

CONTRACT DRAFTING AND REVIEW MANUAL

OFFICE OF ATTORNEY GENERAL
ATTORNEY GENERAL DREW H. WRIGLEY

This edition supersedes all previously published editions of this manual.

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SUMMARY OF CHANGES

Effective December 2023

Language has been revised throughout this Manual to provide clarity, reduce ambiguity, and incorporate statutory changes and contracting best practices for agencies of the state of North Dakota. Significant or material revisions in the language are noted below. It is advised that those using this Manual as a reference review the entire Manual for changes.

DO NOT limit review to only those items listed in this “SUMMARY OF CHANGES”.

GENERAL REVISIONS

- The State and Local Division of the North Dakota Office of Attorney General has been renamed the General Counsel Division.

CHAPTER 2 – TYPES OF STATE CONTRACTS

- Language has been updated in the CONTRACTS FOR PUBLIC IMPROVEMENTS (E.G. CONSTRUCTION CONTRACTS) section to clarify insurance requirements.
- Statutory language has been updated in the LEASES OF OFFICE SPACE, BUILDINGS, OR REAL PROPERTY section.

CHAPTER 5 – CONTRACT CLAUSES

- **TERMINATION FOR CONVENIENCE OR BY MUTUAL AGREEMENT** – An explanation has been added describing termination for convenience. The clause has been updated to allow for termination for convenience by the state agency..
- **NONDISCRIMINATION – COMPLIANCE WITH LAWS** – The explanation section has been significantly updated to reflect changes to N.D.C.C. § 54-44.4-15 passed by the 68th Legislative Assembly. The clause has been updated to incorporate the statutory requirements.

CHAPTER 6 – LEASE CLAUSES

- **OWNERSHIP OF PREMISES** – A NEW section has been added pursuant to statutory changes enacted by the 68th Legislative Assembly.

INTRODUCTION

This manual is a guide for drafting and reviewing contracts¹ entered by an agency² of the State of North Dakota.

The Office of Attorney General intends for this manual to be a primary resource for a non-attorney employee of an agency to use as a reference to draft an initial proposed contract. The agency's assigned legal counsel³ should then review the initial proposed contract prior to presenting to a contractor⁴.

Although contracts are the product of policy decisions by the agency, it is recommended the Attorney General determine the legality of all contracts and offer suggestions and recommendations on contract terms and language before a proposed contract is forwarded to a contractor.

Each agency should contact its assigned legal counsel for legal review prior to executing any contract.

This is particularly important if a contract contains unique or novel issues, imposes a significant financial obligation on the state, or relates to a project that could create significant liability for the state.

The contract language provided in this manual is a basis for state contracts. Each contract to which an agency may enter is unique and may contain unique terms and conditions. Specifically, information technology contracts, contracts for public improvements, and leases will be more complex than the foundation language provided in this manual. Agencies should always seek review and input from their assigned legal counsel.

¹ Contract – means the binding agreement between an agency and another party, interchangeably referred to by terms, including: agreement, memorandum of agreement or understanding, or contract.

² Agency – means all public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order of the governor or any task force or working group created by the individual in charge of a state agency or institution, to exercise public authority or perform a governmental function.

³ Agency's assigned legal counsel – means the either the Assistant Attorney General, or Special Assistant Attorney General, appointed by the Attorney General and authorized to give legal advice to specific, assigned state agencies.

⁴ Contractor – means the other party to the contract with the agency and, for purposes of this manual, interchangeably referred to by terms, including: offeror, bidder, vendor, or contractor.

**THE ANALYSIS IN THIS MANUAL
IS CONSISTENT WITH CURRENT NORTH DAKOTA
CENTURY CODE AND ADMINISTRATIVE CODE.**

**THIS MANUAL IS NOT AN
ATTORNEY GENERAL'S OPINION.**

TABLE OF CONTENTS

SUMMARY OF CHANGES	I
General Revisions.....	I
Chapter 2 – Types of State Contracts	I
Chapter 5 – Contract Clauses	I
Chapter 6 – Lease Clauses.....	I
INTRODUCTION	A
CHAPTER 1: OVERVIEW OF THE CONTRACTING PROCESS	1
Purpose of Contract Review	1
Role of the Agency	1
Role of the Attorney General	2
CHAPTER 2 - TYPES OF STATE CONTRACTS.....	3
Contracts for Services.....	3
Contracts for Goods.....	3
Information Technology Contracts.....	3
State Term Contracts & Cooperative Purchasing Contracts	4
Contracts for Public Improvements.....	5
Leases of Office Space, Buildings, or Real Property	6
Interagency Leases for Office Space, Buildings, or Real Property	7
Leases of Equipment	7
Interagency Agreements	7
Joint Powers Agreements	7
Agreements Between Public Agencies and Indian Tribes.....	8
CHAPTER 3 - PROCUREMENT AND PUBLIC IMPROVEMENTS	9
Goods and Services	9
Bids.....	9
Proposals.....	9
Requests for Proposals and Invitations for Bid	9
Architect, Engineer, and Land Surveying Services.....	10
CHAPTER 4 - CONTRACT FORMATION AND INTERPRETATION	11
Contracts and Obligations	11
Essential Elements of a Contract.....	11
Contract Interpretation.....	12
Public Contracts	12
Form of Contract	13
Language	13
CHAPTER 5 - CONTRACT CLAUSES	15
Parties – Identifying the Parties and Purpose	15
Scope of Work.....	15
Compensation - Payments	16
Term of Contract	19

Time is of the Essence	22
Termination	23
Delay or Default Force Majeure (Natural Disaster/Acts of God)	25
Liquidated Damages	26
Limitations of Liability.....	27
Indemnification.....	29
Insurance.....	29
Works for Hire and Work Product	30
Notice	31
Confidentiality	32
Compliance with Public Record Laws	33
Independent Entity.....	33
Assignment and Subcontracts.....	34
Spoilation (Destruction or Severe Modification of Evidence)	35
Merger and Modification: Conflict in Documents	36
Severability	37
Applicable Law and Venue	37
Alternative Dispute Resolution – Jury Trial.....	38
Attorney Fees and Costs.....	39
Nondiscrimination - Compliance with Laws.....	40
State Audit	41
Counterparts	42
Effective Date of Agreement.....	42
Signatures	42
CHAPTER 6 – LEASE CLAUSES	44
Parties – Identifying the Parties and Purpose	44
Scope of Lease.....	44
Ownership of Premises.....	45
Term of Lease	45
Holding Over	47
Rental Payments	47
Landlord’s Obligations.....	48
State’s Obligations.....	49
Termination of Lease.....	50
Merger and Modification.....	51
Severability	51
Assignment – Sale of Premises	51
Notice	52
Applicable Law and Venue	52
Alternative Dispute Resolution – Jury Trial.....	53
Spoilation (Destruction or Severe Modification of Evidence)	54
Indemnification.....	55
Insurance.....	56
Confidentiality.....	57
Compliance with Public Record Laws	58

State Audit	59
Counterparts	59
Effective Date of Lease	60
Approval	60
Signatures	60
APPENDICES	i
Contract Checklist	ii
Template, Contract	iv
Construction Contract Checklist.....	xiv
Lease Checklist – Agency as Tenant.....	xvi
Template, Lease (Agency as Tenant)	xviii
Lease Checklist – Agency as Landlord	xxv
Template, Lease (Agency as Landlord).....	xxvi
Lease Checklist – Interagency Lease.....	xxxii
Template, Lease (Interagency)	xxxiii
Interagency Agreement Checklist	xxxviii
Template (Interagency Agreement).....	xl
Joint Powers Agreement Checklist.....	xlvi

CHAPTER 1: OVERVIEW OF THE CONTRACTING PROCESS

PURPOSE OF CONTRACT REVIEW

The main purpose of contract review is to ensure that the parties accurately describe their expectations and understandings in a written contract. A well-written contract avoids unexpected liabilities and promotes a smooth relationship between the parties.

The agency's assigned legal counsel should review agency contracts prior to signature to ensure that the contract complies with all applicable laws and the agency is not committing itself to expending public funds beyond the amount appropriated by the Legislature. **This review is particularly important for contracts that are drafted by the contractor (e.g., a "boilerplate" or "form" contract provided by a contractor).**

State agencies and officials have only those powers expressly provided by law or which may necessarily be implied from the powers expressly given to the official or agency.⁵ Every review of a contract must include a determination whether the agency has the authority to enter the proposed contract.

Since the state is not immune from liability for its actions, all state contracts should indicate how risks and liabilities arising out of the contract are assigned among the parties to the contract and what insurance coverage is required.

Each contract provision included in this manual is important. An agency should be reluctant to consider alternate language, removal of language, or additional language proposed by a contractor.

Changes to the contract clauses in this manual should only be made in consultation with an agency's assigned legal counsel.

