NEBRASKA
Administrative Services
Materiel / Purchasing Division

DEVIATION FROM CONTRACTUAL SERVICES PROCESS
and
EMERGENCY SERVICE CONTRACTS PROCESS

Administrative Services, State Purchasing Bureau

What is a Deviation?

- A means of and the process for requesting approval for procuring service(s) by contract for a Sole Source valued at $50,000 and over without going through the usual competitive Request for Proposal (RFP) process.

- A means of and the process for documenting an Emergency Service Contract valued at $50,000 and over. $50,000 and over is calculated using the entirety of the requested contract period, including the initial contract period and any renewal periods called out in the contract.

- A Deviation cannot be used to amend, extend or renew a contract that already exists. A Deviation is used to create a new contract.

- Statutes 73-501 through 73-510 provide the basis for contractual bidding requirements and exceptions to the competitive bid process.

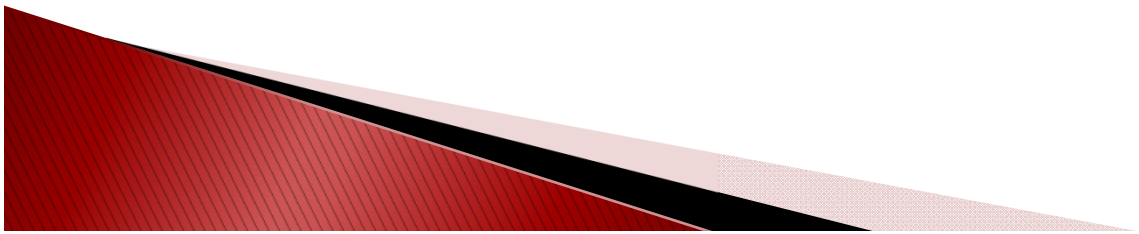
NOTE: The two most common types of Deviations are for Sole Source or Emergency Service contracts. There may be other circumstances, such as conservation of state resources, that may be suitable for the Deviation Process. Please contact State Purchasing Bureau (SPB) to discuss specific situations.

When Does an Agency Request a Deviation?

- A Deviation is a request to bypass the normal Request for Proposal (RFP) competitive bid process for services valued at $50,000 and over.

- The need to deviate from the competitive bid process may be necessary in the event of a valid Sole Source request or other unique service requirements. It should not be taken lightly.

- In the event of a Deviation, the Director of Administrative Services has the final approval, after review of agency documentation.

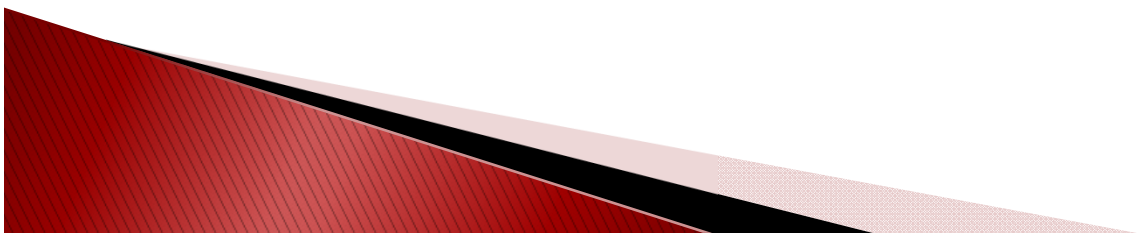


Is a Deviation Necessary?

- Statute 73-507 calls out specific exceptions to the standard competitive service contract process. (The standard competitive bid process for services encompasses the use of a Request for Proposal (RFP) that may be either SPB or agency processed.)

- If the proposed agency contract falls under one of the listed exception categories in Statute 73-507, a Deviation request is not necessary, because it is already excepted from the usual competitive process.

- Each agency's legal counsel should be able to provide guidance. Agencies are encouraged to work with their legal counsel.



