

**CONTRACT FOR SERVICES
GUIDANCE AND INSTRUCTIONS
(Long and Short Forms)**

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CONTRACT FOR SERVICES GUIDANCE AND INSTRUCTIONS (Long and Short Forms)

Whether a document is titled as a contract, an agreement, a memorandum of understanding, or any other type of cooperative undertaking, any written arrangement wherein parties exchange value, such as the exchange of services for payment, is legally considered to be a contract. The relationship's legal status does not change just because the document is labeled as something other than a contract.

The Colleges should use a Contract for Services form (either the NSCS long form or the short form) to document agreements between the College and a party, *other than an employee*, who provides services to the College. The NSCS forms are preferred whenever possible, however, if the contractor requires the use of a different/external form, the guidance provided in these instructions should still be used to make changes that may be necessary for contractor's form. NSCS employees need to be paid through the payroll system, not through "accounts payable" as a contractor.

Statutory Requirements. The Nebraska Public Records statutes (Neb. Rev. Stat. §§ 84-712 through 84-712.09) provide citizens and other interested persons the right to obtain access to, and copies of, public records in the custody of the Nebraska State Colleges. Service contracts are public records.

In addition to being subject to public disclosure under the Nebraska Public Record statutes, most contracts that expend state funds are subject to Neb. Rev. Stat. §84-602.02 which requires contract information be included in a public, searchable database. The public website provides access to a copy of the full contract including any amendments and all documents incorporated by reference in the contract. Limited information, such as social security numbers and federal tax identification numbers will be redacted.

Board Policies. The Board Policies listed below provide more information for certain types of contracts and are available online for reference.

- 7015- Contracts; Limitations, Exemptions
- 7016- Contracts; Consulting Services
- 8064- Capital Construction; Bids
- 8065- Capital Construction; Contracts; Approvals
- 8066- Capital Construction; Contracts; Professional Consulting Services
- 8067- Capital Construction; Contracts; Works of Art
- 8068- Capital Construction; Contracts; Forms, Payments

Contractor or Employee? A Contract for Services is appropriate only when the contracting party will be treated as an independent contractor, rather than as an employee, under federal tax law. The determination is based on criteria established by the Internal Revenue Service; the parties' characterization of their relationship is not conclusive. Paragraphs 1-5 below provide

guidance to make the determination. Incorrectly treating a contracting party as an independent contractor can cause substantial federal tax problems for both the College and the contractor. If the contractor is an employee under federal tax law, do not use the Contract for Services. Hire the contractor as an employee through Human Resources.

1. *Independent Business Entity.* If the contractor is a corporation, limited liability company, partnership or other business entity not affiliated with the College, then in most cases, the contractor will be an independent contractor under federal tax law. See paragraph 2 below, however, if the business entity is affiliated with a current or former College employee.

2. *Affiliated Business Entity.* If (a) the business entity is owned or controlled by a current or former College employee, or (b) a substantial portion of the work under the contract is to be performed by a current or former College employee, the contractual relationship should be analyzed as though it were a contract directly with the current or former employee under paragraph 3 or 4 below.

3. *Current College Employee.* If the contractor is currently a full-time or part-time College employee, do not use the Contract for Services form, even if the contracted work is entirely different from the employee's current duties. Consult with Human Resources about modifying the employee's existing employment contract.

4. *Former College Employee.* Under federal tax law, a former College employee who contracts with the College is likely to be deemed an employee, rather than an independent contractor, particularly if the work to be performed under the contract is similar to the former employee's prior duties at the College. In most cases, a proposed contract with a former employee should be referred to Human Resources with a request to hire the individual as a temporary employee under Board Policy 5010. A Contract for Services should not be used unless the contractor is determined to be an independent contractor using the analysis in paragraph 5 below.

5. *Individual Contractor.* If the contractor is an individual, use the checklist on the following page to evaluate whether the contractor will be treated as an independent contractor or an employee. If the analysis using the checklist is inconclusive, hire the contractor as an employee through Human Resources, and do not use the Contract for Services.

Checklist to Determine Employee/Independent Contractor Status

1. Is the contractor a current employee of the College? Yes No
2. During the past two years, did the contractor provide similar services to the College as a full-time or part-time employee? Yes No

3. Does the contractor work exclusively for the College (versus operating a trade or business that offers services to the general public)? Yes No
4. Will the College provide specific instructions on the details of how to do the work, rather than rely on the Contractor's expertise? Yes No
5. Will the College require the Contractor to work certain days or hours (like an employee), rather than allowing the contractor to establish the work schedule? Yes No
6. Will the College provide all the tools, equipment, and supplies the contractor will use in performing the work? Yes No

A "Yes" answer to any of the six questions above indicates the contractor is most likely an employee, rather than an independent contractor. The contractor should be hired as a temporary employee under Board Policy 5010, and the Contract for Services should not be used.

