft, classification, or type of worker is included in the contract, use the following statement instead.

All contractors and employers shall classify each employee who performs labor on a public works project according to the applicable standard prevailing rate of wages for such craft, classification, or type of employee established by the Commissioner of the Montana Department of Labor and Industry, and shall pay each such employee a rate of wages not less than the standard prevailing rate as specified in the Montana Prevailing Wages Rates for **(insert type of service) (insert year)**.

7. ACCESS AND RETENTION OF RECORDS

7.1 Access to Records. The Contractor agrees to provide the State, Legislative Auditor or their authorized agents access to any records necessary to determine contract compliance. (Section 18-1-118, MCA)

7.2 Retention Period. The Contractor agrees to create and retain records supporting the **(insert services rendered or supplies provided)** for a period of three years after either the completion date of this contract or the conclusion of any claim, litigation, or exception relating to this contract taken by the State of Montana or a third party.

8. ASSIGNMENT, TRANSFER, AND SUBCONTRACTING

The Contractor shall not assign, transfer, or subcontract any portion of this contract without the express written consent of the State. (Section 18-4-141, MCA) The Contractor shall be responsible to the State for the acts and omissions of all subcontractors or agents and of persons directly or indirectly employed by such subcontractors, and for the acts and omissions of persons employed directly by the Contractor. No contractual relationships exist between any subcontractor and the State.

9. HOLD HARMLESS/INDEMNIFICATION

The Contractor agrees to protect, defend, and save the State, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, demands, causes of action of any kind or character, including the cost of defense thereof, arising in favor of the Contractor's employees or third parties on account of bodily or personal injuries, death, or damage to property arising out of services performed or omissions of services or in any way resulting from the acts or omissions of the Contractor and/or its agents, employees, representatives, assigns, subcontractors, except the sole negligence of the State, under this agreement.

Section 10 needs to be tailored to the project. Call SPB for assistance at (406) 444-2575.

10. REQUIRED INSURANCE

(Insert for commercial general liability and automobile liability only)

10.1 General Requirements. The Contractor shall maintain for the duration of the contract, at its cost and expense, insurance against claims for injuries to persons or damages to property, including contractual liability, which may arise from or in connection with the performance of the work by the Contractor, agents, employees, representatives, assigns, or subcontractors. This insurance shall cover such claims as may be caused by any negligent act or omission.

(Insert for all insurance types)

10.2 Primary Insurance. The Contractor's insurance coverage shall be primary insurance with respect to the State, its officers, officials, employees, and volunteers and shall apply separately to each project or location. Any insurance or self-insurance maintained by the State, its officers, officials, employees or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.

(Insert for commercial general liability only)

10.3 Specific Requirements for Commercial General Liability. The Contractor shall purchase and maintain occurrence coverage with combined single limits for bodily injury, personal injury, and property damage of **(insert dollar amount)** per occurrence and **(insert dollar amount)** aggregate per year to cover such claims as may be caused by any act, omission, or negligence of the Contractor or its officers, agents, representatives, assigns, or subcontractors.

The State, its officers, officials, employees, and volunteers are to be covered and listed as additional insureds; for liability arising out of activities performed by or on behalf of the Contractor, including the insured's general supervision of the Contractor; products, and completed operations; premises owned, leased, occupied, or used.

(Insert for automobile liability only)

10.4 Specific Requirements for Automobile Liability. The Contractor shall purchase and maintain coverage with split limits of \$500,000 per person (personal injury), \$1,000,000 per accident occurrence (personal injury), and \$100,000 per accident occurrence (property damage), OR combined single limits of \$1,000,000 per occurrence to cover such claims as may be caused by any act, omission, or negligence of the contractor or its officers, agents, representatives, assigns, or subcontractors.

The State, its officers, officials, employees, and volunteers are to be covered and listed as additional insureds for automobiles leased, hired, or borrowed by the Contractor.

