

## Subchapter 10

### Professional and Consultant Services Contracts

#### 19-11-1001. Definitions.

As used in this subchapter:

- (1) "Consultant services contract" means a contract between a state agency and an individual or organization in which:
- (A) The service to be rendered to the state agency or to a third-party beneficiary under the contract is primarily the giving of advice by the contractor on a particular problem facing the state agency or the third-party beneficiary;
  - (B) The contractor is an independent contractor with respect to the state agency;
  - (C) The state agency does not exercise managerial control over the day-to-day activities of the contractor; and
  - (D) The contract specifies the results expected from the services to be rendered by the contractor and the advice or assistance to be provided;
- (2) "Contractor" means any person or organization that executes a contract with a state agency under which the person or organization agrees to provide professional services or consultant services to the state agency, and the individuals performing the services are not state employees occupying regular full-time or part-time or extra help positions provided by law;
- (3)(A) "Design professional contract" means a contract that is primarily for:
- (i) Minor projects that are time critical; and
  - (ii) Minor remodeling projects that do not exceed one million dollars (\$1,000,000) in cost.
- (B) Design professional contracts are primarily for the procurement of architectural, engineering, and professional services competitively selected under § 19-11-801 et seq.
- (C) Design professional contracts shall be reviewed by the agency or institution at least yearly and adjusted to reflect historical expenditures.
- (D)(i) A state agency shall follow applicable Arkansas Building Authority guidelines, procedures, and rules for the selection and award of contracts.
- (ii) However, a guideline, procedure, or rule of the authority shall not increase or decrease the:
- (a) Dollar amount under subdivision (3)(A)(ii) of this section; or
  - (b) Specified period under § 19-11-238(a).
- (E) Institutions of higher education that are exempt from review and approval of the Arkansas Building Authority shall comply with the provisions of this section;
- (4) "Director" means the State Procurement Director;
- (5) "Employee" means an individual drawing a salary from a state agency, whether elected or not, and any nonsalaried individual performing professional services for any state agency;
- (6) "Professional services contract" means a contract between a state agency and a contractor in which:
- (A) The relationship between the contractor and the state agency is that of an independent contractor rather than that of an employee;
  - (B) The services to be rendered consist of the personal services of an individual that are professional in nature;
  - (C) The state agency does not have direct managerial control over the day-to-day activities of the individual providing the services;
  - (D) The contract specifies the results expected from the rendering of the services rather than detailing the manner in which the services shall be rendered; and

(E) Services rendered under a professional services contract are rendered to the state agency itself or to a third-party beneficiary; and

(7) “State agency” means any department, agency, board, commission, or institution of higher education of the State of Arkansas.

**History.** Acts 2003, No. 1315, § 13; 2007, No. 478, § 7; 2009, No. 532, § 1.

#### **19-11-1002. Purpose of contracts.**

The principal purpose of a professional services contract or a consultant services contract is the procurement of services by the state agency rather than the procurement of commodities.

**History.** Acts 2003, No. 1315, § 13; 2005, No. 1680, § 14.

#### **19-11-1003. Contracts exempted.**

(a) This subchapter shall not apply to the contracts of the Arkansas State Highway and Transportation Department that are covered by the technical work requirements and administrative controls of the Federal Highway Administration, nor shall the provisions of this subchapter be applicable to contracts entered into by the department in which the costs and fees are established by competitive bidding.

(b) This subchapter shall not apply to contracts of institutions of higher education that are for services related to patents, copyrights, or trademarks.

(c) This subchapter does not apply to contracts created under federally approved state plans for services reimbursed under Title V of the Social Security Act, 42 U.S.C. §§ 701 — 710, or Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 — 1396v, as they existed on January 1, 2001, if those contracts and services conform to all applicable federal laws and rules, and to the ethical standards provided for in § 19-11-704.

(d) This subchapter does not apply to major procurement contracts of the Arkansas Lottery Commission under § 23-115-103.

**History.** Acts 2003, No. 1315, § 13; 2009, No. 605, § 22; 2009, No. 606, § 22.

#### **19-11-1004. Restrictions on contracts.**

(a) No contract under this subchapter shall be used to avoid the purpose or the spirit of the General Accounting and Budgetary Procedures Law of Arkansas, § 19-4-101 et seq.

(b) No contract shall be approved that would be in violation of § 19-4-701 et seq. relating to expenditures.