ROLE OF THE AGENCY

Once an agency determines that goods or services are needed from a specific contractor,⁶ or that another reason exists to enter a contract, the agency must develop a written agreement identifying the terms and conditions of the relationship between the agency and the contractor.

⁵ State administrative agencies are creatures of legislative action and, as such, have only such authority or power as is granted to them or necessarily implied from the grant. *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584-85 (N.D. 1984).

⁶ See N.D.C.C. ch. 54-44.4 and N.D.A.C. art. 4-12 regarding bidding requirements for goods and services.

The most important responsibilities of an agency in establishing these terms and conditions are to:

1. Describe the goods or services the contractor is providing or performing.
2. State the dollar amount the agency will pay.
3. Specify how risks and liabilities will be assigned among the parties to the contract.
4. State how the parties will comply with all applicable laws.

In specifying the dollar amount the agency will pay, the agency should keep in mind that its ability to extend financial obligations beyond the current biennium is restricted. *See* N.D.C.C. §§ 54-16-03, 54-16-05, 54-44.1-10.

ROLE OF THE ATTORNEY GENERAL

All state officers must look to the Attorney General for opinions on legal questions relating to their official duties. N.D.C.C. § 54-12-01(6). The Attorney General is also required to prepare drafts of state contracts when necessary. N.D.C.C. § 54-12-01(7).

Although contracts are the product of policy and business decisions by the agency, it is appropriate for the Attorney General to determine the legality of all contracts.

Legal review by the agency's assigned legal counsel should occur before a proposed contract is published with a procurement solicitation or is forwarded to the contractor.

CHAPTER 2 - TYPES OF STATE CONTRACTS

CONTRACTS FOR SERVICES

The service contract must not make the contractor an "employee" of the state. *See* [Independent Entity](#). Note also that an agency may be required to obtain services on a competitive basis. *See* N.D.C.C. ch. 54-44.4; N.D.A.C. art. 4-12, and the Office of Management and Budget (OMB) State Procurement Office (SPO) at:

<https://www.nd.gov/omb/agency/procurement>.

Procurement of architect, engineer, and land surveying services is governed by N.D.C.C. ch. 54-44.7.

The standard contract checklist and contract template are [Appendix 1-a](#) and [Appendix 1-b](#) to this manual.

CONTRACTS FOR GOODS

Agencies may purchase goods provided the purchase is within State Procurement laws and rules. Certain materials, furniture, fixtures, printing, insurance, and other commodities used by state agencies are purchased through OMB if the price of the goods exceeds a certain threshold. *See generally* N.D.C.C. ch. 54-44.4. An agency may be required to obtain goods on a competitive basis. *See* N.D.C.C. ch. 54-44.4; N.D.A.C. art. 4-12 and the OMB State Procurement Office at: <https://www.nd.gov/omb/agency/procurement>.

The standard contract checklist and contract template are [Appendix 1-a](#) and [Appendix 1-b](#) to this manual.

INFORMATION TECHNOLOGY CONTRACTS

Information Technology (IT) contracts have specific statutory review requirements.

The Information Technology Department “[s]hall review requests for lease, purchase, or other contractual acquisition of information technology as required by [N.D.C.C. § 54-59-05(05)]”. N.D.C.C. § 54-59-05. Pursuant to that statute, executive branch agencies and institutions (excluding the institutions under the control of the board of higher education) are required to submit a written request for the lease, purchase, or other contractual acquisition of IT to the department for review and approval.

Major IT projects, or “Large IT” projects, require the appointment of an executive steering committee in accordance with N.D.C.C. § 54-59-32. It is imperative that agencies procuring these

IT goods or services consult assigned legal counsel for determination as to the applicability of N.D.C.C. § 54-59-32.

IT contracts require numerous terms and conditions that are not applicable to basic contracts for services or goods. Because of the uniqueness of these terms and conditions they are not specifically covered in this manual. These contracts should be reviewed with an agency's assigned legal counsel, the OMB State Procurement Office, and the state's Information Technology Department (ITD) for sufficiency.

It is not uncommon for technology contractors to use automated end-user agreements (e.g. click-through, shrink-wrap, or browse-wrap) that require end-users "click" in "agreement" to the terms prior to installing or using software or hardware. These automated end-user agreements often contain terms and conditions to which an agency cannot agree. Furthermore, end-users likely do not have authority to agree or contract on behalf of the agency. These agreements should be reviewed by the agency's assigned legal counsel prior to acceptance. Most often, these automated end-user agreements are superseded by a master contract or a state term contract; however, there are times when language must be included in purchase orders to specifically void the automated end-user agreement's terms and conditions that conflict with state law. Employees should be cautioned that by accepting these terms and conditions, an employee may be acting outside the scope of their employment.

Certain IT contracts for goods and services are negotiated as State Term Contracts or Cooperative Purchasing Contracts and are managed by the OMB State Procurement Office. Information specific to these Cooperative Purchasing Contracts and IT procurement is found at: <https://www.nd.gov/omb/agency/procurement/it-procurement>.

STATE TERM CONTRACTS & COOPERATIVE PURCHASING CONTRACTS

N.D.C.C. § 54-44.4-13 authorizes the OMB State Procurement Office to enter agreements on behalf of multiple state agencies (and other specified entities) when similar goods or services are being procured by those agencies. The OMB State Procurement Office maintains certain "State Term Contracts" under this Cooperative Purchasing authority.

Cooperative Purchasing Contracts may only be awarded by the OMB State Procurement Office. OMB's State Procurement Office must be a signatory party to Cooperative Purchasing contracts. These contracts must contain specific language from OMB informing the parties to the contract, and potential participating entities, that it is a Cooperative Purchasing contract. If a competitive procurement solicitation will result in the award of a Cooperative Purchasing contract, it must include notice of the Cooperative Purchasing language to potential offerors.

A list of active State Term contracts is found at: <https://www.nd.gov/omb/agency/procurement/state-contracts>.

CONTRACTS FOR PUBLIC IMPROVEMENTS

(E.G. CONSTRUCTION CONTRACTS)

Because of the complexity involved in public improvement contracting, the industry standard of using contracts drafted by the American Institute of Architects (AIA®) or the Engineers Joint Contract Documents Committee (EJCDC®) may be acceptable to the agency. However, these contracts are drafted in favor of architects and engineers and contain terms and conditions to which an agency is without authority to agree. It is imperative that these contracts be appropriately amended or supplemented with terms and conditions that are acceptable to state agencies. This is done by incorporating a State Addendum. **While there are not template State Addenda for every AIA® and EJCDC® contract, the Attorney General's Office General Counsel Division maintains versions of various addenda and is available to assist agencies in obtaining or drafting addenda as needed.**

Agencies should ensure that AIA® and EJCDC® contracts being used are the most current version of that document. For example: AIA® B105™-2017 should be used rather than an AIA® B105™-2007. AIA® and EJCDC® contracts often reference additional documents as being incorporated into the main contract. It is imperative that the agency review ALL documents prior to executing the main contract and State Addendum.

It is imperative that these standard contracts be reviewed and supplemented with a State Addendum that is prepared by the agency's assigned legal counsel with the Office of Attorney General.

The contracting process for public improvement projects is subject to numerous requirements in N.D.C.C. ch. 48-01.2. All bids and proposals for public improvement contracts must include a copy of the license or certificate of renewal thereof issued by the Secretary of State enclosed in the required bid bond envelope showing the contractor is licensed as provided in N.D.C.C. ch. 43-07. N.D.C.C. § 43-07-12. Contractors with the state also must file a certificate showing the contractor has paid all applicable state taxes. N.D.C.C. § 43-07-11.1.

A bidder's bond and a contractor's or performance bond are required for many public improvement and construction projects. N.D.C.C. ch. 48-01.2, N.D.C.C. §§ 48-01.2-05, 48-01.2-10. A contractor's or performance bond:

1. must be for an amount equal at least to the price stated in the contract;
2. must be conditioned to be void if the contractor and all subcontractors fully perform all terms, conditions, and provisions of the contract and pay all bills or claims on account of labor performed and any supplies, and materials furnished and used in the performance of the contract, including all demands of subcontractors;
3. must require interest of the amount authorized under section 13-01-14 be paid on bills and claims not paid within ninety days;

4. is security for all bills, claims, and demands until fully paid, with preference to labor and material suppliers as to payment;
5. must run to the governing body, but any person having a lawful claim against the contractor or any subcontractor may sue on the bond.

All construction contracts, except those involving federal aid or where a preference would be contrary to law, must include a clause requiring the contractor to give preference to North Dakota residents in hiring, with preference given first to veterans. N.D.C.C. § 43-07-20.

With some exceptions, any retention of amounts (e.g. retainage) due a contractor under a public improvement contract is subject to 10% of each estimate presented until the project is 50% complete, at which time retainage is based on the contractor's performance. N.D.C.C. §§ 43-07-23, 48-01.2-13.