Conflict of Interest. Nebraska state statutes and Board policy restrict the award of contracts and other financial benefits to a College employee or a family member of a College employee. Under Board Policy 5002, "family member" includes spouse, child, parent, brother, sister, grandchild, or grandparent, by blood, marriage, or adoption.

Specifically, Board Policy 5002 provides:

No employee, employee's family member, or business with which the employee is associated shall enter into a contract valued at two thousand dollars (\$2,000) or more, in any one (1) year, with a governmental body unless the contract is awarded through an open and public process in compliance with Neb. Rev. Stat. § 49-14,102.

No employee involved in an advisory or decision making capacity relating to College or System purchases and no employee's family member shall be financially interested, or have any beneficial personal interest, either directly or indirectly in such purchase or in any bidder, contractor, lessor, or vendor for such purchase.

Liability Insurance Considerations. The College maintains property insurance, liability insurance, and other types of insurance pertinent to its operation. State statutes and Board policies do not dictate any minimum insurance requirements for contractors. The College should require adequate insurance from a Contractor as necessary to protect the College in the event of damage or injury during the Contractor's performance of the contract. The Long form provides four liability insurance options for the College to consider in a risk/benefit analysis when entering into a contractual relationship.

There are situations in which it may be unreasonable to require the Contractor to fully insure for a project. For example, if the contract is for a small remodeling job in a multimillion dollar building, it may be impossible or cost-prohibitive for the Contractor to obtain sufficient insurance to replace the building in the event the Contractor accidentally burns it down. In situations like this one, the College may decide to assume the risk in order to get the work done.

On the other hand, there are situations in which it is essential for the Contractor to provide insurance. One example is a dangerous activity such as a bungee jump or inflatable bounce house. The College's liability insurance specifically excludes "trampolines and rebound devices," so the College will need to require the Contractor to maintain insurance that protects both the Contractor and the College.

Long Form or Short Form? It is always acceptable to use the Long Form Contract for Services when contracting with a non-employee.

The Short Form Contract for Services may be used when the contractor is an individual providing one-time or occasional services, with payment in full upon completion. Some examples of circumstances in which the Short Form Contract for Services could be used are a guest lecture, or a simple construction task (*e.g.*, painting a room, pouring a concrete slab, or replacing a window or door).

The Short Form Contract for Services should also be used when the College will pay an honorarium or reimburse expenses to a volunteer. A documented contract is required to justify the payment. Current College employees are not eligible for honoraria. Any additional payment to a current employee must be reflected in a modification to the employee's existing employment contract or a request for reimbursement of employee expenses.

If (a) the contractor's performance of the contract will require the use of other people, such as contractor employees or subcontractors; (b) the work is complex or will require substantial time to complete, such as a typical construction or remodeling project; (c) the provisions for payment are unusual, such as an advance payment for purchase of materials or a progress payment schedule based on milestones; or, (d) the College will require the Contractor to maintain liability insurance coverage for the protection of the College, the Long Form Contract for Services must be used.

Modifications to Contract Forms. The College should complete the Contract for Services by adding information where required. Detailed notes and instructions are provided on the following pages. If necessary, an addendum can be created to add contract terms. Appendices can also be added/attached to the contract form. Any time an appendix is added, the contract form must specifically note that the appendix "is attached and is incorporated by reference into the contract."

Provisions should not be deleted from the Contract for Services form, unless the deletion is approved by the General Counsel and Vice Chancellor for Employee Relations.

From time to time a contractor will propose its own contract form. In most situations, this will require the addition of numerous provisions to comply with the restrictions that apply to the NSCS. If at all possible, use the appropriate NSCS Contract for Services form.

Regarding Arbitration. Arbitration is a relatively streamlined procedure under which a dispute is submitted to an arbitrator (usually an expert in the field that is the subject matter of the contract), and the parties agree to abide by the arbitrator's decision. By agreeing to arbitration, the College gives up recourse to the court system. As a general matter, governmental agencies fare better in court than in arbitration. It is in the College's interest to resist the inclusion of arbitration clauses in contracts.

Regarding Indemnification. Contractors frequently seek to include so-called "hold harmless," limitation of liability, or indemnification clauses in contracts. These clauses attempt to transfer liability from the contractor to the College. Do not offer to indemnify the contractor, and always resist the addition of indemnification language. When presented with proposed indemnification language, the best response is, "Under our contract, each party is responsible for its own performance. If there is litigation, the court will determine who is liable." The contractor may be able to purchase insurance to cover a risk the contractor is uncomfortable taking. If the contractor insists on indemnification, the contract should include mutual indemnification provisions (each party will indemnify the other).

