

CONTRACT ISSUES

1) Procurement

- a. Once you've decided upon the need for an agreement, how do you procure it?
- b. Professional or General?
- c. Methods of procurement:
 - Small purchase
 - Competitive procurement (RFP/ITB)
 - Sole Source
 - Emergency

2) Scope of Work

- a. Deliverables-based contracts are best; always try to make your contract a deliverables-based agreement
 - i. If you put in an hourly rate with a deliverable cost (generally not a good idea, but if you do) make sure to include language such as "the lesser of the hourly rate or the deliverable cost"
- b. Take care contractor remains an independent contractor ... balancing test (see Department of Labor & IRS Guidelines, Form SS 8)
- c. Make sure to clearly explain in the SOW what it is you want to obtain from this contract; a detailed SOW that is understandable to a third party
- d. If the contract is procured via an RFP, the SOW of the contract CANNOT exceed or be different from the SOW of the RFP

3) Compensation

- a. Make sure it is written to reflect the actual "deal" between the parties – hourly rate, payment schedule, budget, whatever you choose state it clearly (a total sum with nothing more means you intend to pay the contractor that full amount ONLY upon completion of the contract)
- b. Be careful with "including" and "excluding" gross receipts tax
- c. Mileage and per diem CAN be paid at rates other than the statutory employee rates but the contract must clearly state the rate at which you intend to pay them (a simple

statement that mileage and per diem will be paid to the contractor is interpreted to mean it will be paid at the stated rates)

- d. Ensure that the compensation rate is reasonable and responsible
 - e. If the contract was procured via an RFP, then the compensation, if limited in the RFP, is limited in the contract; you cannot write one compensation in the RFP and then change it in the contract
- 4) Term
- a. Begins when last required signatory has signed the contract (DFA/CRB in New Mexico)
 - b. If the contract was procured via an RFP, then the term must reflect the term set forth in the RFP
- 5) Termination
- a. At will for government
 - b. Cause only for contractor
 - c. What happens upon any early termination?
- 6) Status of Contractor
- a. This clause states they are an independent contractor; make sure the SOW comports with this claim
- 7) Subcontracting
- a. Sometimes a subcontractor will be mentioned directly, especially where there's been an RFP and the Contractor identified a sub or subs in their proposal
 - b. Most importantly, the state does NOT pay the subcontractor; our relationship is with the Contractor and the Contractor only; the state has no privity of contract with the subcontractor; this clause makes that clear
- 8) Copyright
- The issue to be careful of here is giving the Contractor something beyond the scope of the contract such that Constitutional anti-donation concerns are implicated
- 9) Conflict of Interest/Governmental Conduct Code
- a. Take note if the Contractor is a former government employee, extra steps need to be taken in contracting with that person

- b. If the Contractor is a current employee or the family member of a current employee, they can only be contracted with pursuant to a competitive process (that is, RFP or ITB)
- c. It is up to the agency to perform due diligence to ensure a current employee or member of a current employee's family is not hired by some method other than a competitive process

10) Applicable Law

We sometimes see vendors who attempt to use the law of another state as the applicable law; we will not sign such a contract

11) Indemnification

- a. By law, the state CANNOT indemnify a contractor; violates the Constitution and statute (potential contingent liability can be created)
- b. By law, the Contractor does not HAVE to indemnify the state but it's a good practice, good protection for the state and so we insist on it
- c. "Limited Liability" provisions are also, generally, disallowed for the same reason as stated in 12.a

AMENDMENT ISSUES

1) Generally

- a. Anything in the contract can be amended
- b. Always remember that you cannot ADD more money to a contract through an amendment unless you ADD SOW or EXTEND Term (which amounts to the same thing); so it is important to write your original SOW and Compensation clauses in such a way that they can be amended later if need be

2) Scope of Work

- a. Take care that the SOW as it appears in the amendment does NOT wipe out the SOW (or a part of the SOW you still need) from the original contract
- b. The rest of the SOW comments from above still apply here

- 3) The language "**All other articles of this contract remain the same.**" MUST be in the amendment

STATE OF NEW MEXICO

**ADMINISTRATIVE OFFICE OF THE COURTS
PROFESSIONAL SERVICES AGREEMENT**

THIS AGREEMENT is made and entered into this 1st day of July, 2015 by and between the Administrative Office of the Courts, hereinafter referred to as the "AOC," and _____, hereinafter referred to as the "Contractor."