(Insert for professional liability only)

10.5 Specific Requirements for Professional Liability. The Contractor shall purchase and maintain occurrence coverage with combined single limits for each wrongful act of **(insert dollar amount)** per occurrence and **(insert dollar amount)** aggregate per year to cover such claims as may be caused by any act, omission, negligence of the Contractor or its officers, agents, representatives, assigns, or subcontractors. Note: if "occurrence" coverage is unavailable or cost prohibitive, the Contractor may provide "claims made" coverage provided the following conditions are met: (1) the commencement date of the contract must not fall outside the effective date of insurance coverage and it will be the retroactive date for insurance coverage in future years; and (2) the claims made policy must have a three-year tail for claims that are made (filed) after the cancellation or expiration date of the policy.

(Insert for all insurance types)

10.6 Deductibles and Self-Insured Retentions. Any deductible or self-insured retention must be declared to and approved by the state agency. At the request of the agency either: (1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the State, its officers, officials, employees, or volunteers; or (2) at the expense of the Contractor, the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

(Insert for all insurance types)

10.7 Certificate of Insurance/Endorsements. A certificate of insurance from an insurer with a Best's

rating of no less than A- indicating compliance with the required coverages, has been received by the State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135. The Contractor must notify the State immediately, of any material change in insurance coverage, such as changes in limits, coverages, change in status of policy, etc. The State reserves the right to require complete copies of insurance policies at all times.

11. COMPLIANCE WITH WORKERS' COMPENSATION ACT

Contractors are required to comply with the provisions of the Montana Workers' Compensation Act while performing work for the State of Montana in accordance with sections 39-71-401, 39-71-405, and 39-71-417, MCA. Proof of compliance must be in the form of workers' compensation insurance, an independent contractor's exemption, or documentation of corporate officer status. Neither the contractor nor its employees are employees of the State. This insurance/exemption must be valid for the entire term of the contract. A renewal document must be sent to the State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135, upon expiration.

12. COMPLIANCE WITH LAWS

The Contractor must, in performance of work under this contract, fully comply with all applicable federal, state, or local laws, rules, and regulations, including the Montana Human Rights Act, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Any subletting or subcontracting by the Contractor subjects subcontractors to the same provision. In accordance with section 49-3-207, MCA, the Contractor agrees that the hiring of persons to perform the contract will be made on the basis of merit and qualifications and there will be no discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the contract.

Section 13 is optional depending on project.

13. INTELLECTUAL PROPERTY

All patent and other legal rights in or to inventions created in whole or in part under this contract must be available to the State for royalty-free and nonexclusive licensing. Both parties shall have a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use and authorize others to use, copyrightable property created under this contract.

Section 14 is optional depending on project.

14. PATENT AND COPYRIGHT PROTECTION

14.1 Third-Party Claim. In the event of any claim by any third party against the State that the products furnished under this contract infringe upon or violate any patent or copyright, the State shall promptly notify Contractor. Contractor shall defend such claim, in the State's name or its own name, as appropriate, but at Contractor's expense. Contractor will indemnify the State against all costs, damages, and attorney's fees that accrue as a result of such claim. If the State reasonably concludes that its interests are not being properly protected, or if principles of governmental or public law are involved, it may enter any action.

14.2 Product Subject of Claim. If any product furnished is likely to or does become the subject of a claim of infringement of a patent or copyright, then Contractor may, at its option, procure for the State the right to continue using the alleged infringing product, or modify the product so that it becomes noninfringing. If none of the above options can be accomplished, or if the use of such product by the State shall be prevented by injunction, the State will determine if the Contract has been breached.

Section 15 is optional and if used must be tailored to the specific procurement. The following sample clauses are provided for consideration. Call SPB for assistance at (406) 444-2575.

15. CONTRACT PERFORMANCE ASSURANCE

15.1 Milestone Payments. Payments to the Contractor will be based on completion and acceptance of each milestone defined below.

15.2 Payment Holdbacks. ___% will be withheld from each milestone payment. The total amount withheld will be paid to the contractor at the completion and acceptance of the final milestone.

Milestone/Deliverable	Hold Back	Payment % of Total
Milestone 1:	___% of approved invoice	%
Milestone 2:		%
Milestone 3:	___% of approved invoice	%
Milestone 4:	___% of approved invoice	%
Milestone 5:	___% of approved invoice	%
Final Acceptance		100%

Contract performance security may be used as a performance assurance tool. If used, an agency may choose to accept all forms of security or limit the security to surety bonds only. Call SPB for assistance at (406) 444-2575.

