

TEXAS A&M UNIVERSITY-KINGSVILLE

Title: Contracting Program

Procedure No.: PP-130

Date: 6/5/96

I. Purpose

To establish the structure and content of contracts.

II. Scope

Applies to all contract procurements.

III. Legal Review

The following list is a guide developed by TAMUS Office of General Counsel to be used evaluating the basic legal framework of a contract. All contracts must comply with TAMUS Policy 25.07 and Regulation 25.07.01.

1 Description of goods/services to be received by component?

Clear and understandable description of the subject of the contract. Limit use of highly technical terms when possible.

2 Contractor's name, address, phone, fax?

Verify current information.

3 Contact person(s) for contractor, name, address, phone, fax, email address?

Verify current information, especially if anything differs from (2).

4 Date contract is to begin

This may or may not be the date the contract is signed.

5 Date contract ends

This refers to date the contract would normally end unless terminated earlier for any reason.

6 Other important dates (deadlines, mileposts, reports due, etc.)

Dates should be clearly identified. Use full dates (ex: "June 3, 2004") whenever possible. NOTE: in many foreign countries dates expressed in numerals use the Day/Month/Year format (e.g., June 3, 2004 would be written as 3/6/04 rather than 6/3/04).

7 Procedure for renewal clearly identified and understood

8 Procedure for termination clearly identified and understood

Termination for cause and termination at will should be identified.

9 Verify highest level of approval within TAMUS needed for contract*

Use current Delegation of Authority to identify highest level.

10 All exhibits, attachments, appendices, schedules, etc. attached
OGC normally will not approve an agreement until all of these documents have been provided for review.

11 Title and authority of person signing for contractor
Should be an officer or authorized agent of contractor.

12 If contract can be terminated at will (for no cause or without cause), verify that this is what component wants in the contract
This may cause problems for component and should be clearly understood prior to signature.

13 Clear description of amounts of money or other consideration for contract
Partial payments should be stated with due dates; amount tied to other amounts (e.g., royalties, percentages) should be stated in clear terms.

14 All payments are in U.S. dollars
If any part of the contract is performed or payable outside the U.S.

15 Method for providing notice of default and opportunity to cure
Normally written notice and reasonable time to cure.

16 Rights, obligations, duties of every party clearly listed
Each party's responsibilities identified in understandable wording.

17 Time and place for performance
If performance extends over a period of time, include due dates if necessary.

18 Indemnification, liquidated damages, attorney's fees, waiver of contractor's liability, waiver of statutes of limitations clauses
These types of clauses are not allowable for TAMUS components because of state constitutional restrictions. Notify contractor that these must be deleted. AFTER attempting to have these deleted, if contractor refuses to comply, the following wording must be inserted before the wording: "To the extent permitted by the laws and constitution of the State of Texas,".

19 Governed by laws of the State of Texas
TAMUS components may not agree to be governed by the laws of another state.

20 Venue for suits in county where component's CEO has main office
State law mandates this venue: it is not negotiable.

21 If insurance is required, types and levels of coverage listed.
The TAMUS Office of Risk Management should be consulted if there are questions about the levels of coverage and/or carriers.

22 Confidentiality provisions?
TAMUS cannot agree to keep information confidential if it is subject to public disclosure under the Texas Public Information Act (Ch. 552, Texas Government Code).

23 Act of God or force majeure clause
Provides relief if performance impaired by unexpected events including weather and civil disturbances.

24 Assignment by either party must be approved in advance in writing
Written pre-approval of assignments is preferred but not mandatory.

25 Mandatory Alternative Dispute Resolution clause (Ch. 2260) included
Not required for contracts with other agencies of the State of Texas or the U.S. Government.

26 Spelling, formatting, general appearance of document are professional and accurate.

IV. Procedure

To the extent possible, all procurements of materials and services are to be obtained using the formal purchase order (see Procedure PP-220) or the blanket purchase order (see Procedure PP-080).

The contract types listed below with their major subject content are to be used as appropriate and are to be issued under a formal purchase order. Any terms and conditions not covered by the formal purchase order are to be included in the contract.

All contracts must adhere to the Texas A&M University System Policies and Regulations..