Public improvement contracts require more stringent indemnification and insurance language per the OMB Risk Management Division. Agencies should consult their assigned legal counsel and OMB's Risk Management Division.

Agencies should also consult the OMB Risk Management Division's manual titled "Guidelines to Managing Contractual Risk" under "Risk Services" of the "Team Member Resources" tab found at: <https://ndgov.sharepoint.com/sites/TeamND>

The public improvement (construction) contract checklist is [Appendix 2](#) to this manual.

LEASES OF OFFICE SPACE, BUILDINGS, OR REAL PROPERTY

All leases and rental agreements for office space, regardless if the role of the agency is as Landlord or Tenant, must be reviewed for legal sufficiency by the Attorney General and must be approved by the OMB Facility Management Division. N.D.C.C. § 54-21-24.1. Legislation enacted during the 68th Legislative Assembly requires: "A lease or rental agreement entered under this section must include a list of all owners of the leased property, including each individual with an ownership interest in a business or businesses that directly or indirectly own the leased property if the individual's aggregate ownership interest in the leased property is ten percent or more." (See N.D.C.C. § 54-21-24.1)

OMB's procedure for completing a state office lease may be found under the "Purchasing and Leasing" tab at: <https://ndgov.sharepoint.com/sites/TeamND>.

The standard lease checklist and lease template, wherein the agency is the tenant, are [Appendix 3-a-1](#) and [Appendix 3-a-2](#) to this manual.

The standard lease checklist and lease template, wherein the agency is the landlord, are [Appendix 3-b-1](#) and [Appendix 3-b-2](#) to this manual.

INTERAGENCY LEASES FOR OFFICE SPACE, BUILDINGS, OR REAL PROPERTY

Interagency leases are those executed between two or more agencies. Because agencies, by their very existence as such, are subject to a number of statutory requirements it is unnecessary to include all standard lease terms and conditions that would be included in a lease between an agency and an outside, private tenant or landlord.

The interagency lease checklist and lease template are [Appendix 3-c-1](#) and [Appendix 3-c-2](#) to this manual.

LEASES OF EQUIPMENT

Leases of equipment can be converted to rental purchase agreements with the approval of OMB, as long as the conversion is to the financial advantage of the state and the agreement does not commit the state to payments beyond the current biennium. N.D.C.C. § 54-06-17. OMB has created a form to assist with this determination, found under the “Purchasing and Leasing” tab, “Lease vs. Purchase Analysis” at: <https://ndgov.sharepoint.com/sites/TeamND>.

INTERAGENCY AGREEMENTS

(E.G MEMORANDUMS OF AGREEMENT, MEMORANDUMS OF UNDERSTANDING)

Interagency agreements, often referred to as a Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU), are those executed between two or more agencies. Because agencies, by their very existence as such, are subject to a number of statutory requirements it is unnecessary to include all standard contract terms and conditions that would be included in a contract between an agency and an outside contractor or entity.

The interagency agreement checklist and agreement template are [Appendix 4-a](#) and [Appendix 4-b](#) to this manual.

JOINT POWERS AGREEMENTS

Joint powers agreements are a special category of contracts in which an agency enters into a binding agreement with another agency or with a political subdivision of the state of North Dakota or another state that borders North Dakota. N.D.C.C. chs. 54-40 and 54-40.3 authorize state

agencies and political subdivisions to enter joint powers agreements when other, specific statutory authority may not exist.

Joint powers agreements may be used for a number of purposes, including: acquiring, constructing, and maintaining any building for the joint use of the contracting government agencies; the use of buildings under the control of the state; and the joint exercise of any power or function that any of the parties to the agreement is authorized to perform. *See generally* N.D.C.C. chs. 54-40, 54-40.3.

N.D.C.C. § 54-40.3-01 is very broad; it authorizes political subdivisions and state agencies to enter joint powers agreements to cooperate or jointly administer any power or function that only one of the parties to the agreement is obligated. Joint powers agreements do not relieve the agency of its statutory duties, but actual and timely performance of those duties by another party created by the joint powers agreement is sufficient. N.D.C.C. § 54-40.3-01(3) and N.D.A.G. 94-F-08.

Joint powers agreements authorized under N.D.C.C. ch. 54-40 must contain certain provisions. Joint powers agreements authorized under N.D.C.C. ch. 54-40.3 have no required form, but multiple contract topics are suggested in N.D.C.C. § 54-40.3-01(1).

The Attorney General must determine that joint powers agreements that involve state agencies are legally sufficient. Therefore, review by the Attorney General's General Counsel Division is required prior to execution of such joint powers agreements. *See* N.D.C.C. §§ 54-40-08, 54-40.3-01(2), and 54-40.3-04.

The joint powers agreement checklist is [Appendix 5](#) to this manual.

AGREEMENTS BETWEEN PUBLIC AGENCIES AND INDIAN TRIBES

Unless otherwise provided by law, agreements between a Public Agency⁷ and a tribal government are governed by N.D.C.C. ch. 54-40.2. If N.D.C.C. ch. 54-40.2 applies, the Public Agency involved must publish notice of the agreement and, if requested, hold a public hearing. These agreements must be approved by the Governor and by the governing body of the tribes involved and may require legislative confirmation. N.D.C.C. § 54-40.2-04. Depending on the Public Agency, additional statutory requirements may be triggered. Agreements with tribal governments may also implicate federal statutes or regulations. The Attorney General's Natural Resources and Indian Affairs Division is available for consultation on these agreements.

⁷ "Public Agency" for purposes of agreements with Indian Tribes means any political subdivision, including municipalities, counties, school districts, and any agency or department of North Dakota. N.D.C.C. § 54-40.2-01.

CHAPTER 3 - PROCUREMENT AND PUBLIC IMPROVEMENTS

GOODS AND SERVICES

Goods and services purchased by the OMB State Procurement Office on behalf of agencies under N.D.C.C. ch. 54-44.4, or pursuant to purchasing authority delegated by OMB, are usually purchased under a competitive procurement procedure. The OMB State Procurement Office develops specifications, receives bids, and may reject any bids or negotiate for a lower price with the successful bidder. State Term contracts and multiple award contracts for certain contracts are also authorized under N.D.C.C. § 54-44.4-05.

For more information regarding the bidding process, *see* the OMB State Procurement Office website at: <https://www.nd.gov/omb/agency/procurement>.

BIDS

For certain contracts, competitive bids are required. Examples of these contracts include:

1. Contracts for construction of public improvements if the estimated cost exceeds \$200,000. N.D.C.C. § 48-01.2-02.1.
2. Concessions in public buildings or on public grounds. N.D.C.C. § 48-09-01.
3. Highway construction contracts exceeding \$20,000. N.D.C.C. § 24-02-17.
4. State printing contracts. N.D.C.C. ch. 46-02.
5. State purchasing contracts. N.D.C.C. § 54-44.4-05.

An agency subject to bidding requirements should be very careful to review and follow all requirements set out in Century Code, Administrative Code, and OMB Policy, if applicable.

PROPOSALS

A request for proposals (RFP) is similar to the bid process but gives the agency additional flexibility after receiving proposals from contractors. Frequently, the process includes negotiation with the contractors based on a comparison of the proposals received by the agency.

REQUESTS FOR PROPOSALS AND INVITATIONS FOR BID

When preparing an RFP or Invitation for Bid (IFB), the agency should specify both the terms and conditions it will require in the contract and those that are unacceptable. This gives potential

contractors notice of the state's contracting requirements. Solicitation templates are available at the OMB State Procurement Office website:

<https://www.nd.gov/omb/agency/procurement> (public-facing site); or under the “Purchasing and Leasing” tab at: <https://ndgov.sharepoint.com/sites/TeamND>.

Some RFPs, specifically IT-related, contain provisions requiring the potential contractor to affirmatively agree, disagree, or propose new language for each contract clause contained in the state’s contract template specific to that solicitation. Proposals that fail to respond to these provisions may be deemed non-responsive and be rejected by the procuring agency. The intent of requiring responses specific to the contract language is to be up front about negotiation positions and to ensure all parties are negotiating contract terms in good faith.

ARCHITECT, ENGINEER, AND LAND SURVEYING SERVICES

The procurement of architect, engineer, and land surveying services is governed by N.D.C.C. ch. 54-44.7. Standard engineering and architectural contracts drafted by the Engineers Joint Contract Documents Committee (EJCDC®) and American Institute of Architects (AIA®) favor engineers and architects and contain terms to which an agency may not agree.

It is imperative that these standard contracts be reviewed and supplemented with a State Addendum that is prepared by the agency’s assigned legal counsel with the Office of Attorney General.

CHAPTER 4 - CONTRACT FORMATION AND INTERPRETATION

CONTRACTS AND OBLIGATIONS

N.D.C.C. Title 9 – Contracts and Obligations, is the governing law within North Dakota for contracts.