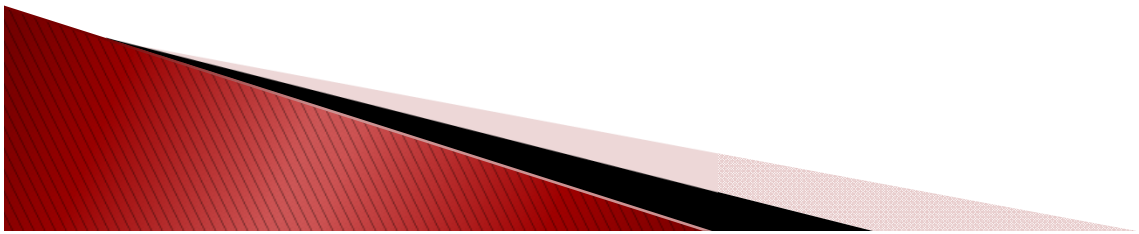
73-507: Exceptions to the Standard Competitive Bid Process

a. Contracts for services subject to the Nebraska Consultants' Negotiation Act
b. Contracts for services subject to federal law, regulation or policy or state statute, under which a state agency is required to use a different selection process or to contract with an identified contractor or type of contractor
c. Contracts for professional legal services and services of expert witnesses, hearing officers, or administrative law judges retained by state agencies for administrative or court proceedings
d. Contracts involving state or federal financial assistance pass through by a state agency to a political subdivision
e. Contracts valued at $15 million or less with direct providers of medical, behavioral, or developmental health services, child care, or child welfare services to an individual
f. Agreements for services to be performed for a state agency by another state or local government agency or contracts made by a state agency with a local government agency for the direct provision of services to the public
g. Agreements for services between a state agency and UNL, the Nebraska state colleges, the courts, the Legislature, or other officers or state agencies established by the Constitution of Nebraska
h. Department of Insurance contracts for financial or actuarial examination, for rehabilitation, conservation, reorganization, or liquidation of licensees, and for professional services related to residual pools or excess funds under the agency's control
i. Department of Roads contracts for all road and bridge projects
j. Nebraska Investment Council contracts
k. Contracts under section 57-1503

Sole Source Definition

- Statute 73-502 defines a sole source to be of such a unique nature that the contractor selected is clearly and justifiably the only practicable source to provide the service.
- Determination that the contractor selected is justifiably the sole source is based on either:

Uniqueness of the service
OR
Sole availability at the location required

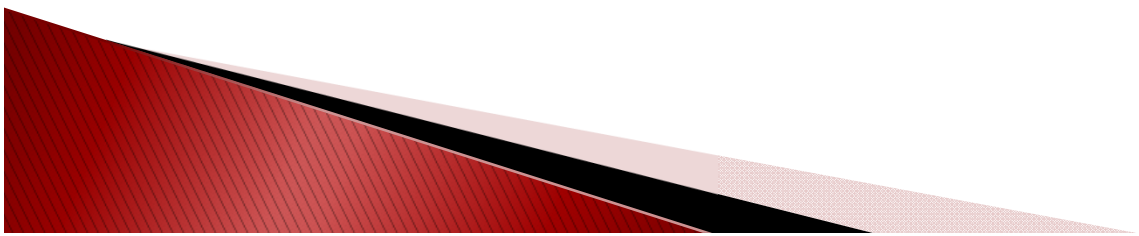


Sole Source Requirements

- Is the contractor legitimately the only supplier of the service being requested?
- What is so unique about the service that only this contractor can provide the service?
- Is the contractor the only provider in the area where the service is to be provided?