A. Construction

- The Statement of Intent
- Specifications
- Drawings and Schedule
- Buyer to Provide
- Insurance
- Terms
- Warranty
- Responsibility
- Permits
- Licenses
- Inspections
- Subcontractors
- Performance Bonds

B. Lease Agreement for Property

- Leasee and Lessor Identification
- Description of Property

- Location of Property
- Lease Payment
- Terms
- Lease or Warranty

C. Lease Agreement for Equipment

- Description of Equipment
- Terms of Lease Payments
- Purchase or Option Renewal
- Delivery, Maintenance and other Special Charges
- Conditions or Restrictions on Use

D. On-Call Service

- Identification and Location of Equipment to be Serviced
- Period of Service
- Movement or Modification of Equipment
- Responsibility of Supplier
- Service Charges
- Notice and Response to Notice

E. Professional Services

- Party's Identification
- Services to be Rendered
- Inventions
- Proprietary Information
- Consultant's Representation
- Period of Agreement

F. Real Estate

- Notice of Pending Forfeiture for Cancellation of Contract
- Declaration of Forfeiture and Cancellation of Contract
- Warranty Fulfillment Deed
- Quit Claim Deed
- Purchaser's Assignment of Contract and Deed
- Deed and Seller's Assignment of Real Estate Contract
- Exclusive Sale and Listing Agreement
- Earnest Money Provisions
- Escrow Instructions for Seller
- Escrow Instructions for Buyer

G. Subcontract

- Scope of Work
- Period of Performance
- Estimated Cost and Expenditure Limitation
- Allowable Cost and Payment
- Budget
- Buyer's Program Director
- Contractor's Principal Investigator
- Technical Reports

V. Checklist for the Preparation of Contracts

A. The Necessity for a Contract and its Completeness We should ask the following questions regarding contracts before making final commitments.

1. Is it necessary to have a contract?
 - a) Does it lower our cost?
 - b) Does it reduce our inventory?
 - c) Does it assure us of delivery in case of shortages?
 - d) Is it with the manufacturer or the distributor?
 - e) What are the disadvantages of not having a contract?
2. Have negotiations been completed?
3. Are the essential elements of the contract settled?
4. Is there a chance of vagueness or ambiguity in terms or language of the contract?
5. Are the contracting parties, their agents or representatives competent and authorized to bind the company?

B. Description of Goods and Services

1. Is the material, equipment or service clearly described in writing in the:
 - a) Blueprints
 - b) Specifications
 - c) Purchase order
 - d) Other written memorandum
2. Are the specifications complete?
3. Is the quantity clearly defined?
4. Are there any limitations on quantity per period of time?

5. Will the supplier furnish drawings? If so, are such drawings subject to buyer's approval?
6. Will the supplier install equipment? If so, is the charge satisfactory?
7. What services will the supplier furnish, such as training in usage and maintenance of equipment, instruction manuals, parts manuals, etc.?

C. Price and Payment Terms

1. What is the initial purchase price?
2. Is the price definite? If not, is the method for ascertaining the price clear?
3. Is the price subject to adjustment?
 - a) Does price adjustment work both ways?
 - b) Is adjustment limited to change in price?
 - c) Is the date of price basis stated?
 - d) What is the length of time for advance notification of price adjustment?
 - e) Is there an escape clause on price increases?
 - f) Is there an escape clause when a supplier's competitor quotes lower prices and the present supplier is unable to meet them?
4. Is the payment schedule satisfactory?
5. Are the cash terms satisfactory?
6. Does the contract lend itself to price/cost analysis?

D. Packaging, Delivery and Insurance Factors

1. Is the delivery schedule satisfactory?
2. Are the "times for delivery" terms definite? (Does "reasonable time," in particular circumstances, have a certain meaning according to prior dealings or practices between the Buyer and Seller?)
3. Is the mode of delivery satisfactory?
4. Is the packaging satisfactory?
5. Who bears the risk of loss if it occurs before delivery to the Buyer?

E. Time and Termination Factors

1. What period of times does the contract cover? (One, two, three years?)
2. Are the provisions for termination by either party clearly stated and satisfactory?
3. Are there clauses pertaining to thirty-, sixty-, ninety-day advance notice, prior to termination date, that the contract will not be renewed? (If not, are we subjected to automatic renewal for a specified period or time? If so, these should be avoided.)

F. Performance guarantees and Warranties of Quality

1. Would it be advisable to insert a liquidated damages clause?
2. Would it be advisable to ask for a performance bond? (Some service contracts are required to have performance bonds greater than \$100,000)
3. Would it be advisable to get a Dun and Bradstreet report on the supplier?
4. Is the Buyer protected against negligence of the supplier's employees?
5. Is the supplier's insurance protection adequate? (Will he furnish a Certificate of Insurance?)
6. Is a "Force Majorue" clause satisfactory?
7. Does the supplier guarantee performance?
8. Does the supplier guarantee quality?
9. Does the supplier guarantee the equipment for at least one year from start-up date against defects of design, materials, workmanship, etc.?
10. Are inspection, test and engineering requirements fully understood by both parties?
11. Is there an express written warranty by the Seller that the goods will conform to the description, promise, model or sample?
12. Are there any provisions for cancellations or cure if the goods do not meet the specifications?
13. Does the written contract provide for a percentage of rejection, or for tolerances or variances?

G. Legal Requirements

1. Does the contract meet all legal requirements?

- a) Federal, state or local laws.
- b) System Policies
- c) Ethical and/or business standards of practice.
- d) ICC regulations.
- e) FTC regulations.

2. Does the patent protection appear adequate?