ESSENTIAL ELEMENTS OF A CONTRACT

A "contract" is an agreement to do or not do a certain thing. N.D.C.C. § 9-01-01(1). The four essential elements of a valid contract are:

1. parties capable of contracting;
2. the consent of the parties;
3. a lawful object; and
4. sufficient cause or consideration.

In other words, a contract must have: competent parties; offer and acceptance; a legal purpose; and consideration.

The terms of a contract also must be reasonably definite and certain for the contract to be enforceable. *Delzer v. United Bank*, 459 N.W.2d. 752 (N.D. 1990).

“It is essential to the validity of the contract, not only that the parties should exist, but that it should be possible to identify them.” N.D.C.C. § 9-02-03. If a party is an entity or organization, care should be taken to ensure that the person signing the contract has the authority to do so.

State agencies and officials have only those powers expressly provided by law or which may necessarily be implied from the powers expressly given to the official or agency.⁸ Every review of a contract must include a determination whether the agency is authorized to enter the contract.

⁸ State administrative agencies are creatures of legislative action and, as such, have only such authority or power as is granted to them or necessarily implied from the grant. *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584-85 (N.D. 1984).

The employee executing the contract on behalf of the agency must ensure they have the authority to bind the state to contractual obligations. A state employee executing a contract against the advice of its assigned legal counsel may be found to have acted outside the scope of their employment.

Any benefit conferred upon a promisor or prejudice suffered by a promisee is valid consideration for a contract. N.D.C.C. § 9-05-01. A written contract is presumptive evidence of consideration. N.D.C.C. § 9-05-10.

CONTRACT INTERPRETATION

Contracts are generally governed by the law in effect when the contract is formed. The language of a contract governs its interpretation if the language is clear and explicit and does not involve an absurdity. A contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting if that intent can be determined and is lawful. For written contracts, the intent of the parties must be determined from the writing alone if possible. A contract must be interpreted as a whole, giving effect to every clause, sentence, or provision consistent with the main purpose of the contract. Words in a contract are given their ordinary meaning unless used in a technical sense. *See generally* N.D.C.C. ch. 9-07.

If a contract is unambiguous, its interpretation is a question of law and extrinsic evidence, that is, information gathered from outside or beyond what is in the written contract, is not admissible to contradict contract terms. If a contract is ambiguous, extrinsic evidence can be used to clarify the parties' intent. Whether a contract is ambiguous is a question of law. A contract is ambiguous when rational arguments can be made for different positions about its meaning. If extrinsic evidence is used to interpret an ambiguous contract, the parties' intent is a question of fact.

Contracts that purport to limit or restrict a party's ability to enforce a right are considered void under N.D.C.C. § 9-08-05. It is not uncommon for a contractor to request that an agency limit the time in which the agency may bring a claim against the contract. Because this limitation is contrary to statute, agencies should not accept such limitations on enforcement of rights.

PUBLIC CONTRACTS

Contracts involving government agencies or officials are generally interpreted under the same rules as contracts between private parties. N.D.C.C. § 9-07-01. However, in public contracts, any ambiguity or uncertainty is presumed to be caused by the private party and is interpreted against the private party. N.D.C.C. § 9-07-19.

FORM OF CONTRACT

An agency contemplating entering a contract should review the checklist attached as [Appendix 1-a](#) before beginning the drafting process. *State contracts should be in writing with numbered clauses and numbered pages.*

Certain contracts are invalid unless they are in writing. *See* N.D.C.C. § 9-06-04. Numbering the separate clauses in a contract can make the agreement clear and make internal cross-references easy. If the contract has been modified from an earlier draft, make sure to update any internal cross-references.

A written contract supersedes all oral negotiations that preceded or accompanied the execution of the contract. N.D.C.C. § 9-06-07.

If an agency receives a “boilerplate” or “form” contract from a contractor or private party, that contract should not be executed without legal review by the agency’s assigned legal counsel.

LANGUAGE

Definitions should be included for words and phrases that are unclear or are frequently used in the contract. If the same phrase identifying a thing or entity is used frequently throughout the contract, a shortened form should be indicated early in the document to avoid repetitive use of a needlessly long term or phrase.

Contract language does not have to be complicated or wordy to be effective. Certain words are sometimes used in contract drafting either because they sound or look legal and important, or because it has “always been done that way.” Occasionally some of this legalese may be needed, but generally it may be avoided. Superfluous language should be removed unless it makes the contract clearer. Use certain words carefully.

The term "**shall**" describes what a party is required to do. “Shall” is used to qualify an active verb. Use “shall” when imposing a duty on a person or entity that is the subject of the sentence. Use “shall” in a mandatory or imperative sense. Example: “The licensee shall give the debtor a copy of the signed contract.”⁹

The word “**must**” describes conditions that have to exist before something else happens. “Must” is used to qualify an inactive verb or an active verb in the passive voice. Use “must” in reference to a thing, rather than a person, and to express status requirements, i.e., statements about what

⁹ Legislative Drafting Manual, PART 5. <http://www.legis.nd.gov/legislative-drafting-manual>

people or things must be rather than what they must do. Examples: “The contract must contain two signatures.” “A candidate must be a resident of the county.”¹⁰

Use **"may"** to confer a power, privilege, or right. Example indicating power: “The state may demand an extension of time.” Example indicating privilege: “The state may renew the application.” Example indicating right: “The state may appeal the decision.”¹¹

Do not use **“such”** as a substitute for “the”, “that”, “it”, “those”, “them”, or other similar words.¹²

Use **“which”** to introduce a nonrestrictive clause. Example: “The application, which need not be verified, must be signed by the applicant.” Use “which” to modify a remote antecedent in a restrictive clause. Example: “An application to renew a license which has been rejected” (In this example, the application was rejected, not the license.)¹³

Use **“that”** to introduce a restrictive clause modifying the nearest antecedent. Example: “An application to renew a license that has been revoked” (In this example, the license was revoked.)¹⁴

Every two years, the Legislative Council publishes a Legislative Drafting Manual. This manual contains a chapter on style and grammar. While the manual is written as a resource to use for drafting legislation, it is an excellent resource for any type of writing.

This manual is available at: <https://www.ndlegis.gov/legislative-drafting-manual>.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

CHAPTER 5 - CONTRACT CLAUSES

PARTIES – IDENTIFYING THE PARTIES AND PURPOSE

Contracts frequently include "recitals" at the beginning of the agreement that identify the parties to the agreement and the purpose of the agreement. Although not legally required, recitals can effectively explain the agreement, which will help in understanding the remaining terms of the contract. Recitals often begin with terms such as: "*Whereas...*" and "*Therefore...*".

A contract should begin with a recital identifying the parties to the contract. Except for contracts between agencies, the state, rather than a particular agency or official, is the real party to state contracts. For contracts between agencies, separate terms describing each agency should be used. The agency should be identified as follows: "This Contract is between the State of North Dakota acting through its [agency] (STATE) and [ABC Company] (CONTRACTOR)."

Use one-word descriptive terms, introduced in the opening clause identifying the parties, to refer to the parties throughout the contract. Check to be sure that references to the parties are consistent throughout the contract. An example of an acceptable paragraph identifying the parties is: "This agreement is between the State of North Dakota, acting through its Commissioner of Labor (STATE), and ABC Company (CONTRACTOR)." Note that when this is done the one-word descriptive term is considered a proper noun and, in most cases, no longer needs to be preceded by the definite article "the." Example: "CONTRACTOR and STATE will ..." rather than "The CONTRACTOR and the STATE will ...".

Recommended Language

PARTIES

The parties to this contract (Contract) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (CONTRACTOR);

SCOPE OF WORK

Purpose

Describe the goods or services required under the contract in sufficient detail so that a failure of the contractor to meet the state's expectations will be a breach of contract. The goods or services are typically described in general terms in the contract itself or a more detailed description, sometimes called the "statement of work" or "scope of work" (both referred to as SOW), may be attached as an exhibit to the contract and incorporated by reference.

If the description contained in the SOW is too vague, it will be difficult for the state to enforce the contract or establish a breach of contract by the contractor. Because SOWs generally relate to the

policies, business practices and specific needs of the agency, the content of the SOW should be drafted by agency personnel having intimate knowledge of the solicitation and what work is required. At times, although rare in occurrence, the SOW may be jointly drafted between the agency and the selected contractor.

Statements [or Scopes] of Work should be reviewed by the agency’s assigned legal counsel to ensure there are no legal concerns with the SOW’s language and the obligations of the parties under the SOW.