Section-by-Section Notes– Long Form

Parties. Insert College name. Insert Contractor name and organizational form ("an individual," "a Nebraska corporation," etc.) Insert Contractor's federal tax identification number (Social Security number for individual; Employer Identification Number (EIN) for others). If the College does not have Form W-9 on file, the Contractor should complete Form W-9, which is available in fillable form at <http://das.nebraska.gov/accounting/forms/forms.htm>. A copy of Form W-9 is attached to the Contract for Services Form.

If the Contractor is another governmental agency, the Nebraska Interlocal Cooperation Act, Neb. Rev. Stat. §§13-801 to 13-827, includes specific requirements that must be met. Interlocal agreements must be reviewed by the General Counsel and Vice Chancellor for Employee Relations and must always be approved by the Board of Trustees.

Section 1. Effective Date. Please note a beginning date and an ending date. The contract is enforceable when it is signed by all parties. No work should be done under the contract until it has been signed by all parties. If Board approval is required, the contract can't be signed and work can't be performed until Board approval has been obtained.

Section 2. Services. Describe in detail the services to be provided by the Contractor (*be sure to include all elements addressing "who, what, when, where and how"*). If the description refers to an attachment, be sure to attach the attachment and include language incorporating the attachment by reference (*e.g., "the provisions of which are incorporated by reference"*). If the attachment is an existing document, it is advisable to import an electronic version of the existing

document to the end of the contract form. It is far better to attach a referenced document than to refer to an unattached document that may be difficult to find or reproduce if a dispute arises.

Section 3. Consideration. Include the amounts and times of payment from the College to the Contractor. If the College will pay or reimburse expenses, the contract should include specific descriptions and maximum amounts of the expenses to be paid or reimbursed. If the contract is for more than \$25,000, or if multiple payments will be made to the Contractor during a year, payment will be made by electronic transfer (ACH). ACH payment is optional for other contracts. To establish an electronic payment process, the College must complete the State of Nebraska ACH Enrollment Form, available in fillable form at <http://das.nebraska.gov/accounting/forms/forms.htm>. A copy of the ACH Enrollment Form is attached to the Contract for Services Form.

Section 4. Prompt Payment Act. The Prompt Payment Act applies to the NSCS under Neb. Rev. Stat. § 81-2402. The applicable interest rate is 3% for 2014.

Section 5. Independent Contractor. See the general discussion above under “Contractor or Employee?”

Section 6. Access to Records. The funding Federal Agency and the Comptroller General will have access to the Contractor’s records under this section only if the contract is for the expenditure of federal funds. In addition to the specific provisions of this section, the contract and attachments (with narrow exceptions) are public records under Neb. Rev. Stat. §§ 84-712 to 84-713. The Nebraska Auditor of Public Accounts has broad authority to review State College contracts under Neb. Rev. Stat. §§ 84-304 to 84-315.

Section 7. New Employee Work Eligibility Status. State statute requires this provision for all State contracts. It is non-negotiable, and the language cannot be changed. If the Contractor is an individual or a sole proprietorship, the Contractor must complete the Department of Administrative Services United States Citizenship Attestation Form, available at http://das.nebraska.gov/lb403/attestation_form.pdf. A copy of the United States Citizenship Attestation Form is attached to the Contract for Services Form.

Section 8. Non-Discrimination. Self-explanatory.

Section 9. ADA & Drug-Free Workplace Requirements. Self-explanatory.

Section 10. Debarment/Suspension Certification. Applies only in the limited circumstances stated. Because the language is conditional, the paragraph does not need to be removed when it does not apply.

Section 11. Use of Information; Property Ownership. This section has two purposes – to prevent the Contractor from using the College’s information outside of the scope of its duties under the contract, and to avoid future disputes about the ownership of property created under the contract. The assignment of copyright is especially important to make sure the College has unrestricted rights to use the Contractor’s work product.

Section 12. Parties; Subcontractors; Assignment. Self-explanatory.

Section 13. Cancellation. If the Contractor cancels, the College will only pay for completed work. If the College cancels, the College will pay for completed work and work in progress.

Section 14. Default; Remedies. Self-explanatory.

Section 15. Unavailability of Funding. Board Policy 7015 requires this provision in contracts that extend beyond the current fiscal year.