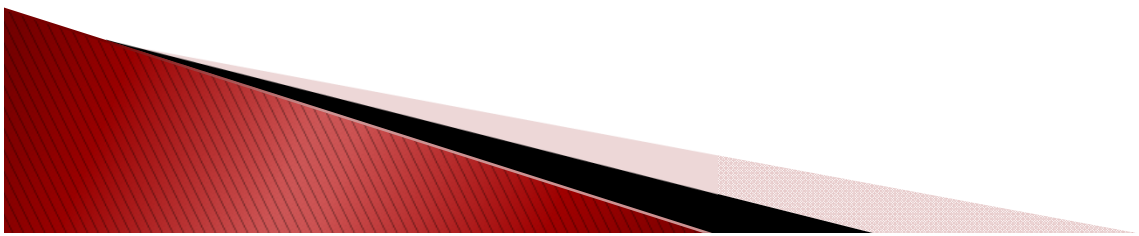
A justification for the Sole Source must be provided and include thoughtful responses to these requirements.

The justification should clearly explain why the service cannot be competitively bid.



Writing a Sole Source Justification for a Deviation:

- A Sole Source justification should be a "stand alone" document; that is, it should be clear, thorough and written for an audience who does not know the details of the Agency's needs. The Sole Source justification should not assume prior knowledge on the part of the audience.
- A Sole Source justification does not explain why the contractor is a good provider of the service but describes why the contractor is the **only** provider of the service.
- Unique elements of the service should be clearly described, including but not limited to such items as:
  - Customization(s) already in place;
  - Work in progress;
  - Relationship to federal programs, funding or requirements; or
  - Other circumstances that have a bearing on the situation.

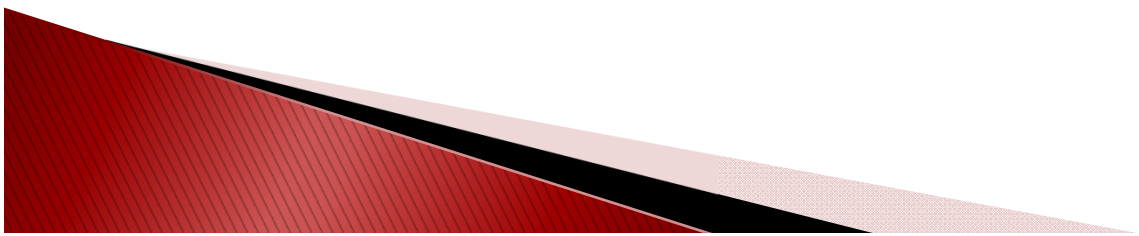


A Sole Source is Not Justified by the Following:

- Requesting extension or renewal of an existing contract that is out of renewal options (recall that Deviations can only be used to create a new, stand alone contract);
- Requesting retention of an existing provider simply because of their past performance; or
- Requesting to broaden the scope of services that were originally bid.

Deviation Requests Step by Step

- The Agency must have a good grasp on the total dollar value of the proposed contract. Recall that a Deviation creates a contract, not an RFP. The total dollar value includes the contract period and any possible renewal periods.
- The Agency must develop a proposed contract.
- The Agency must complete the Deviation From Contractual Services form.
- The Agency must enter an O8 requisition into PFC and attach the proposed contract and the Deviation From Contractual Services form to the requisition.