15.3 Contract Performance Security – All Forms Accepted. The Contractor must provide contract performance security based upon (insert %)% of the contract total.

The contract performance security must be provided by the Contractor in one of the following forms, within 10 working days from the Request for Documents Notice. ONLY THE FOLLOWING TYPES OF SECURITY ARE ACCEPTABLE AND MUST BE IN ORIGINAL FORM. FACSIMILE, ELECTRONIC, OR PHOTOCOPIES ARE NOT ACCEPTABLE. Personal or business checks are not acceptable.

- A sufficient bond from a surety company licensed in Montana with a Best's rating of no less than A- and supplied on the State of Montana's designated form entitled "Contract Performance Bond," found at <http://svc.mt.gov/gsd/OneStop/GSDDocuments.aspx>; or
- Lawful money of the United States; or
- An irrevocable letter of credit from a single financial institution and supplied on the State of Montana's designated form entitled "Irrevocable Letter of Credit," found at <http://svc.mt.gov/gsd/OneStop/GSDDocuments.aspx>; or
- A cashier's check, certified check, bank money order, bank draft, certificate of deposit, or money market certificates drawn or issued by a federally or state-chartered bank or savings and loan association that is insured by or for which insurance is administered by the FDIC or that is drawn and issued by a credit union insured by the national credit union share insurance fund. Certificates of deposit or money market certificates will not be accepted as security for bid, proposal, or contract security unless the certificates are assigned only to the State. All interest income from these certificates must accrue only to the contractor and not the State.

See Title 18, chapter 4, part 3, MCA, Title 30, chapter 5, MCA, and ARM 2.5.502.

This contract performance security must remain in effect for the entire term of the contract. A new surety bond or irrevocable letter of credit must be issued to the State of Montana if this contract is renewed.

The contract performance security in the form of a **(insert form)** has been provided to the following address: State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135.

OR

15.3 Contract Performance Security – Surety Bonds Only. The Contractor must provide contract performance security based upon 100% of the contract total. This security must be in the form of a surety bond licensed in Montana with a Best's rating of no less than A-. The surety bond must be supplied on the form designated by the State of Montana. The required form entitled "Contract Performance Bond," may be found at <http://svc.mt.gov/gsd/OneStop/GSDDocuments.aspx>. **THE ORIGINAL FORM MUST BE PROVIDED. FACSIMILE, ELECTRONIC, OR PHOTOCOPIES ARE NOT ACCEPTABLE.**

The contract performance security must be provided to the State of Montana within 10 working days from the Request for Documents Notice. This security must remain in effect for the entire term of the contract. A new surety bond must be issued to the State of Montana if this contract is renewed.

The original surety bond form has been provided to the following address: State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135.

16. CONTRACT TERMINATION

The following three termination provisions are presented as options for Section 15.1. In deciding which provision to use, consideration should be given to the circumstances of each individual contract.

16.1 Termination for Cause. The State may, by written notice to the Contractor, terminate this contract in whole or in part at any time the Contractor fails to perform this contract.

OR

16.1 Termination for Cause with Notice to Cure Requirement. The State may terminate this contract for failure of the Contractor to perform any of the services, duties, or conditions contained in this contract after giving the Contractor written notice of the stated failure. The written notice must demand performance of the stated failure within a specified period of time of not less than **(insert number of days)**. If the demanded performance is not completed within the specified period, the termination is effective at the end of the specified period.

OR

16.1 Termination for Convenience. The State may, by written notice to the Contractor, terminate this contract without cause. The State must give notice of termination to the Contractor at least **(insert numbers of days)** days prior to the effective date of termination.

16.2 Reduction of Funding. The State must terminate this contract if funds are not appropriated or otherwise made available to support the State's continuation of performance of this contract in a subsequent fiscal period. (See section 18-4-313(4), MCA.)