Recommended Language

SCOPE OF WORK

CONTRACTOR, in exchange for the compensation paid by STATE under this Contract, shall provide the following:

COMPENSATION - PAYMENTS

Purpose

The Compensation – Payments clause identifies the amount of money the state must pay pursuant to the contract. If a total number of goods or hours of service cannot be identified, a monetary cap should be placed on the total amount, which may not be exceeded without the written consent of the agency. Contracts requiring payment for each good or hour of service should not be open-ended and should instead identify the total number of goods or hours of service being purchased.

Prepayment

The Attorney General and the State Auditor discourage the use of prepayment provisions. An agency should not only avoid paying public funds before verifying the quality or sufficiency of the goods or services being purchased but should reconsider doing business with a contractor whose financial condition is so marginal that it needs an infusion of cash to proceed with the project. An agency should strongly consider requiring the contractor to post a performance bond if the contractor requires a prepayment.

Payment required for IT software maintenance or IT software-as-a-service (SaaS) subscription services should not be considered “prepayment” as described in the paragraph above. This is because these maintenance and subscription services are generally available to the agency at the same time payment is made, therefore payment is not considered prepayment.

Taxpayer ID

An agency should obtain the contractor's federal employer ID number (FEIN) by requiring this in the contract. Although this clause is not essential to the contract, it may save time for the agency.

Payment of Taxes by State

State has tax exempt status. Contracts must ensure that the agency is not responsible for the payment of taxes.

Interest Due on Overdue Payments

Although there is no need to include a provision governing interest in state contracts, agencies should be aware that interest must be paid on a payment due from an agency if the payment is not made by the date specified in the contract or, if no date is specified, within forty-five (45) days of receipt of an invoice. N.D.C.C. § 13-01.1-02. Because this statute provides forty-five (45) days for payment, it is recommended that agencies negotiate the same period as the time allotted for payments due under the contract.

Recommended Language

COMPENSATION

Contractual Amount

STATE shall pay for the accepted services provided by CONTRACTOR under this Contract an amount not to exceed *[Amount]* (Contractual Amount).

The Contractual Amount is firm for the duration of this Contract and constitutes the entire compensation due CONTRACTOR for performance of its obligations under this Contract regardless of the difficulty, materials or equipment required, including fees, licenses, overhead, profit and all other direct and indirect costs incurred by CONTRACTOR, except as provided by an amendment to this Contract.

Payment

1) Payment made in accordance with this Compensation section shall constitute payment in full for the services and work performed and the deliverables and work(s) provided under this Contract and CONTRACTOR shall not receive any additional compensation hereunder.

2) STATE shall make payment under this Contract within forty-five (45) calendar days after receipt of an approved invoice.

3) Payment of an invoice by STATE will not prejudice STATE's right to object to or question that or any other invoice or matter in relation thereto. CONTRACTOR's

invoice will be subject to reduction for amounts included in any invoice or payment made which are determined by STATE, on the basis of audits conducted in accordance with the terms of this Contract, not to constitute allowable costs. At STATE's sole discretion, all payments shall be subject to reduction for amounts equal to prior overpayments to CONTRACTOR.

4) For any amounts that are or will become due and payable to STATE by CONTRACTOR, STATE reserves the right to deduct the amount owed from payments that are or will become due and payable to CONTRACTOR under this Contract.

NOTE: In the event your contract will allow for separately billed travel expenses (i.e.: outside of fixed price contract), modify or delete the following clauses as applicable:

Travel

CONTRACTOR acknowledges travel costs are covered by the Contractual Amount and shall not invoice STATE for travel costs.

OR

STATE shall reimburse CONTRACTOR for expenses related to travel at amounts not to exceed those outlined below:

- 1) **Lodging:** Reimbursement shall not exceed the then-current, published GSA rate for the travel location. Copies of receipts are required for lodging reimbursement. STATE shall not reimburse for incidental and miscellaneous expenses charged to the room, including alcohol, telephone charges, or entertainment (e.g., movies).
- 2) **Transportation:** Air travel shall be reimbursed by STATE at the actual cost of air fare for coach class travel only. CONTRACTOR shall make air travel arrangements at least fourteen (14) days in advance whenever possible. Reimbursement for rented, chartered, or contracted vehicle transportation shall be limited to reasonable rates as determined by STATE.
- 3) **Meals:** Meals shall be paid on a per diem basis for each day of travel at then-current, published GSA per diem rate for the travel location. Per diem for the first and last day of travel shall be paid at seventy-five percent (75%) of the GSA per diem rate. Requests for per diem payments must include the start and end dates of travel, the location where the services are performed, and the allowable per diem amount for each trip on the billing/invoice.

Payment for any travel expenses that exceed the travel budget as agreed upon by the Parties must be approved by STATE.

PREPAYMENT

STATE will not make any advance payments before performance or delivery by CONTRACTOR under this Contract.

PAYMENT OF TAXES BY STATE

STATE is not responsible for and will not pay local, state, or federal taxes. STATE sales tax exemption number is E-2001. STATE will furnish certificates of exemption upon request by the CONTRACTOR.

TAXPAYER ID

CONTRACTOR's federal employer ID number (FEIN) is: *[Insert FEIN]*.

PURCHASING CARD

STATE may make payment using a government credit card. CONTRACTOR will accept a government credit card without passing the processing fees for the government credit card back to STATE.

TERM OF CONTRACT

Purpose

The Term of Contract clause identifies the period during which the agency and contractor are subject to the contract's commitments.

An agency generally lacks authority to commit funds beyond the term of the current biennium. A contract may extend beyond the current biennium if the agency has express authority to enter the contract or if the Termination clause in the contract allows the agency to terminate the contract if sufficient funds are unavailable, if the law regarding the contract is changed, or without cause at any time. See [Termination](#); and N.D.A.G. 77-01.

Options for going beyond the initial term are titled: Renewal, Extension, and Renegotiation. They are outlined below with brief descriptions as to their applicability.

Any exercise of an Extension, Renewal, or Renegotiation requires a written contract amendment identifying the amended terms and conditions.

Contract amendments should be drafted in consultation with an agency's assigned legal counsel.

Term of Contract

This clause identifies the start and end of the contract's initial term. A contract may begin on a specified date or it may begin on the contract's Effective Date, that is defined in the Effectiveness of Contract clause at the end of the contract. The Effective Date is generally defined as the most recent date of the parties' signatures.

No Automatic Renewal

Contracts should only be considered renewed when the agency specifically exercises a unilateral right to renew the contract or both parties mutually agree that the contract will be renewed. Any language referencing automatic renewal should be struck from a contract. Automatic renewal clauses run the risk of the agency unintentionally entering a renewal term.

Renewal Option

A renewal option is normally used when a multi-year contract is anticipated. A renewal option provides the agency the unilateral right to renew the contract beyond the current contract term end date. The renewal provision allows the existing contract terms and conditions to be renewed for additional contract terms after the completion of the initial contract term.

If a contract is renewed, the agency should compare the cost of the goods or services in the contract to the current market for those goods or services. Continuing an existing contract may spare the agency time, but the agency also loses the opportunity to go through a competitive procurement process and obtain similar or better services or goods at similar or better prices. If renewal is expected or a possibility, parties to a contract should agree to the number of potential renewal terms in advance and in writing in the initial contract. If the contract was awarded through a procurement process, the number of renewals must be negotiated in the initial contract.

When exercising a renewal option, the new term should be specified and acknowledged by the parties in writing in the form of a contract amendment.

Extension Option

An extension option provides the agency the unilateral right to extend the contract beyond the current contract term end date up to twelve (12) months. The extension option is intended as a one-time option to be used after all renewal options have been exercised or it has been determined remaining renewal options will not be exercised. Generally, extensions are exercised when additional time is needed to complete a contract or it is necessary to keep a contract in place and prevent a gap in coverage for goods or services while a new procurement process is conducted.

When exercising an option to extend, the new term should be specified and acknowledged by the parties in writing in the form of a contract amendment.

Renegotiation Option

A renegotiation option would normally be used for a strategic solution/product, for example a critical line-of-business application that is expected to be used for an extended period of time (e.g. IT solutions with perpetual licenses, software maintenance, equipment maintenance, subscription services), and where it is in the state's best interest to have the ability to renegotiate the contract. Renegotiation occurs after completion of the initial term, any renewals, and extension, if applicable.

Agencies subject to N.D.C.C. ch. 54-44.4 procurement laws must ensure that the proper authorization exists within their current procurement process to include the renegotiation option within their contract.

Recommended Language

Term of Contract

This Contract term (Term or Initial Term) begins on *[Month, Day], 20[Year] or its Effective Date*, and ends on *[Month, Day], 20[Year]*.

No Automatic Renewal

This Contract will not automatically renew.

Renewal Option

STATE may renew this Contract upon satisfactory completion of the Initial Term. STATE reserves the right to execute up to *[Number]* options to renew this Contract under the same terms and conditions for a period of *[Number]* months each (Renewal Term).

Extension Option

STATE reserves the right to extend this Contract for an additional period, not to exceed *[Number]* months, beyond the current termination date of this Contract.