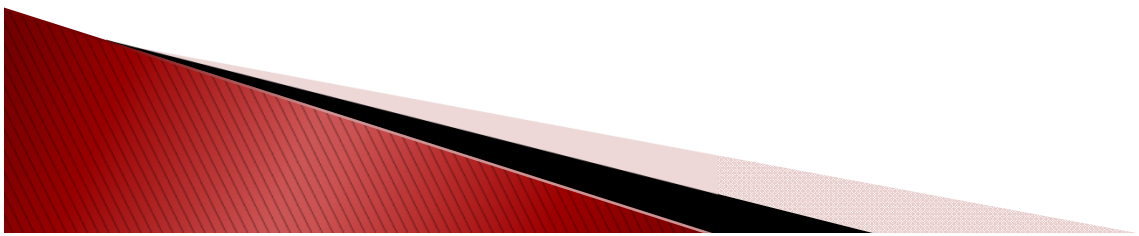
Deviation Processing

- The Deviation from Contractual Services Form is completed and attached in Payroll & Financial Center (PFC) to an O8 requisition.
- The O8 requisition should mirror the initial contract period and any proposed renewal periods. The dollar figure on the Deviation Form and within the O8 requisition must match.
- The Deviation from Contractual Services Form must have the signature of the Agency Director or he/she must be in the PFC approval route.
- A copy of the proposed contract is attached to the O8 requisition
- The contract period may not begin until the Director of Administrative Services has approved the O8 Deviation request.
- Contractor may not begin providing services until the contract is signed
- It is strongly recommended that the contract developed by the Agency use the Terms and Conditions from the standard Request for Proposal (RFP) boilerplate.

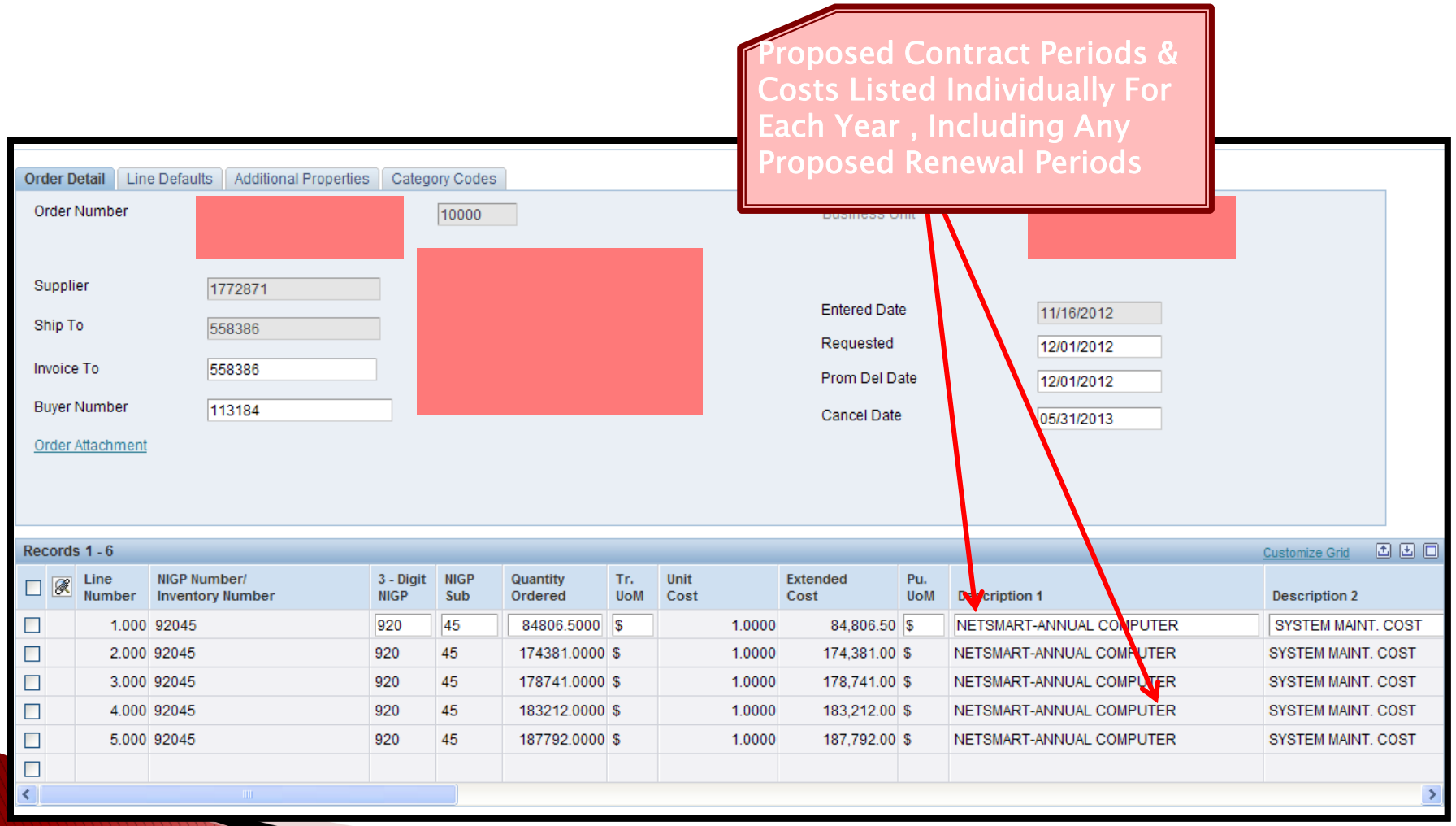
Agency must have Administrative Services approval before moving forward with the contract and services.

