



State of North Carolina

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August 8, 2012

Secretary Moses Carey, Jr.
North Carolina Department of Administration
1301 Mail Service Center
Raleigh, North Carolina 27699-1301



Re: Review of Contracts Exceeding \$1,000,000 (G.S. §114-8.3)

Dear Secretary Carey.:

As you may be aware, Session Law 2012 as amended by Session Law 2011-326 (codified as G.S. §114-8.3) now requires the Attorney General or the Attorney General's designee to review all proposed contracts for supplies, materials, printing, equipment and contractual services that exceed \$1,000,000. The stated purpose of the review is to "ensure that the proposed contracts are in proper legal form, contain all clauses required by law, are legally enforceable, and accomplish the intended purposes of the proposed contract." G.S. §114-8.3(a). The legislation also authorizes the Attorney General to designate attorneys outside the Attorney General's Office to perform the required legal reviews. The purpose of this letter is to formally notify you of this review requirement; advise you of procedures we have developed to conduct contract reviews; designate attorneys on your staff to review certain contracts; and request your cooperation in ensuring that all covered contracts proposed by your agency are reviewed in an efficient and timely manner.

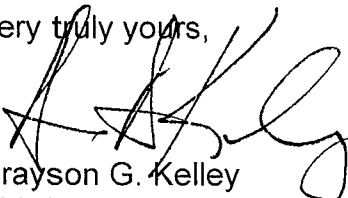
In order to facilitate the contract review process, this Office has developed review policies and a contract review checklist for the use of reviewing attorneys. We have also drafted a list of questions which we recommend be considered by your attorneys and agency procurement officials. A copy of these documents is attached for the use of attorneys in your agency who may be approved to conduct contract reviews, as well as other personnel who may find them beneficial.

In addition, this letter should be considered formal approval for your general counsel, and any licensed attorney who is supervised by your general counsel, to conduct contract reviews required by G.S. §114-8.3 in accordance with the policies established in the attached documents. The review structure we have established authorizes your in-

house attorneys to review covered contracts with a projected value between \$1,000,000 and \$5,000,000. Contracts expected to exceed \$5,000,000 must also be reviewed by an attorney on the Attorney General's staff. Typically, this additional review will be conducted by an attorney on our staff who is normally assigned to advise and represent your agency. Contracts in excess of \$15,000,000 must also be reviewed by attorneys in the Property Control Section of this Office, or the Transportation Section in the case of Department of Transportation contracts. The attached contract review checklist should be used as a guide by your staff, but not as a substitute for professional judgment. Attorneys in this office will, of course, be available to assist your staff at any point in the contract development and review process.

Please provide these documents to appropriate personnel in your office. Your cooperation in ensuring that contracts requiring review by this Office are forwarded in a timely manner will be greatly appreciated. In turn, our lawyers will endeavor to complete their legal review within ten days of the receipt of all information necessary to perform a thorough review. Should you or your staff have questions at any time in regard to this process, individual contracts or contracts in general, please contact the Property Control Section of the Attorney General's Office at (919) 733-7408.

Very truly yours,



Grayson G. Kelley
Chief Deputy Attorney General

GGK/ml

attachments

**ATTORNEY GENERAL'S POLICIES, CHECKLIST AND RECOMMENDED
QUESTIONS FOR CONTRACT REVIEWS
REQUIRED BY SESSION LAW 2010-194, AS AMENDED BY 2011-326
(REVIEW OF CERTAIN CONTRACTS EXCEEDING \$1,000,000)**

SL 2010-194 as amended by SL 2011-326 (codified as G.S. §114-8.3) requires the Attorney General or Attorney General's designee to review all proposed state contracts for supplies, materials, printing, equipment, and contractual services that exceed \$1,000,000 to ensure that the proposed contracts are in proper legal form, contain all clauses required by law, are legally enforceable, and accomplish their intended purposes. The attached contract review checklist has been developed by the Attorney General's Office to assist attorneys performing contract reviews required by G.S. §114-8.3.