Renegotiation Option

Because it is unknown how long the solution and services will be used by STATE and ongoing maintenance and support are required for as long as the system is operational, STATE and CONTRACTOR may renegotiate this Contract. After completion of the initial Term, renewals, and extensions, STATE and CONTRACTOR may renegotiate the pricing and Term of this Contract. New pricing and Term shall be mutually agreed upon by the parties and executed in writing.

If, during the initial Term, any renewal, or extension, STATE determines a realignment of the Term is needed (e.g. to align with STATE'S fiscal biennium), the parties may mutually agree, in writing, to a new Term with a termination date not to exceed the total available length of Contract including its initial Term, renewals, and extensions.

TIME IS OF THE ESSENCE

“Time is of the Essence” is a clause not commonly used in state contracts for goods or services. However, there may be unique circumstances surrounding a contract where time is of the essence. An agency should consult with its assigned legal counsel to determine if time is of the essence.

Generally, if time is not of the essence, reasonable delay in performance does not constitute a material breach; unreasonable delay constitutes a material breach.

Time is of the essence when a Contractor's service(s) must be performed within a specified time and that performance is essential to require performance on the part of the agency (the Contractor needs to do their part to require the agency to do its). The Contractor is not afforded any opportunity to cure a delay in performance and any delay may be a material breach of the contractual terms and conditions. The agency must be prepared to terminate a contract if a material breach occurs and time is of the essence. Waiving “Time is of the Essence” for a Contractor's delay in performance at any time during the contract term may result in a waiver of all “Time is of the Essence” milestones unless otherwise agreed upon, in writing, by the agency and Contractor.

If it is determined that time is of the essence, the following recommended language should be used.

Recommended Language

TIME IS OF THE ESSENCE

CONTRACTOR hereby acknowledges that time is of the essence for performance under this Contract unless otherwise agreed to in writing by the Parties.

TERMINATION

Purpose

The Termination clause identifies the circumstances under which the contract may be cancelled prior to the scheduled termination date specified in the contract.

Termination for Convenience or by Mutual Agreement

Termination for convenience is a simple provision that allows for a party to a contract to terminate the contract without having to provide justification for the termination. Because these are state contracts wherein the agency has dedicated numerous resources to procure the contract, it is to the state's benefit to allow for the unilateral right of termination for convenience by the agency but not accept termination for convenience by the contractor. Termination by mutual agreement is a simple provision that allows for the parties to terminate the contract at any time during the Term of contract so long as both parties mutually agree to the terms of termination.

Early Termination in the Public Interest

Early termination in the public interest allows for an agency to unilaterally terminate the contract that might no longer serve the public policy interests of the state of North Dakota.

Termination for Lack of Funding or Authority

Termination for lack of funding or authority is a **required** clause for agency contracts. This clause allows for an agency to unilaterally terminate the contract in the event there is no longer an appropriation of funds or the agency's authority to contract for the goods or services provided no longer exists. This is vitally important in contracts that may contain Renewal or Extension clauses, or even an Initial Term, that may extend beyond the current biennium. Agencies are only authorized to expend public funds in accordance with specific statutory authority or legislative

Termination under any provision of the contract should be documented in the form of a written amendment.

authority. An agency cannot bind itself to financial obligations beyond its current legislative and statutory authority for each biennium.

Termination for Cause

Termination for cause allows an agency to terminate the contract when the contractor ceases to perform, fails to perform, or breaches a material provision of the contract. It is imperative that agencies document performance matters related to each contract to ensure that termination for cause is justified and can be demonstrated through documentation of breach or contractor's failure to perform.

Recommended Language

TERMINATION

Termination for Convenience or by Mutual Agreement

This Contract may be terminated by STATE upon thirty (30) days' written notice to CONTRACTOR. This Contract may be terminated by mutual consent of both Parties executed in writing.

Early Termination in the Public Interest

STATE is entering this Contract for the purpose of carrying out the public policy of the State of North Dakota, as determined by its Governor, Legislative Assembly, and Courts. If this Contract ceases to further the public policy of the State of North Dakota, STATE, in its sole discretion, by written notice to CONTRACTOR, may terminate this Contract in whole or in part.

Termination for Lack of Funding or Authority

STATE by written notice to CONTRACTOR, may terminate the whole or any part of this Contract under any of the following conditions:

- 1) If funding from federal, state, or other sources is not obtained or continued at levels sufficient to allow for purchase of the services or goods in the indicated quantities or term.
- 2) If federal or state laws or rules are modified or interpreted in a way that the services or goods are no longer allowable or appropriate for purchase under this Contract or are no longer eligible for the funding proposed for payments authorized by this Contract.
- 3) If any license, permit, or certificate required by law or rule, or by the terms of this Contract, is for any reason denied, revoked, suspended, or not renewed.

Termination of this Contract under this subsection is without prejudice to any obligations or liabilities of either Party already accrued prior to termination.

Termination for Cause.

STATE may terminate this Contract effective upon delivery of written notice to CONTRACTOR, or any later date stated in the notice:

- 1) If CONTRACTOR fails to provide services or goods required by this Contract within the time specified or any extension agreed to in writing by STATE; or
- 2) If CONTRACTOR fails to perform any of the other provisions of this Contract, or so fails to pursue the work as to endanger performance of this Contract in accordance with its terms.

The rights and remedies of STATE provided in this subsection are not exclusive and are in addition to any other rights and remedies provided by law or under this Contract.

DELAY OR DEFAULT FORCE MAJEURE (NATURAL DISASTER/ACTS OF GOD)

Purpose

The Force Majeure clause is necessary to identify the obligations of the parties and expectations of the parties if timely performance of the contract is impossible or extremely difficult for reasons beyond a party's control.

Immediate termination is an option, but an agency generally should consider giving a contractor a grace period to resume providing services or goods before terminating the contract and finding a new contractor.

During the COVID-19 Pandemic, a number of contract negotiations involved contractors requesting or proposing language to the Force Majeure clause allowing for exceptions including incidents of pandemics or epidemics. In those instances, optional language is suggested in this manual.

Recommended Language

FORCE MAJEURE

Neither Party shall be held responsible for delay or default caused by fire, riot, terrorism, pandemic (excluding COVID-19), acts of God, or war if the event was not foreseeable through the exercise of reasonable diligence by the affected Party, the event is beyond the Party's reasonable control, and the affected Party gives notice to the other Party promptly upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default. If CONTRACTOR is the affected Party and does not resume

performance within fifteen (15) days or another period agreed between the Parties, then STATE may seek all available remedies, up to and including termination of this Contract pursuant to its Termination Section, and STATE shall be entitled to a pro-rata refund of any amounts paid for which the full value has not been realized, including amounts paid toward software subscriptions, maintenance, or licenses.

NOTE: In the event a contractor requests force majeure exceptions for COVID-19, the following OPTIONAL language may be used IN PLACE OF the recommended language above:

- a. Neither Party shall be held responsible for delay or default caused by fire, riot, terrorism, pandemic (excluding COVID-19), acts of God, or war if the event was not foreseeable through the exercise of reasonable diligence by the affected Party, the event is beyond the Party's reasonable control, and the affected Party gives notice to the other Party promptly upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default. If CONTRACTOR is the affected Party and does not resume performance within fifteen (15) days or another period agreed between the Parties, then STATE may seek all available remedies, up to and including termination of this Contract pursuant to its Termination Section, and STATE shall be entitled to a pro-rata refund of any amounts paid for which the full value has not been realized, including amounts paid toward software subscriptions, maintenance, or licenses.
- b. The Parties agree that any delay or default caused by the COVID-19 pandemic may only forgive a Party's failure to perform under this Contract to the extent it is memorialized through a mutually agreed upon written amendment setting forth the cause, any anticipated duration, and all contractual provisions impacted. If either Party cannot resume performance as contemplated by such an amendment, the other Party may exercise the remedies set forth in the paragraph above.

LIQUIDATED DAMAGES

Purpose

Liquidated damages are not common in contracts for general goods or services; however, liquidated damages are common in IT contracts. A Liquidated Damages clause is used to compensate a party for losses caused by the other party, depending upon the language of the contract. The clause should determine the estimated amount of damages in advance, if a contractor breaches the contract.

Concern

Penalties imposed by contract for any nonperformance thereof are void." N.D.C.C. § 9-08-03.

Contracts may not include a damages provision that fixes the amount of damages in the event of nonperformance or breach of contract, "...except that the parties may agree therein upon an amount presumed to be the damage sustained by a breach in cases in which it would be impracticable or extremely difficult to fix the actual damage."¹⁵ This exception is addressing liquidated damages. In order for liquidated damages to be upheld, three facts must exist at the time the contract was formed or the Liquidated Damages clause was agreed to¹⁶:

1. "[T]he damages stemming from a breach of contract are impractical or extremely difficult to ascertain at the time the contract was entered;
2. there was a reasonable endeavor by the parties to fix their compensation; and
3. the amount stipulated bears a reasonable relation to the probable damages and is not disproportionate to any damages reasonably to be anticipated."