(c)(1) Except as provided in this subsection, no state agency shall engage in a professional services or consultant services contract with a part-time or full-time employee who occupies a position authorized to be paid from extra help or regular salaries for a state agency, except as provided in § 21-1-403.

(2) However, this subsection does not prohibit an institution of higher education from executing a contract with a state agency under which professional or consulting services will be performed by employees of the institution of higher education.

(3) An employee of an institution of higher education performing professional or consulting services to a state agency may receive additional compensation if:

(A) The institution of higher education requests and receives written approval from the Office of Personnel Management of the Department of Finance and Administration concerning the amount of additional compensation to be paid to any employee; and

(B) The total salary payments received from the employee's regular salaried position and amounts received for services performed under a professional services contract do not exceed one hundred twenty-five percent (125%) of the maximum annual salary authorized by law for the employee's position with the institution of higher education.

(d) No director or any other department head of any state agency shall receive additional compensation under this subchapter.

(e)(1) Any contract under which a state agency retains day-to-day managerial control over the person performing the services or in which the relationship between the contractor and the state agency is that of employer and employee is not a professional services contract and is prohibited.

(2) However, the Department of Information Services may employ persons over whom they exercise day-to-day managerial control for those services under § 25-4-112 for which professional services contracts may be used.

**History. Acts 2003, No. 1315, § 13.**

#### **19-11-1005. General guidelines and regulations.**

The State Procurement Director, after soliciting suggestions from state agencies and after seeking and receiving the advice of the Attorney General and review by the Legislative Council or by the Joint Budget Committee, if the General Assembly is in session, shall publish general guidelines for the procurement of professional and consultant services contracts and general regulations governing the use of each type of contract.

**History. Acts 2003, No. 1315, § 13.**

#### **19-11-1006. Submission of contracts required.**

(a)(1) All contracts for professional services or consultant services, except for those which are specifically exempt from review, requiring the services of an individual for regular full-time or part-time weekly work where the total contract amount exceeds fifty thousand dollars (\$50,000) must be presented to the Legislative Council, or to the Joint Budget Committee if the General Assembly is in session, before the execution date of the contract.

(2) The Legislative Council or the Joint Budget Committee shall provide the State Procurement Director with their review as to the propriety of the contract within thirty (30) days after receipt of the proposed contract.

(3) The contract shall not be submitted to the Legislative Council or to the Joint Budget Committee until the Department of Finance and Administration has reviewed the contract and provided the Legislative Council or the Joint Budget Committee with a recommendation regarding the legality of the contract.

(b) The Legislative Council or the Joint Budget Committee may review or exempt from review any contract or group of contracts contemplated by this subchapter.

(c)(1) Funds from grants and contracts to any state institution of higher education may be used for the purpose of subcontracting with institutions under the performance conditions of the grants or contracts.

(2) Subcontracts for research that are derived from grants and contracts to any state institution of higher education require the prior approval of the director and a review by the Legislative Council or by the Joint Budget Committee.

**History. Acts 2003, No. 1315, § 13; 2013, No. 1189, § 4.**

**R1:19-11-1006. Performance Evaluation and Expenditure Review of Professional and Consultant Service Contracts.**

**Professional and consultant service contracts between state agencies where the total contract amount exceeds fifty thousand dollars (\$50,000) must be presented to the Performance Evaluation and Expenditure Review Committee (PEER) or Joint Budget Committee by the Department of Finance and Administration prior to the execution date of such contract.**

**R2:19-11-1006. Review Requirements of Professional and Consultant Service Contracts that Are Amended.**

**(a) AMENDMENTS TO CONTRACTS THAT WERE ORIGINALLY REVIEWED BY LEGISLATIVE COUNCIL OR JOINT BUDGET COMMITTEE. An amendment will require review by Legislative Council or Joint Budget Committee prior to approval by the Department of Finance and Administration if the original contract was reviewed by Legislative Council or Joint Budget Committee and the amendment increases the dollar amount and/or involves major changes in the objectives and scope of the contract.**

**(b) AMENDMENTS TO CONTRACTS THAT ORIGINALLY DID NOT REQUIRE REVIEW BY LEGISLATIVE COUNCIL OR JOINT BUDGET COMMITTEE. Any amendment that increases the total dollar amount of a professional or consultant service contract to exceed the sum of fifty thousand dollars (\$50,000) shall require review by the Legislative Council or Joint Budget Committee, prior to the approval of the Department of Finance and Administration and before the execution date of the amendment. The amendment, along with a copy of the original contract and any attachments thereto, must be submitted to the Office of State Procurement in accordance with the time guidelines as prescribed in R1:11-19-1012. Contracts that have expired cannot be amended.**