O8 Requisition–Used For Deviations

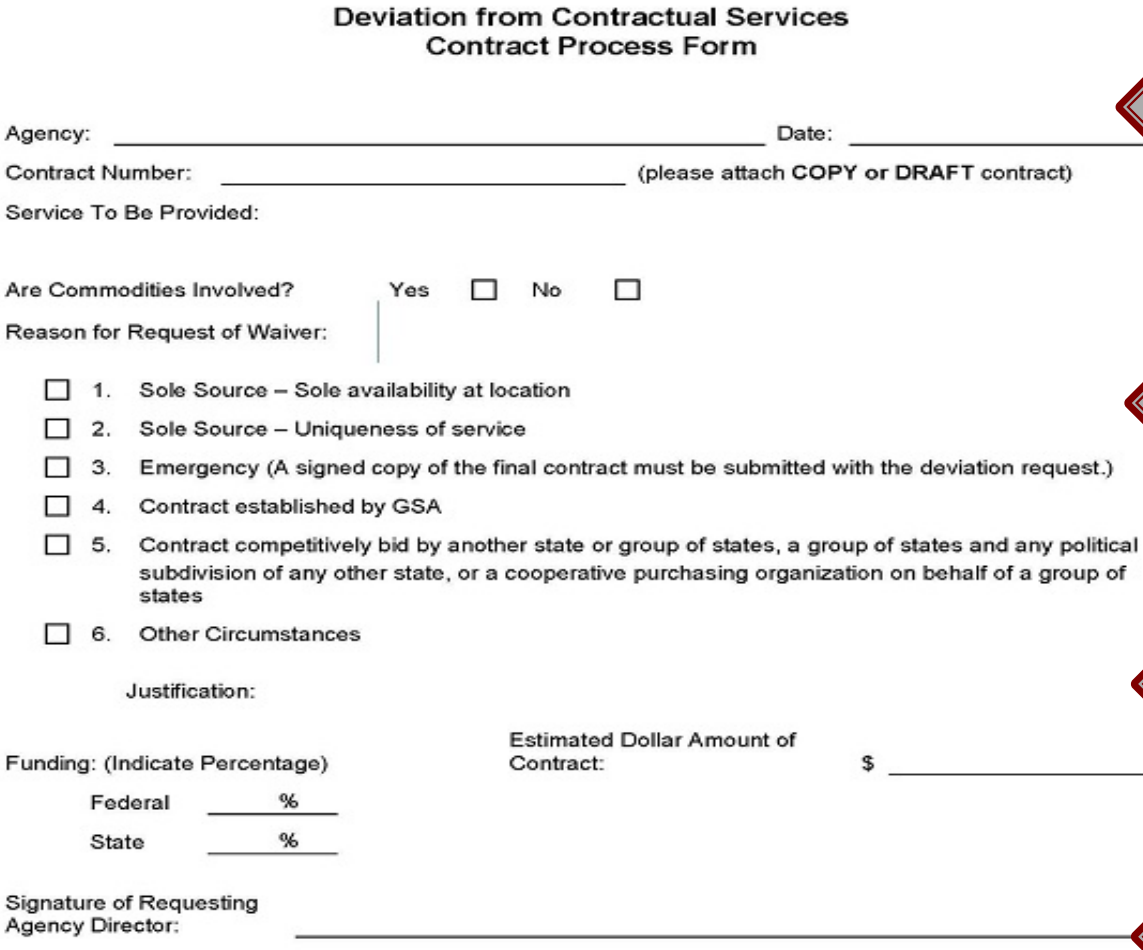
- O8 Requisition is entered into PFC.
- Completed Deviation from Contractual Services Process form is attached to the O8 Requisition.
- A copy of the proposed contract is attached to the O8 Requisition.
- The Agency Director has signed the Deviation from Contractual Services Process form or he/she is in the PFC approval route for the O8 Requisition.
- The O8 Requisition routes to State Purchasing Bureau (SPB) where review of documentation occurs. Agencies may be asked to provide further explanation, justification, or clarification to ensure all compliance with statutory requirements. All should understand that sufficient time for review and approval is necessary.