Eddy v. Lee, 312 N.W.2d 326, 330 (N.D. 1981). These requirements are more liberally applied in public contracts.

Liquidated damages provisions that may be enforced against the state are strongly discouraged.

Liquidated damages against the agency should be struck. An agency must have the ability to terminate a contract not only for cause or by mutual consent, but also if funding is reduced or for another legitimate reason without incurring additional liability. There is also questionable appropriations authority to expend

Recommended Language

LIQUIDATED DAMAGES

NOTE: This manual does not offer a sample clause to impose liquidated damages. A Liquidated Damages clause should not be used without the specific advice of the agency's assigned legal counsel.

LIMITATIONS OF LIABILITY

Contracts that limit a contractor's liability to the state are governed by N.D.C.C. § 32-12.2-15. "An agency's authority to agree to a limitation is limited to contracts for the purchase or lease of, or services related to, software, communication, electronic equipment, and economic forecasting." N.D.C.C. § 32-12.2-15(1).

¹⁵ N.D.C.C. § 9-08-04.

¹⁶ "A contract provision, to be upheld as a valid liquidated-damages clause, must not only meet the statutory requirement of § 9-08-04, N.D.C.C., but also must fulfill the requirements imposed by case law." *Eddy v. Lee*, 312 N.W.2d 326, 330 (N.D. 1981).

A proposed limitation of liability for direct damages “must be equal to twice the total value of the contract, unless all parties to the contract agree to an alternative amount.”¹⁷ N.D.C.C. § 32-12.2-15(3).

Limitation(s) of the following types of loss to the state are **prohibited**:

1. Loss resulting from fraud,
2. Loss resulting from intentional or willful misconduct,
3. Breach of confidentiality obligations, or
4. Loss resulting from tangible property damage or personal injury.¹⁸

N.D.C.C. § 32-12.2-15 authorizes agencies to limit a contractor’s liability to the agency (the state). It does not authorize the agency to limit a contractor’s liability to third parties who may bring a claim against the contractor.

An agency should work with its assigned legal counsel to assist in removing any requirement that the state contractually limit the liability of a contractor and to ensure any limitation expressly excludes direct damages that cannot be limited under N.D.C.C. § 32-12.2-15.

Recommended Language

LIMITATION OF LIABILITY

NOTE: This manual does not offer a sample clause for an agency to use to limit the liability of a contractor or third party because these clauses should not be used without the specific advice of the agency’s assigned legal counsel.

Other than those contracts approved under the process outlined in N.D.C.C. § 32-12.2-15, the Risk Management Fund will not cover claims against the state that arise by an indemnity or limitation of liability provision included in a state contract. *See* N.D.C.C. ch. 32-12.2.

For further information on limitations of liability, consult the OMB Risk Management Division’s manual titled “*Guidelines to Managing Contractual Risk*” under “Risk Services” of the “Team Member Resources” tab found at:

<https://ndgov.sharepoint.com/sites/TeamND>.

¹⁷ Liquidated damages provisions and retainage provisions are not subject to limitations of liability, either for direct or indirect damages, pursuant to N.D.C.C. § 32-12.2-15(3).

¹⁸ N.D.C.C. § 32-12.2-15(4).

INDEMNIFICATION

Purpose

The Indemnification clause is often the most contentious in any contract negotiation. The purpose of the Indemnification clause is to allocate responsibility for risks of liability and costs of legal defense that may arise out of a dispute related to a contract. The clause ensures the party exercising control over the activities governed by the contract, and in the best position to implement safety and loss control practices, retains as much risk of liability and costs of legal defense as is commercially reasonable.

The indemnification obligations of the contractor cannot be limited by a Limitation of Liability clause in the contract.

Absent legislative authority or specific statutory authority, an agency may NOT agree to indemnify a party to a contract.

When contracting with political subdivisions, an agency's ability to limit its liability is statutorily constrained. N.D.C.C. § 32-12.2-13. An agency should consult with its assigned legal counsel regarding any contract with a political subdivision.

Recommended Language

INDEMNIFICATION

NOTE: The Risk Management Division of the OMB has sample indemnity and limitation of liability language that should be used in each contract with the state. Depending upon the type of contract, different provisions may be used. It is therefore imperative that you review the language provided by the Risk Management Division and determine which clause is best suited for your specific situation. The Risk Management manual "Guidelines to Managing Contractual Risk" is found under "Risk Services" of the "Team Member Resources" tab at: <https://ndgov.sharepoint.com/sites/TeamND>.

INSURANCE

Purpose

The Insurance clause is necessary to ensure that sufficient coverage is in place to cover all claims against the contractor and any claims and costs that the state might incur. Thus, it is important to identify the types and amounts of insurance coverage that will be maintained by the parties to the contract. An agency should make sure the insurance coverages required by the contract will cover the types of claims that may arise under that contract.

The benefit of requiring a contractor to indemnify the state or have certain levels of insurance coverage, or both, can be easily neutralized if the details of the contractor's insurance policy are

written in a way to effectively exclude from coverage the very claims the state wants covered by the policy. For example, an insurance policy offers little protection if it is offered by an insolvent insurer or if the policy has an unusually high deductible.

It is common for a contractor to omit or remove any clause requiring that the state be named as an additional insured.¹⁹ However, agencies should be aware of the significant risk this poses to the state and decreased protection from liability. Without an additional insured endorsement, the insurance coverage will generally cover claims against the contractor but disregard claims against the state. An attempt to seek indemnity from the contractor personally may be unsuccessful because the contractor may have insufficient assets to fulfill the contractor's duty to indemnify the state.

Some IT contracts may have the contractor hosting the solution or storing state information. These contracts may require cyber-liability insurance and should be specifically discussed with an agency's assigned legal counsel and the OMB Risk Management Division. OMB's Risk Management Division has cyber-liability insurance requirements that are dependent on the type of information the contractor may be hosting or may have access.

Recommended Language

INSURANCE

NOTE: The Risk Management Division of the OMB has sample insurance and cyber-liability insurance (if applicable) language that should be used in each contract with the state. Depending upon the type of contract, different provisions may be used. It is therefore imperative that you review the language provided by the Risk Management Division, and determine, which clause is best suited for your specific situation. Please review the Risk Management Manual "Guidelines to Managing Contractual Risk" found under "Risk Services" of the "Team Member Resources" tab at: <https://ndgov.sharepoint.com/sites/TeamND>.

WORKS FOR HIRE AND WORK PRODUCT

Purpose

The Works for Hire and Work Product clauses establish ownership of work product, materials, and equipment purchased or created under the contract. The reason for this is so the agency gets full value for the amount of public funds expended to purchase or create documents, materials, or equipment under the contract.

¹⁹ "If indemnification is required, the contract must require that the state be endorsed on the contractor's commercial general liability policy as an additional insured or must require an equivalent form of protection for the state." N.D.C.C. § 32-12.2-17.

If a contractor is allowed to retain valuable property that was purchased or created with public funds, the agency should determine whether the contract price should be adjusted to reflect the value retained by the contractor.

Works for hire and work product may not be applicable in every state contract. Works for hire is specifically defined under the United States Copyright Act (Title 17, U.S.C.). The US Copyright Office has more specific information at: <https://www.copyright.gov/>.

Recommended Language

WORKS FOR HIRE

CONTRACTOR acknowledges that all work(s) under this Contract is "work(s) for hire" within the meaning of the United States Copyright Act (Title 17 United States Code) and hereby assigns to STATE all rights and interests CONTRACTOR may have in the work(s) it prepares under this Contract, including any right to derivative use of the work(s). All software and related materials developed by CONTRACTOR in performance of this Contract for STATE shall be the sole property of STATE, and CONTRACTOR hereby assigns and transfers all its right, title, and interest therein to STATE. CONTRACTOR shall execute all necessary documents to enable STATE to protect STATE's intellectual property rights under this section.

WORK PRODUCT

All work product, equipment or materials created for STATE or purchased by STATE under this Contract belong to STATE and must be immediately delivered to STATE at STATE's request upon termination of this Contract.

NOTICE

Purpose

All contracts should contain a notice provision identifying the representative of each party to whom notices required under the contract must be provided.

These contractual notice requirements, however, do not replace or supersede any other statutory notice requirement.

Recommended Language

NOTICE

All notices or other communications required under this Contract must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses:

STATE	CONTRACTOR
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

CONFIDENTIALITY

Purpose

The Confidentiality clause is used by parties to ensure that certain information remains confidential. A clause should explain the obligations of the parties in maintaining, releasing, and discarding information that is confidential.