**19-11-1007. Certification by agency head.**

The head of every state agency shall certify by his or her signature on each contract entered into by that state agency that:

- (1) All information required by law and by regulation is supplied;
- (2) The proper contracting form is utilized;
- (3) All information contained in the contract is true and correct to the best of his or her knowledge and belief;
- (4) All general guidelines prescribed by the State Procurement Director have been complied with;
- (5) The services proposed to be provided under the contract are necessary for operation of the state agency in fulfilling its legal responsibilities and cannot be provided by any existing state agency;
- (6) The contractor is fully qualified to perform the contract and has no vested interest in the subject matter of the contract that would constitute a conflict of interest and a bar to the contractor's providing services of a professional and disinterested quality;

- (7) The contract terms are reasonable and the benefits to be derived are sufficient to warrant the expenditure of the funds called for in the contract;
- (8) Sufficient funds are available to pay the obligations when they become due; and
- (9) A projected total cost of the contract is provided to include expenditures that may be incurred under all available periods of extension if the extensions were executed.

**History.** Acts 2003, No. 1315, § 13; 2005, No. 1680, § 15.

**19-11-1008. Approval or disapproval of contracts.**

(a) The State Procurement Director may make whatever additional inquiry he or she deems necessary and may require that additional information be supplied if he or she has reason to believe that the contract should be rejected because it does not comply with this subchapter.

(b) The director shall return to the contracting state agency any contract which fails to comply with the applicable laws and regulations governing the contract and shall approve any contract that complies with this subchapter.

(c)(1) The director shall have final and ultimate authority over the supervision and approval of all contracts described in this subchapter.

(2) However, the director shall seek review of the Legislative Council or the Joint Budget Committee before approving or disapproving any contract or class or group of contracts authorized under this subchapter, unless the Legislative Council or Joint Budget Committee specifically exempts the contract or class or group of contracts by formal committee action.

**History.** Acts 2003, No. 1315, § 13.

***R1:19-11-1008. Procedures for Approval of Architects, Engineers and Land Surveyor Contracts.***

***(a) With the exception of those agencies exempt from Arkansas Building Authority review, all contracts for architectural, engineering and land surveyor services must be first reviewed by the Arkansas Building Authority for its recommendation and approval as to the propriety and legality of the contract. Agencies shall submit contracts requiring ABA review in accordance with the time guidelines as prescribed on the Office of State Procurement website. After receiving the recommendation and approval of the Arkansas Building Authority, the Office of State Procurement of the Department of Finance and Administration shall review and prepare such contracts for their ultimate submission to the Arkansas Legislative Council or the Joint Budget Committee.***

***(b) In the event Arkansas Building Authority refuses to give a favorable recommendation to the propriety of a contract, the agency involved may request the Legislative Council to review the decision of Arkansas Building Authority. The Legislative Council may then request the Arkansas Building Authority to review their previous decision, abide by the decision of the Arkansas Building Authority, or request the agency to make changes in the contract.***

**(c) In no event shall the Arkansas Building Authority have the final authority to deny a contract solely on the basis of its propriety.**

**19-11-1009. Filing of contracts.**

Service contracts filed with a state agency under § 19-4-1109 shall be available for public inspection and auditing purposes.

**History.** Acts 2003, No. 1315, § 13.

***R1:19-11-1009. Professional and Consultant Service Contracts on File at a State Agency.***

***Professional and Consultant Service Contracts on file with a state agency shall be available for public inspection to the extent permitted by Arkansas State Freedom of Information Laws.***

**19-11-1010. Development and use of performance-based contracts.**

(a) Performance-based contracts provide an effective, efficient method of monitoring and evaluating the overall quality of services provided.

(b) The practice of including benchmark objectives that the provider must attain at specific intervals during the term of the contract is an essential requirement for measuring performance.

(c) Under regulations promulgated by the State Procurement Director, all state agencies, boards, commissions, and institutions of higher education shall use performance-based standards in professional and consultant service contracts.