O8 Requisition Detail Lines



Deviation From Contractual Services Contract Process Form



Deviation from Contractual Services Contract Process Form

Agency: _____ Date: _____

Contract Number: _____ (please attach **COPY or DRAFT** contract)

Service To Be Provided:

Are Commodities Involved? Yes ☐ No ☐

Reason for Request of Waiver:

- ☐ 1. Sole Source – Sole availability at location
- ☐ 2. Sole Source – Uniqueness of service
- ☐ 3. Emergency (A signed copy of the final contract must be submitted with the deviation request.)
- ☐ 4. Contract established by GSA
- ☐ 5. Contract competitively bid by another state or group of states, a group of states and any political subdivision of any other state, or a cooperative purchasing organization on behalf of a group of states
- ☐ 6. Other Circumstances

Justification:

Funding: (Indicate Percentage)

Federal ____ %

State ____ %

Estimated Dollar Amount of Contract: $ _____

Signature of Requesting Agency Director: _____

Download this form from the SPB website – State Agency Information – Procurement for Services.

Attach the proposed draft contract.

Estimated dollar value is for the total contract, including the initial period and all proposed renewal periods.

Agency Director must sign Deviation Form or is part of the PFC approval route.

Proposed Contract: Attached to Deviation Requisition

- Attach a draft contract, not an ITB, RFP or a contractor's proposal. The contract period **cannot** begin until after AS/SPB review and approval.

- Agencies are strongly encouraged to base the contract on the Terms and Conditions located within the Request for Proposal (RFP) boilerplate. These terms and conditions afford the State and its' resources proven levels of protection, having already undergone extensive legal review and approval.

- Agencies are always encouraged to seek the advice of their agency legal counsel in regard to any terms or conditions proposed by the potential contractor that may be at variance with standard RFP clauses.

- Agencies must include all proposed renewal periods within the contract, in order to exercise those renewal periods after the expiration of the initial contract period.