In most instances, the contract review should be conducted in two phases. If the agency or institution estimates that procurement will likely result in a contract exceeding \$1,000,000 in value, a designated attorney should review the request for proposals (RFP) or invitation for bids (IFB) before it is issued to the public. The preliminary review is a truncated examination, covering only the most basic inquiries: (1) is the procurement required to be reviewed under the statute; (2) if a response complying with the RFP/IFB is received from a qualified and responsive bidder, will the resulting contract contain the essential data for the formation of an enforceable contract; and, (3) does the RFP/IFB contain a concise and understandable statement of the agency's intent in issuing the proposed procurement.

A second legal review should be conducted after the agency's evaluators and purchasing staff have selected a proposed vendor for the contract award, because the vendor's proposal or bid will usually become part of the contract (i.e., state contracts usually consist of an RFP or IFB, any addenda, and the vendor's proposal or bid). Thus, the reviewing attorney must review the vendor's proposal or bid to determine if the proposal or bid made changes to or proposed deviations from the RFP's or IFB's requirements, terms, conditions, specifications and/or scope of work and whether the resulting contract, inclusive of the vendor's proposal or bid, will comply with the requirements of G.S. §114-8.3.

The attached contract review checklist should be used by the reviewing attorney in both the preliminary and final review phases of the process. Reviewing counsel, of course, will frequently lack detailed information concerning policy issues and other factors related to the contract development process and specific needs of the agency or institution. It is therefore critical that appropriate communication takes place between the reviewing attorney and contracting entity throughout the review process.

The legislation also authorizes the Attorney General to designate attorneys outside the Attorney General's Office to perform the review required by G.S. §114-8.3. As a matter of policy, it has been determined that required reviews should be performed as follows:

- (1) Contracts expected to involve between \$1,000,000 and \$5,000,000 may be reviewed by any attorney approved by the Attorney General's Office, including agency in-house counsel and private counsel retained by a state entity. If the contracting agency or entity does not have the services of an attorney approved to conduct the review, the contract will be reviewed by an attorney assigned from the Attorney General's Office.

- (2) Contracts expected to exceed \$5,000,000 must also be reviewed by an attorney in the Attorney General's Office. This second review will usually be conducted by an attorney normally assigned to represent that agency or other state entity.
- (3) Contracts expected to exceed \$15,000,000 must be reviewed by an attorney in the Property Control Section of the Attorney General's Office, or the Transportation Section in the case of contracts proposed by the Department of Transportation. This review will be in addition to any initial review performed by a designated attorney outside the Attorney General's Office or by an attorney in the Attorney General's Office.

The Attorney General's Office has also drafted the attached Recommended Questions To Be Considered By Contract Administrators. Although not specifically required by G.S. §114-8.3, it is recommended that the reviewing attorney or agency counsel discuss with agency officials the questions listed. This review may be in regard to a specific contract or as related to procurement practices in general.

RECOMMENDED QUESTIONS TO BE CONSIDERED BY CONTRACT ADMINISTRATORS

In addition to the specific issues requiring review by G.S. §114-8.1 and the checklist, it is recommended that the following questions be considered in connection with the review of individual contracts. It may also be beneficial for agency contracting personnel to review these questions with their attorneys in regard to the procurement and contract administration process in general.

- For service contracts, does contractor's proposal/bid identify a project manager, key personnel or other point of contact who will be primarily responsible for overseeing the performance of the contract on behalf of the contractor?
- Did the RFP/IFB request contractor to list the experience of the contractor and/or its project management personnel?
- Did the RFP/IFB request contractor to provide references for recent similar projects? Did the evaluators check the references and, of the references provided by the contractor, were the references similar to the project/scope of the work of the proposed contract?
- Does contract (RFP, IFB, proposal and/or bid) include any methods, processes, procedures, milestones, benchmarks, expectations, deliverables, project/delivery schedules, and/or reporting that will allow the using agency to monitor the contractor's performance?
- Does the contract (RFP, IFB, proposal and/or bid) include any process, method, limitation and/or procedure for modifying, amending and/or changing the contract's scope of the work and/or adjusting the contract price resulting from changes that arise during the performance of the contract?
- Does any such process, method, limitation and/or procedure comply with State laws, regulations and/or an agency's internal policies/controls for amending state contracts (e.g., review by the Division of Purchase and Contract, Board of Award, agency head approval, etc.)?
- For service contracts, does RFP/IFB designate a contract administrator, project manager or such other employee/agent for the using agency who will be responsible for monitoring contractor's performance? If yes, does this provision state that: all official and binding communications by the using agency shall only come through the designated contract administrator; and the contractor shall direct all its communications to the using agency concerning the contract to the designated contract administrator?
- Does the contract set forth any closeout procedures?
- Is contract closeout and final payment conditioned on: contractor's satisfactory completion of the proposed contract's scope of work, timely completion of all deliveries, deliverables and/or services; there are no outstanding disputes or claims between the contractor and the using agency; and, except for warranty and maintenance issues and claims, the parties will release any and all claims relating to the subject contract?
- Does the proposed contract, in the event of a material breach of the contract, reserve the agency's right to setoff its actual damages, costs to complete the performance of the contract, and/or retainage due the contractor under the contract? *The use of liquidated damages against payments is a delicate legal matter that should be used only in appropriate circumstances and with advice of experienced purchasing officials or counsel.*