**History.** Acts 2003, No. 1315, § 13.

***R1:19-11-1010. Use of Performance-Based Standards in Professional and Consultant Service Contracts.***

***(a) All PCS contracts greater than fifty thousand dollars (\$50,000), other than those listed herein and those specifically exempted by the Director of the Office of State Procurement, will include performance standards. Agencies are encouraged, however, as a matter of good procurement principle, to include performance standards in all professional and consultant service contracts. The purpose of these standards will be to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.***

***(b) Performance standards may be standardized for use with similar contracts or may be specifically developed for unique requirements.***

**(c) Performance standards should measure, at prescribed points throughout the term of the contract, the quality and quantity of work being performed.**

**(d) Performance standards may be refined by the agency and the provider as a part of the contract negotiations.**

**(e) A provider's inability to meet established performance standards may be sufficient cause for declaring default and may also result in cancellation of the contract.**

**(f) Contracts that may be exempt from the use of performance standards include:**

**(1) Sole source by law contracts in which the state is compelled as a result of court, state or federal mandate to award for services from a specific provider.**

**(2) Emergency contracts in which the need for expediency does not permit for the development of performance standards.**

**(3) Architectural and Engineering contracts that are awarded using Arkansas Building Authority criteria or similar criteria developed by those colleges and universities which are exempt from ABA review.**

#### **19-11-1011. Review requirement.**

(a)(1) Every contract for professional consultant services covered by this subchapter that is executed using the professional and consultant service contract form approved by the State Procurement Director shall be filed with the Office of State Procurement of the Department of Finance and Administration.

(2) The execution date of all contracts shall be defined as the date upon which performance of the services to be rendered under the contract is to begin and not the date upon which the agreement was made.

(b)(1) No purchase order shall be paid if a copy of the contract under which the payment is being made has not previously been filed with the Office of State Procurement.

(2) No payment shall be made covering services rendered prior to the execution date of the contract.

(c)(1) It is the intent of the General Assembly that this section be strictly construed and enforced.

(2) However, in the unusual event that an obligation has been incurred by a state agency under any contractual agreement or proposed contract prior to the approval of the contract, the Chief Fiscal Officer of the State may approve payment for such services after having first received the review of the Legislative Council.

**History. Acts 2003, No. 1315, § 13; 2005, No. 1680, § 16.**

#### **R1:19-11-1011. Professional and Consultant Service Contracts on File in the Office of State Procurement.**

**All agencies will be required to maintain copies in accordance with current document retention laws (Ark. Code Ann. § 19-11-214) of all purchase orders issued for the procurement of professional and consultant services.**

**19-11-1012. Standard contract forms.**

(a) The State Procurement Director shall prescribe standard forms to be utilized by all state agencies.

(b) The standard contract form shall include the following items, plus such additional items as the director shall deem desirable for the purposes of this subchapter:

(1) A section setting forth in reasonable detail the objectives and scope of the contractual agreement and the methods to be used to determine whether the objectives specified have been achieved;

(2) The rates of compensation, transportation, per diem, subsistence, out-of-pocket allowances, and all other items of costs contemplated to be paid the contractor by the state agency;

(3) The method by which the rate of compensation and the total payment shall be calculated;

(4) The maximum number of dollars which the state agency may be obligated to pay to the contractor under the terms of the contract, including all expenses and other items of costs, and the source of funding to be utilized;

(5) The term of the contract;

(6)(A) The names of all individuals who will be supplying services to the state agency or to third-party beneficiaries under the terms of the contracts, so far as those names are known to the contractor at the time of the execution of the contract.

(B) If the names of all individuals supplying services under the contract are not available at the time of the execution of the contract, the contract shall contain a provision requiring the contractor to submit periodically the names of individuals supplying services as soon as the identity of those individuals is known to the contractor;

(7) When the contractor is a business entity, the federal identification number of the business entity shall be listed on the contract form;

(8)(A) A certification signed by the contractor shall be included as follows:

“ \_\_\_\_\_ (name) \_\_\_\_\_ (title)  
I \_\_\_\_\_, certify under penalty of perjury that, to the best of my knowledge and belief, no regular full-time or part-time employee of any state agency of the State of Arkansas will receive any personal, direct, or indirect monetary benefits which would be in violation of the law as a result of the execution of this contract.”

(B) As used in subdivision (b)(8)(A) of this section, it shall be understood that when the contractor is a widely held public corporation “direct or indirect monetary benefit” shall not apply to any regular corporate dividends paid to a stockholder of the corporation who is also a state employee and who owns less than ten percent (10%) of the total outstanding stock of the contracting corporation;

(9)(A) For any contract in which the total compensation exclusive of reimbursable expenses to be paid by the state agency does not exceed fifty thousand dollars (\$50,000), a purchase order may be utilized in lieu of the standard form or forms prescribed by the director.