Standard Terms and Conditions

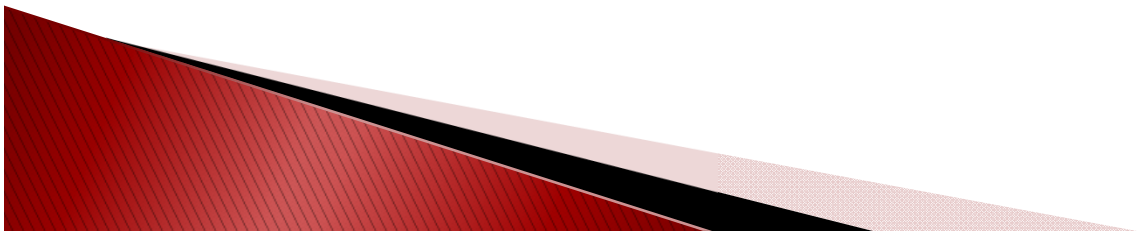
III. TERMS AND CONDITIONS

A. GENERAL
B. AWARD
C. COMPLIANCE WITH CIVIL RIGHTS LAWS AND EQUAL OPPORTUNITY EMPLOYMENT NONDISCRIMINATION
D. PERMITS, REGULATIONS, LAWS
E. OWNERSHIP OF INFORMATION AND DATA
F. INSURANCE REQUIREMENTS
G. COOPERATION WITH OTHER CONTRACTORS
H. INDEPENDENT CONTRACTOR
I. CONTRACTOR RESPONSIBILITY
J. CONTRACTOR PERSONNEL
K. STATE OF NEBRASKA PERSONNEL RECRUITMENT PROHIBITION
L. CONFLICT OF INTEREST
M. PROPOSAL PREPARATION COSTS
N. ERRORS AND OMISSIONS
O. BEGINNING OF WORK
P. ASSIGNMENT BY THE STATE
Q. ASSIGNMENT BY THE CONTRACTOR
R. DEVIATIONS FROM THE REQUEST FOR PROPOSAL
S. GOVERNING LAW
T. ATTORNEY'S FEES
U. ADVERTISING
V. STATE PROPERTY
W. SITE RULES AND REGULATIONS
X. NOTIFICATION
Y. EARLY TERMINATION
Z. FUNDING OUT CLAUSE OR LOSS OF APPROPRIATIONS
AA. BREACH BY CONTRACTOR
BB. ASSURANCES BEFORE BREACH
CC. PENALTY
DD. RETAINAGE
EE. BID BOND
FF. PERFORMANCE BOND
GG. FORCE MAJEURE
HH. PROHIBITION AGAINST ADVANCE PAYMENT
II. PAYMENT
JJ. INVOICES
KK. AUDIT REQUIREMENTS
LL. TAXES
MM. INSPECTION AND APPROVAL
NN. CHANGES IN SCOPE/CHANGE ORDERS
OO. SEVERABILITY
PP. CONFIDENTIALITY
QQ. PROPRIETARY INFORMATION
RR. CERTIFICATION OF INDEPENDENT PRICE DETERMINATION/COLLUSIVE BIDDING
SS. PRICES
TT. BEST AND FINAL OFFER
UU. ETHICS IN PUBLIC CONTRACTING
VV. INDEMNIFICATION
WW. NEBRASKA TECHNOLOGY ACCESS STANDARDS
XX. ANTITRUST
YY. DISASTER RECOVERY/BACK UP PLAN
ZZ. TIME IS OF THE ESSENCE
AAA. RECYCLING
BBB. DRUG POLICY
CCC. NEW EMPLOYEE WORK ELIGIBILITY STATUS
DDD. CERTIFICATION REGARDING DEBARMENT, SUSPENSION AND INELIGIBILITY

Standard Terms and Conditions from Request for Proposal (RFP) Boilerplate

Deviation Process Checklist

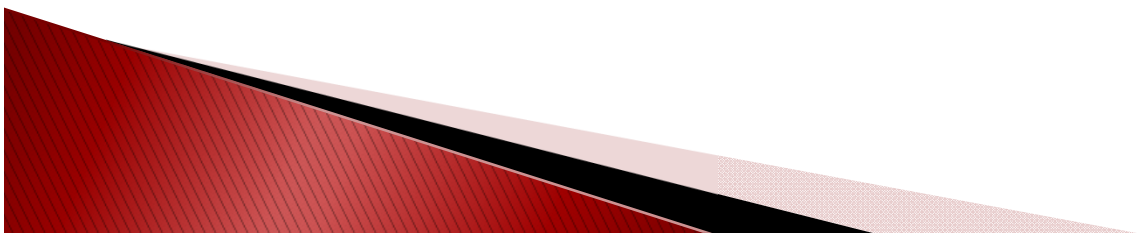
- O8 Requisition is entered in PFC;
- Deviation from Contractual Services Form is completed and attached to O8 requisition;
- Agency Director has signed Deviation Form or is in PFC approval route;
- Proposed contract is also attached to O8 requisition;
- Total dollar value of requisition, proposed contract and Deviation Form all match and include initial contract period plus any optional renewal periods; and
- Agency has used standard RFP boilerplate terms and conditions within the proposed contract and/or has reviewed all terms with their agency legal counsel.