Section 16. Complete Agreement; Governing Law; Amendment. Self-explanatory. Contractors often ask to change the state whose law will govern. As an agency of the State of Nebraska, it is difficult for the State Colleges to consent to the jurisdiction of another state, to become familiar with that state's law, and to pursue or defend litigation in the other state. Do not change the state in the Contract for Services form, and if a Contractor submits a form that specifies another state's law will apply, request that the state be changed to Nebraska.

After the contract is in effect, a change in circumstances, facts, or conditions that affects performance of the contract may require an amendment to the contract. The amendment can be made using the Contract for Services form. It is the responsibility of the designated College representative to monitor the parties' performance under the contract and to make sure the contract amendment is approved and signed by the Board, Chancellor or President, as appropriate.

Section 17. Designated College Representative. Add name and contact information for designated College representative responsible for implementation, monitoring and oversight of the contract. The designated College representative must also be identified in the Board of Trustees materials. The designated College representative can be an administrator, faculty member or professional staff member. Support staff may not be designated as the College Representative.

Section 18. Party Signatures. Contractor should typically sign the document first. Refer to Board Policy 7015 to see who is authorized to sign the contract for the College.

Short Form Notes

Contract Terms.

Insert Contractor's name and federal tax identification number (Social Security number for individual; Employer Identification Number (EIN) for others). If the College does not have Form W-9 on file, the Contractor should complete Form W-9, which is available in fillable form at <http://das.nebraska.gov/accounting/forms/forms.htm>. A copy of Form W-9 is attached to the Contract for Services Form.

Describe in detail the services to be provided by the Contractor. If the description refers to an attachment, be sure to attach the attachment and include language incorporating the attachment

by reference (e.g., “the provisions of which are incorporated by reference”). If the attachment is an existing document, it is advisable to import an electronic version of the existing document to the end of the contract form.

If the contract is for more than \$25,000, or if multiple payments will be made to the Contractor during a year, payment will be made by electronic transfer (ACH). ACH payment is optional for other contracts. To establish an ACH process, the College must complete the State of Nebraska ACH Enrollment Form, available in fillable form at <http://das.nebraska.gov/accounting/forms/forms.htm>. A copy of the ACH Enrollment Form is attached to the Contract for Services Form.

If the College will pay or reimburse expenses, the contract should include specific descriptions and maximum amounts of the expenses to be paid or reimbursed.

New Employee Work Eligibility Status. State statute requires that all State contracts include the new employee work eligibility status provision set forth in the second through seventh paragraphs. It is non-negotiable, and the language cannot be changed. If the Contractor is an individual or a sole proprietorship, the Contractor must complete the Department of Administrative Services United States Citizenship Attestation Form, available at http://das.nebraska.gov/lb403/attestation_form.pdf. A copy of the United States Citizenship Attestation Form is attached to the Contract for Services Form.

Designated College Representative. Add name and contact information for the designated College representative responsible for administering and monitoring the contract. The designated College representative must also be identified in the Board of Trustees materials.

Signatures. The Contractor should sign before the College President or designated Vice President.

Contracts of Student Organizations

Under Board Policy 3300, “Student organizations wishing to enter into agreements or contracts with persons, corporations or organizations, external to the College community, must have approval by the College chief business officer, or his or her designee, prior to entering into such an agreement or contract in order to ensure that the contract does not create inappropriate or unanticipated liability for the College and the Board of Trustees.”

Because student organizations will often use College facilities and their activities will be associated with the College in the public perception, the College’s review of student organization contracts may extend beyond a narrow legal definition of “liability.”

Contracts proposed by student organizations should be reviewed for the following:

Funding. What is the source of payment the student organization expects to use? If the plan is to sell tickets or merchandise to cover the cost of an event, does the student organization have a backup source of funds to meet its obligations under the contract in the event sales are insufficient?

Risks to the Public. Does the student organization or contractor carry adequate insurance to cover common or foreseeable risks of the activity? Will the student organization and the College be designated as “additional insureds” on the contractor’s policy? The College’s insurance will cover some risks, such as the risk of someone being injured because of a dangerous condition in a College building. In other cases, such as rebound devices and trampolines, the College’s insurance policies do not cover the risk.

Risks to the College. Does the activity put participants, onlookers, other people, or College property in unreasonable danger? Will the activity cast an unfavorable light on the reputation of the College? (If this is a concern, it should be discussed with the Vice President responsible for student affairs.) Does the contract attempt to make the College a financial guarantor for the student organization? Will the contract require extraordinary or overtime work of College personnel or otherwise strain the resources of the College?

Scheduling. Does the activity conflict with academic or College-sponsored activities? Will the activity disrupt the reasonable expectations of others in the community (*e.g.*, excessive noise during classes or late at night)?