(B)(i) However, should the state agency enter into a subsequent contract with the same individual or organization during the same fiscal year, regardless of the nature of the contract, then the details of the original contract which utilized a purchase order form and of all subsequent contracts, regardless of amount or type, shall be promptly reported to the director.

(ii) This reporting shall be done to allow the director to determine whether the state agency is utilizing a series of contracts to avoid the use of the standard form and to avoid the application of appropriate regulations;

(10) Standard contract forms in use by licensed practitioners such as architects and engineers may be used to supplement the standard contract forms; and

(11) All professional consultant services contracts shall contain the following clause:

“In the event the State of Arkansas fails to appropriate funds or make moneys available for any biennial period covered by the term of this contract for the services to be provided by the contractor, this contract shall be terminated on the last day of the last biennial period for which funds were appropriated or moneys made available for such purposes.

“This provision shall not be construed to abridge any other right of termination the agency may have.”



(c) For the purpose of reporting methods of finance, a state agency shall disclose the total estimated project cost in addition to any other reporting requirements of the Legislative Council or the Joint Budget Committee.

History. Acts 2003, No. 1315, § 13; 2005, No. 1680, § 17; 2013, No. 1189, § 5.

**R1:19-11-1012. Compensation.**

***Each professional and consultant service contract shall clearly state the compensation, and indicate if various levels of expertise are to be supplied by the contractor. A rate for each level and the number of personnel within each level should be listed. All calculations should be extended and totaled. A schedule of allowable reimbursable expenses and estimated rates for each item of expense should be agreed to. All items should be listed along with respective rates. Rates should be totaled by item column, and a total compensation provided that is inclusive of reimbursable expenses.***

**R2:19-11-1012. Contract Dates.**

***For each professional and consultant service contract, the agency is required to enter the beginning and ending date of the contract. The beginning date of all contracts shall be defined as the date upon which performance of the services to be rendered under the contract are to begin and not the date upon which the agreement was made. This date should be arrived at with emphasis placed on the following:***

***(a) Any contract or amendment to a contract that requires review by the Legislative Council Committee must be submitted to the Department of Finance and Administration, Office of State Procurement, in accordance with the time guidelines as prescribed on the Office of State Procurement website. The beginning date of the contract must not precede the date of the Arkansas Legislative Council meeting in which such contract is to be reviewed. The Legislative Council or the Joint Budget Committee, when the General Assembly is in session, shall provide the Chief Fiscal Officer with their review as to the propriety of the contract within thirty (30) days of said submission;***

***(b) All contracts greater than fifty thousand dollars (\$50,000), unless specifically excepted, must be filed with the Department of Finance and Administration and/or the Office of Construction of the Arkansas Building Authority.***

**R3:19-11-1012. Required Information.**

***Information should be provided on each professional and consultant service contract form listing the name, and relationship of those persons***

**who will be supplying services to the state agency insofar as they are known at the time the contract is signed. If the names are not known at the time of the execution of the contract, the contractor shall submit the names along with the other information as they become known. Such persons shall, for all purposes, be employees or independent contractors operating under the control of the contractor (sub-contractors), and nothing herein shall be construed to create an employment relationship between the agencies and the persons listed.**

**R4:19-11-1012. Professional and Consultant Service Contract Form.**

**Each contract should be completed and include the following information:**

**(1) Agency assigned contract number or outline agreement and amendment number. For those contracts for which payment will be made wholly or in part against a Method of Financing, enter the assigned Method of Financing on the contract form.**

**(2) Date the agreement was signed by the agency and the contractor, the outline agreement or contract number and the vendor number. Also enter the agency's code (or business area) and title, division, if applicable, and the contractor's Federal ID number, name and address.**

**(3) Funding source: State, Federal, Cash, Trust or Other (specify).**

**(4) Any resources to be provided by the agency to the contractor as part of the agreement.**

**(5) Name of the agency representative who will represent the agency in coordinating the work of the contractor.**

**(6) Disclose all information as required under the terms of any existing Executive Order. The contractor shall also require the subcontractor to disclose the same information. Any existing Contract and Grant Disclosure and Certification Form shall be used for this purpose.**