What If There's An Emergency? Is That a Deviation?

- Yes. An Emergency Service contract valued at $50,000 and above is a type of deviation from the standard competitive bid process; therefore, many of the processing steps are similar.

- However- an Agency does NOT require prior AS/SPB approval to enter into a service contract valued at $50,000 or over in the event of an emergency.



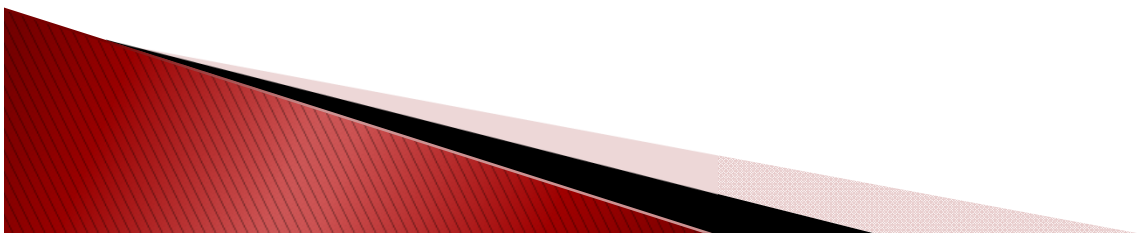
Emergency Service Contract Requirements

- Statute 73-502 (2) defines an emergency as when action is necessary to meet an urgent or unexpected requirement or when health and public safety or the conservation of public resources is at risk.

- The Agency Director is responsible for any and all questions arising out of the Emergency Service Contract. In contrast to a Sole Source Deviation request, an emergency is declared by the Agency Director. Therefore, an Emergency Service Contract does **not** require approval by Administrative Services prior to moving forward.

Writing the Emergency Service Contract Justification:

- An Emergency Service Contract justification should be a "stand alone" document; that is, it should be clear, thorough and written for an audience who does not know the details of the situation or Agency operations.
- An Emergency Service Contract justification explains the nature of the emergency based on the definition within Statute 73-502 (2).
- The Agency Director assumes responsibility for any questions arising out of the Emergency Service Contract.



Emergency Service Contract Processing

- Deviation from Contractual Services Form completed, including explanation of the emergency, and attached to an O8 requisition in Payroll & Financial Center (PFC).

- Deviation from Contractual Services form must have either the signature of the Agency Director or he/she must be in the approval route in PFC.

- A copy of the signed final contract must be attached to the O8 requisition in PFC within three (3) working days of contract signature by the Agency and Contractor.

Prior approval by Administrative Services is not necessary for Emergency contracts, but the agency must notify by using the Deviation from Contractual Services form and O8 requisition.

Questions?

- ✓The Deviation from Contractual Services Request form is located on the State Purchasing Bureau (SPB) website for download at **http://das.nebraska.gov/materiel/purchasing.**
- ✓Payroll & Financial Center instructions are available through the PFC homepage.
- ✓Please contact State Purchasing Bureau at 402.471.2401.
- ✓The two most common types of Deviation Requests are Sole Source or Emergency Service Contracts. There may be other circumstances , such as conservation of state resources, that may be suitable for the Deviation Process. Please contact State Purchasing Bureau (SPB) to discuss specific situations.

Have a question? Email SPB at: as.materielpurchasing@nebraska.gov

(Subject line "Procurement Question— Your Agency Name")