ADDRESS OF CONTRACTOR:

PHONE NUMBER OF CONTRACTOR:

E-mail Address:

IT IS AGREED BETWEEN THE PARTIES:

1. Scope of Work

A. The Contractor shall:

1. Provide court interpreting services as assigned through the centralized web-scheduling system, per mutual agreement with the AOC Regional Coordinators (Coordinator), as follows:

- a. Deliver sight translation, consecutive, and simultaneous interpreting services in the language pair(s) that the Contractor is recognized by the AOC to provide while present at proceedings, hearings, and direct service contexts (e.g., clerk's window, jury deliberations, court-ordered services) and at various locations, which may include jails or detention centers, hospitals, or off-site locations determined by the court.
- b. Deliver sight translation, consecutive, and simultaneous interpreting services in the language pair(s) the Contractor is recognized by the AOC to provide via telephone or video from a specified New Mexico State Court location or from the Contractor's home or office per the assignment details as confirmed through the scheduling system and the Coordinator.
- c. Provide accurate and complete information as required for statistical reporting systems and completion of invoices.
- d. Acknowledge that they have read and hereby agree to abide by

the following:

New Mexico Judiciary's Court Interpreter Code of Professional Responsibility, Attachment A to this agreement;

Court Interpreter Payment Schedule and Policy & Procedure for Reimbursement of Expenses; Attachment B to this agreement;

Court Interpreting Assignment Management Policy, Attachment C to this agreement;

Continuing Education Policy, Attachment D to this agreement;

and that they will utilize the AOC-approved invoice(s) and itemized schedule, Attachment B to this agreement, unless otherwise instructed by the AOC.

2. Compensation.

A. The AOC will reimburse the contract interpreter **only** for services or travel expenses approved in advance by an AOC Language Access Coordinator or the AOC Language Access Services Program Manager and confirmed through the centralized web-based scheduling system at rates as detailed in Attachments B, C and D. Assignments or travel not confirmed through the centralized web-scheduling system or a Coordinator will not be guaranteed payment. Compensation shall be conditioned upon submission of an AOC-approved invoice by the Contractor and no compensation shall be made prior to the delivery of services in accordance with the New Mexico Court Interpreter Standards of Practice and Payment Policies and other requirements as set forth in this agreement.

In FY16, such compensation shall not exceed _____ dollars (\$), excluding gross receipts tax. The New Mexico gross receipts tax levied on the amounts payable under this Agreement in FY16 totaling no more than _____ dollars (\$) shall be paid by the AOC to the Contractor. The total amount payable to the Contractor under this Agreement, including gross receipts tax, shall not exceed _____ dollars (\$) in FY16.

These amounts are a maximum and not a guarantee that the work assigned to be performed by Contractor under this Agreement shall equal the amount stated herein. The parties do not intend for the Contractor to continue to provide services without compensation when the total compensation amount is reached. Contractor is responsible for notifying the AOC when the services provided under this Agreement reach the total compensation amount. In no event will the Contractor be paid for services provided in excess of the total compensation amount without this Agreement being amended in writing prior to those services in excess of the total compensation amount being provided.

If additional funds become available during the fiscal year, this contract may be increased by up to five thousand dollars (\$5,000.00) and these funds will be used for the provision of interpreting services at the above referenced rates, including gross receipts taxes. Should this occur, the AOC will send a letter to the Contractor stating the increased amount and the purpose for which the funds shall be used.

B. Payment is subject to availability of funds in FY16 pursuant to the Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work.

C. Contractor must submit a detailed statement accounting for all Services performed and expenses incurred using only the AOC-provided invoices and completed as instructed by the AOC. The AOC reserves the right to change methods for submitting invoices. Upon certification by the AOC that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of receipt by the AOC. However, the AOC shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein. All payments will be made through direct deposit only.

5. Certification and Other Requirements:

a. Prior to executing this agreement and commencing work with the AOC the Contractor must:

1. Be authorized to work in the United States, but United States Citizenship is not required.
2. Complete the required application.

3. Verify level of certification.
 4. Complete NCIC background check,
 5. Provide digital photo and submit cashier's check or money order in the amount of \$25.00 for creation/replacement of photo identification badge.
 6. Complete a W-9 form as required by the State of New Mexico in order for payments to be made for services rendered.
 7. Authorize Direct Deposit in a bank or other financial institution.
 8. Register as a business with the New Mexico Taxation & Revenue Department and provide their tax identification number to the AOC.
- b. Following the execution of this agreement the Contract must maintain certification by meeting required continuing education requirements, see Attachment D.