CONSOLIDATED CONTRACT REVIEW CHECKLIST (G.S. §114-8.3)

IFB or RFP # _____ Commodity or Service: _____
 Issuing Agency _____ Using Agency _____
 Requisition Estimate: \$ _____ Awarded Contract Price \$ _____
 Date Review Requested: _____ Date Review Completed _____

Preliminary Review Prior to Publication of Procurement Document

(X-No / √- Yes)

I. Preliminary Information

Does the anticipated contract amount exceed \$1,000,000 for the specified contract period excluding options to extend/renew the contract? [If "no," then STOP]

Is the contract for one of the following (circle all that apply):

- **supplies,**
- **materials,**
- **printing,**
- **equipment, and/or**
- **contractual services** (not involving building/highway construction)

[If none of the items were circled, then STOP]

If a response complying with the RFP/IFB is received from a qualified and responsive bidder, will the resulting contract contain the essential data for the formation of an enforceable contract such as:

- Identity of the Parties
- Description of the goods or services including quantities and quality
- Inclusion of applicable standard terms and conditions
- Term of the Contract
- Price

Does the RFP/IFB include a complete and understandable statement of the agency's intended purpose in making the procurement.

Name and Title of Preliminary Reviewer: _____

Signature

Date

Detailed Review After Receipt of Vendor Responses

(X-No / √- Yes)	I. Vendor Qualification and Preferences
	Has contractor submitted a statement disclosing whether any contract services will be performed outside the United States per G.S. §143-59.4
(X-No / √- Yes)	II. Final Contract Should Accomplish Intended Purposes:
	Has the Agency/Institution provided a detailed description of the supplies, materials, printing, equipment or contractual services sought and the desired results to be obtained through the term contract?
	Does proposed contractor's bid or proposal offer the supplies, materials, printing, equipment or services requested?
	Is the purpose of the contract identified and accurate? Do recitals clearly identify the purpose of the contract?
(X-No / √- Yes)	III. Proper Legal Form, Enforceability and Required Clauses
	Has the state agency taken all action and/or obtained all approvals necessary to complete transaction?
	Is the Contractor registered with the North Carolina Secretary of State's Office? *Check Contractor's NCSOS filings on-line, the SOS of the State of Contractor's residence and/or internet searches to verify the identity/legal existence of the Contractor.
	Is Contractor eligible to submit bid or proposal under G.S. §143-59.1 (Ineligible Vendors)?
	Has Contractor submitted the certification required by G.S. §143-59.1?
	Does the signature page include the proper parties, party names, signature block and notary?
(X-No / √- Yes)	Addenda
	Was any addendum required to be returned and executed by Contractor?
	Did proposed contractor's bid or proposal include all addenda that were required to be signed and returned?
(X-No / √- Yes)	Debarments
	<ul style="list-style-type: none"> • Has Contractor's name been checked against the State of North Carolina's Debarment list? • Have the names of the owners, officers, and/or principals been checked against the State's debarment list (i.e., some owners of debarred businesses will create new entities to get around the debarment)?
	If vendor is not a resident of North Carolina, has Contractor's name been checked against the debarment lists of the state vendor was incorporated in and/or the state of the Contractor's principal place of business/corporate headquarters?
	Has Contractor's name been checked against the federal debarment list?
	Have the names of all identified subcontractors in the Contractor's bid or proposal been checked against the state and federal debarment lists?