17. LIAISON AND SERVICE OF NOTICES

All project management and coordination on behalf of the State shall be through a single point of contact designated as the State's liaison. Contractor shall designate a liaison that will provide the single point of contact for management and coordination of Contractor's work. All work performed pursuant to this contract shall be coordinated between the State's liaison and the Contractor's liaison.

_____ will be the liaison for the State.

(Address):
(City, State, ZIP):
Telephone:
Cell Phone:
Fax:
E-mail:

_____ will be the liaison for the Contractor.

(Address):
(City, State, ZIP):
Telephone:
Cell Phone:
Fax:
E-mail:

The State's liaison and Contractor's liaison may be changed by written notice to the other party. Written notices, requests, or complaints will first be directed to the liaison.

18. MEETINGS

The Contractor is required to meet with the State's personnel, or designated representatives, to resolve technical or contractual problems that may occur during the term of the contract or to discuss the progress made by Contractor and the State in the performance of their respective obligations, at no additional cost to the State. Meetings will occur as problems arise and will be coordinated by the State. The Contractor will be given a minimum of three full working days notice of meeting date, time, and location. Face-to-face meetings are desired. However, at the Contractor's option and expense, a conference call meeting may be substituted. Consistent failure to participate in problem resolution meetings two consecutive missed or rescheduled meetings, or to make a good faith effort to resolve problems, may result in termination of the contract.

Section 19 is optional depending on project.

19. CONTRACTOR PERFORMANCE ASSESSMENTS

The State may do assessments of the Contractor's performance. This contract may be terminated for one or more poor performance assessments. Contractors will have the opportunity to respond to poor performance assessments. The State will make any final decision to terminate this contract based on the assessment and any related information, the Contractor's response and the severity of any negative performance assessment. The Contractor will be notified with a justification of contract termination. Performance assessments may be considered in future solicitations.

20. TRANSITION ASSISTANCE

If this contract is not renewed at the end of this term, or is terminated prior to the completion of a project, or if the work on a project is terminated, for any reason, the Contractor must provide for a reasonable period of time after the expiration or termination of this project or contract, all reasonable transition assistance requested by the State, to allow for the expired or terminated portion of the services to continue without interruption or adverse effect, and to facilitate the orderly transfer of such services to the State or its designees. Such transition assistance will be deemed by the parties to be governed by the terms and conditions of this contract, except for those terms or conditions that do not reasonably apply to such transition assistance. The State shall pay the Contractor for any resources utilized in performing such transition assistance at the most current rates provided by the contract. If there are no established contract rates, then the rate shall be mutually agreed upon. If the State terminates a project or this

contract for cause, then the State will be entitled to offset the cost of paying the Contractor for the additional resources the Contractor utilized in providing transition assistance with any damages the State may have otherwise accrued as a result of said termination.

21. CHOICE OF LAW AND VENUE

This contract is governed by the laws of Montana. The parties agree that any litigation concerning this bid, proposal or subsequent contract must be brought in the First Judicial District in and for the County of Lewis and Clark, State of Montana and each party shall pay its own costs and attorney fees. (See section 18-1-401, MCA.)

22. SCOPE, AMENDMENT, AND INTERPRETATION

22.1 Contract. This contract consists of **(insert number)** numbered pages, any Attachments as required, RFP # **(insert RFP number)**, as amended and the Contractor's RFP response as amended. In the case of dispute or ambiguity about the minimum levels of performance by the Contractor the order of precedence of document interpretation is in the same order.

22.2 Entire Agreement. These documents contain the entire agreement of the parties. Any enlargement, alteration or modification requires a written amendment signed by both parties.

23. EXECUTION

The parties through their authorized agents have executed this contract on the dates set out below.

(INSERT AGENCY NAME)
(Insert Address)
Insert City, State, Zip

(INSERT CONTRACTOR'S NAME)
(Insert Address)
(Insert City, State, Zip)
FEDERAL ID #

BY: _____
(Name/Title)

BY: _____
(Name/Title)

(Signature)

(Signature)

DATE: _____

DATE: _____

Approved as to Legal Content:

Legal Counsel (Date)

Approved as to Form:

Procurement Officer (Date)
State Procurement Bureau