H. The New Mexico Department of Finance & Administration will issue a 1099 Form to the Contractor in January of each year in which the Contractor has been paid \$600.00 or more for all services rendered to the state.

3. Term. THIS AGREEMENT runs from July 1, 2015 until June 30, 2016 unless terminated pursuant to paragraph 4 (Termination), or paragraph 5 (Appropriations). In accordance with Section 13-1-150 NMSA 1978, no contract term for a professional services contract, including extensions and renewals, shall exceed four years, except as set forth in Section 13-1-150 NMSA 1978. Any extension of this contract is dependent upon the Contractor's fulfillment of continuing education requirements and compliance with the NM Code of Professional Conduct and compliance with the requirements detailed herein.

4. Termination.

A. Termination. This Agreement may be terminated by either of the parties hereto upon written notice delivered to the other party at least thirty (30) days prior to the intended date of termination. Except as otherwise allowed or provided under this Agreement, the AOC's sole liability upon such termination shall be to pay for acceptable work performed prior to the Contractor's receipt of the notice of termination, if the AOC is the terminating party, or the Contractor's sending of the notice of

termination, if the Contractor is the terminating party; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor if the Contractor becomes unable to perform the services contracted for, as determined by the AOC or if, during the term of this Agreement, the Contractor or any of its officers, employees or agents is indicted for fraud, embezzlement or other crime due to misuse of state funds or due to the Appropriations paragraph herein. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE STATE'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT."

B. Termination without cause. The AOC may terminate this agreement at any time upon a 30-day notice to the Contractor.

C. Termination Management. Immediately upon receipt by either the AOC or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the AOC; 2) comply with all directives issued by the AOC in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the AOC shall direct for the protection, preservation, retention or transfer of all property titled to the AOC and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the AOC upon termination and shall be submitted to the AOC as soon as practicable.

5. Appropriations. The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate immediately upon written notice being given by the AOC to the Contractor. The AOC's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall

be final. If the AOC proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

6. Status of Contractor. The Contractor and its agents and employees are independent contractors performing professional services for the AOC and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

7. Assignment. The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the AOC.

8. Subcontracting. The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the AOC.

9. Release. Final payment of the amounts due under this Agreement shall operate as a release of the AOC, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

10. Confidentiality. Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the AOC.

11. Product of Service -- Copyright. All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the AOC no later than the termination date of this Agreement. Nothing developed or produced, in

whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

12. Conflict of Interest; Governmental Conduct Act. The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement. The Contractor certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a public officer or state employee or former state employee have been followed.

13. Amendment. This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and all other required signatories.

If the AOC proposes an amendment to the Agreement to unilaterally reduce funding due to budget or other considerations, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

14. Merger. This Agreement incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

15. Penalties for violation of law. The Procurement Code, Sections 13-1-28 through 13-1-199, NMSA 1978, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

16. Equal Opportunity Compliance. The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual

orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

17. Applicable Law. The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with Section 38-3-1 (G) NMSA 1978. By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.

18. Workers Compensation. The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the AOC.

19. Records and Financial Audit. The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the AOC, the Department of Finance and Administration and the State Auditor. The AOC shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the AOC to recover excessive or illegal payments

20. Indemnification. The Contractor shall defend, indemnify and hold harmless the AOC and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof

has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the AOC and the Risk Management Division of the New Mexico General Services Department by certified mail.

21. Invalid Term or Condition. If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

22. Enforcement of Agreement. A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

23. Notices. Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the AOC: Paula Couselo-Findikoglu, Administrative Office of the Courts, 237 Don Gaspar, Rm. 25, Santa Fe, NM 87501; Email: aocpvc@nmcourts.gov.

To the Contractor: _____

24. Authority. If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represents and warrants that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract.

Signed by the parties on the dates indicated:

**STATE OF NEW MEXICO
ADMINISTRATIVE OFFICE OF THE COURTS**

Arthur W. Pepin

Date: _____

CONTRACTOR

Contractor:
Vendor ID:

Date: _____

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

CRS Number:

By: _____
Taxation and Revenue Department

Date: _____

**CHARGES FILED AGAISNT YOU
DRIVERS LICENSE**