(X-No /√- Yes)	Bid Tabulation
	Was a Bid Tabulation Prepared pursuant to N.C. Gen. Stat. §143-52? If no bid tabulation was posted, did an exception apply (complex procurement, numerous line items, etc.)? Explain exception and indicate whether exception was documented in procurement file:
(X-No /√- Yes)	Insurance Coverage
	Does RFP or IFB include standard N.C. General Contract Terms & Conditions for Insurance?
	Did contractor's bid or proposal offer the required insurance coverage?
(X-No /√- Yes)	General Contract Provisions
	Does the contract contain a clause noting that the State Auditor & internal auditors may audit the records of the contractor during the term of the contract to verify accounts and data affecting fees and performance?
	Does the contract have a clause making payment subject to the appropriation, allocation or availability of funds?
(X-No / √- Yes)	Integrity of Procurement Process
	Does the contract contain a Prohibition on Gifts clause per Executive Order 24 and G.S. §133-32?
(X-No /√- Yes)	Prohibited Clauses or Clauses to Avoid
	Does Contractor attempted to obtain any ownership interest, title, copyright and/or patent in any intellectual property, deliverable, and/or property the Contractor is to deliver to the using agency?
	Is there an arbitration clause and/or mandatory mediation clause in the proposed contract?
	Does proposed contract attempt to limit the Contractor's liability for damages due to breach of contract (e.g., using agency's recovery is limited to the amounts paid the contractor), tort claims, certain types of damages (consequential, punitive, lost profit, lost savings, lost income/revenue) and/or any other cause of action? If yes, does the procurement file reflect any negotiation of the limitation and any justification by the using agency in support of such a limitation?
	Does Contractor's bid or proposal include the right to assign the contract or parts of the scope of work?
	Does proposed contract attempt to include any confidentiality provision that attempts to negate and/or circumvent N.C. Public Records Laws?
	Does the contract require the State to indemnify the contractor? Unless there is statutorily authorized indemnification for a State contractor, the issuing and/or using agency cannot enter into any agreement that would bind the State to indemnify the contractor or its subcontractors.
(X-No /√- Yes)	Warranties
	Does the proposed contract require express warranties?
	Does proposed contract contain any disclaimers by the contractor of any express or implied warranties?

	If yes, does the procurement file reflect the using agency's consideration, negotiation, and/or justification for agreeing to the contractor's disclaimers?
	Is there a time limit within which a warranty claim must be brought? Is each limitation acceptable to using agency?
(X-No /√- Yes)	Faithful Performance, Default, Termination & Damages
	Does the contract require a deposit or retainage, and if so, is there a provision stipulating who holds the deposit, how or if it is applied to the purchase price, who retains any interest/income and how it is to be released?
	Does the proposed contract require the contractor to provide the using agency with a performance bond?
	In the event of default, what types of remedies are included in the contract (e.g., right to obtain the commodities from the next highest bidder or offeror and charge contractor for any increased prices, common law damages for breach of contract, liquidated damages, specific performance)?
	On what grounds can the using agency terminate the contract? Default and/or Convenience?
	On what grounds can the contractor terminate the contract? Nonpayment and/or Convenience?

Name and Title of Designated Reviewer: _____

Signature

Date

The above designated attorney certifies that that he or she has reviewed the proposed contract and is of the opinion that the proposed contract is in proper legal form, contains all clauses required by law, is legally enforceable, and appears to accomplish the agency's intended purposes.

If over \$5,000,000, additional review and certification by AG staff member:

Name and Title of Reviewer: _____

Signature

Date

The Attorney General's staff member concurs with the above attorney's opinion concerning the proposed contract.

If over \$15,000,000, additional review and certification by the Property Control Section or Transportation Section of the Attorney General's Office.

Name and Title of Reviewer: _____

Signature

Date

The PC/DOT Section of the Attorney General's Office concurs with the above opinion concerning the proposed contract.