Regardless the language of the contract, all parties must abide by applicable confidentiality laws.

Contractors frequently ask the agency to keep all information provided by a contractor confidential. The public records law does not allow an agency to deny a request for records unless the records are closed or confidential under a specific law.

Further information regarding public records and meetings may be found at: <https://attorneygeneral.nd.gov/open-records-meetings>.

An agency is without authority to agree to keeping records confidential under a contract that are not specifically excluded from public disclosure in accordance with applicable laws.

Recommended Language

CONFIDENTIALITY

CONTRACTOR shall not use or disclose any information it receives from STATE under this Contract that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Contract or as authorized in advance by STATE. STATE shall not disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of STATE and

CONTRACTOR to maintain confidentiality of information under this section continues beyond the Term of this Contract.

COMPLIANCE WITH PUBLIC RECORD LAWS

Purpose

A state contract should contain a clause notifying a contractor that the contract is subject to the state's public records laws and advise the contractor of its responsibilities under the public records law.

As previously indicated, the parties must comply with the public records laws even if this clause is omitted. Including this clause in the contract places contractors on notice regarding the requirements of the public records laws and prevents misunderstandings about how those laws may apply to certain records.

An agency should consult with its assigned legal counsel to determine whether a contract should also include language notifying a contractor that it could be considered a public entity under N.D.C.C. ch. 44-04 and N.D.C.C. § 44-04-17.1(13)(c) which would subject the contractor to the open meetings laws.

Recommended Language

COMPLIANCE WITH PUBLIC RECORDS LAWS

Under the North Dakota public records law and subject to the Confidentiality clause of this Contract, certain records may be open to the public upon request.

Public records may include: (a) records STATE receives from CONTRACTOR under this Contract, (b) records obtained by either Party under this Contract, and (c) records generated by either Party under this Contract.

CONTRACTOR agrees to contact STATE immediately upon receiving a request for information under the public records law and to comply with STATE's instructions on how to respond to such request.

INDEPENDENT ENTITY

Purpose

The Independent Entity clause clearly defines the relationship between the parties. When an agency hires a contractor, the contract should clearly indicate that the contractor is not acting as a state employee when performing the contract. Otherwise, the state might be required to deduct certain amounts from payments to the contractor and comply with other laws governing employer-employee relationships.

The contract should indicate that the contractor retains sufficient control and discretion over carrying out the activities in the contract and the contractor will not be considered a state employee.

Recommended Language

INDEPENDENT ENTITY

CONTRACTOR is an independent entity under this Contract and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. CONTRACTOR retains sole and absolute discretion in the manner and means of carrying out CONTRACTOR's activities and responsibilities under this Contract, except to the extent specified in this Contract.

ASSIGNMENT AND SUBCONTRACTS

Purpose

The Assignment and Subcontracts clause allows the agency to maintain some control over its choice of the contractor who will provide the goods or services under the contract. A contractor will often bid on a project with the intent of having a subcontractor complete the work. This ultimately may result in inflated costs to the agency; or, if a contract is awarded based on the qualifications of the contractor, but the contractor assigns or transfers those duties to another person who may lack those qualifications, the agency's expectations are frustrated. The clause should identify the obligations of the contractor under the contract that may be assigned (transferred) or delegated to another person.

There may be times when assignment or subcontracts are appropriate. Therefore, an agency may permit assignment, but should require the contractor to obtain the agency's consent before the assignment. For subcontracts, the consent of the agency is not required, but the contract should provide the contractor remains responsible and liable for performance of the contract and for the acts of its subcontractors.

In the event of an assignment request by the contractor, the agency should determine the assignee (the new contractor being granted the assignment) is not a contractor that has been barred from contracting with the state of North Dakota for procurement or bidder violations.

Recommended Language

ASSIGNMENT AND SUBCONTRACTS

CONTRACTOR may not assign or otherwise transfer or delegate any right or duty without STATE's express written consent, provided, however, that CONTRACTOR may assign its rights and obligations hereunder in the event of a change of control or sale of all or substantially all of its assets related to this Contract, whether by merger, reorganization, operation of law, or otherwise. Should Assignee be a business or entity with whom STATE is prohibited from conducting business, STATE shall have the right to terminate in accordance with the Termination for Cause section of this Contract.

CONTRACTOR may enter subcontracts provided that any subcontract acknowledges the binding nature of this Contract and incorporates this Contract, including any attachments. CONTRACTOR is solely responsible for the performance of any subcontractor with whom CONTRACTOR contracts. CONTRACTOR does not have authority to contract for or incur obligations on behalf of STATE.

SPOLIATION (DESTRUCTION OR SEVERE MODIFICATION OF EVIDENCE)

Purpose

The Spoliation clause is included in the contract to require a contractor be responsible for preventing spoliation (destruction or severe modification of evidence), particularly when the scene of an accident or claim is beyond the state's control. It also identifies responsibilities for controlling the scene of an accident or potential claim and for preserving any relevant evidence of the circumstances surrounding the accident or potential claim.

Determining the cause of an accident is important for future loss prevention and for determining responsibility for the accident. Spoliation can interfere with proper investigation of an accident, jeopardize, or nullify applicable insurance coverage, and even result in a separate lawsuit against the party responsible for the spoliation. However, controlling the scene of an accident and preservation of evidence should not take priority over public safety.

A similar clause may be used in service contracts as well as leases. This clause is not required by law and may be omitted when services are provided in locations that are under the state's control.

For further information on spoliation, consult the Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB. The manual can be found under "Risk Services" of the "Team Member Resources" tab at:

<https://ndgov.sharepoint.com/sites/TeamND>.

Recommended Language

SPOLIATION (NOTICE OF POTENTIAL CLAIMS)

CONTRACTOR shall promptly notify STATE of all potential claims that arise or result from this Contract. CONTRACTOR shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect such evidence, including the scene of the accident.

MERGER AND MODIFICATION: CONFLICT IN DOCUMENTS

Purpose

The Merger and Modification: Conflict in Documents clause is necessary to confirm the provisions of the contract supersede any prior oral negotiations and prevent subsequent, unwritten communications from being considered amendments to the contract. This clause also outlines the controlling order (e.g., order of precedence) for documents in the event there is a conflict between the terms and conditions contained within the documents. The clause should also explain how the contract may be amended.

Recommended Language

MERGER AND MODIFICATION – CONFLICT IN DOCUMENTS

This Contract, including the following documents, constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Contract. This Contract may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

Notwithstanding anything herein to the contrary, in the event of any inconsistency or conflict among the documents making up this Contract, the documents must control in this order of precedence:

- a. The terms of this Contract as may be amended;
- b. STATE’s Solicitation Amendment #1 to Request for Proposal (“RFP”) number _____ dated _____;
- c. STATE’s Request for Proposal (“RFP”) number _____, dated _____;
- d. CONTRACTOR’s proposal dated _____ in response to RFP number _____.
- e. All automated end-user agreements (e.g., click-through, shrink-wrap, or browse-wrap) are specifically excluded and null and void. Clicking shall not

represent acknowledgement or agreement to any terms or conditions contained in those agreements.

SEVERABILITY

Purpose

The Severability clause should be included in a contract so that if one or more provisions in the contract are declared illegal, and performance of the contract without the illegal clause is possible, the remaining terms of the contract remain enforceable. Contract termination may be an option if it suited the situation.

Recommended Language

SEVERABILITY

If any term of this Contract is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Contract did not contain that term.

APPLICABLE LAW AND VENUE

Purpose

The Applicable Law and Venue clause is necessary to identify the law governing the contract and the court or courts in which contract disputes may be heard. The goal of this provision is to have a contract interpreted according to North Dakota law (i.e., applicable law) and any dispute resolved in North Dakota state courts (i.e., venue).

Absent legislative authority, an agency may not agree to submit to the jurisdiction of the federal courts, or to the court of another state or foreign country. N.D. Const. art. I, § 9. If an agency were to agree to federal court jurisdiction, the state's 11th Amendment immunity could be waived. Generally, the federal courts lack jurisdiction because a state is not considered a citizen for purposes of diversity jurisdiction.

Subjecting the agency to another state's laws or jurisdiction, or that of a foreign country, may not be in the agency's (the state's) best interests and any risks involved must be weighed against those interests through legal consultation.

If a contractor is unwilling to agree to be bound by North Dakota law or be subject to the jurisdiction of North Dakota courts, the agency must consult with its assigned legal counsel, the Office of Attorney General, and the OMB Risk Management Division.

Recommended Language

APPLICABLE LAW AND VENUE

This Contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Contract must be adjudicated exclusively in the state District Court of Burleigh County, North Dakota. Each Party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens*.

ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

Without specific, legislative authority, agencies are without the authority to bind the state to an alternative dispute resolution process.

Purpose

Occasionally a contractor (or private party) will propose a clause that requires contractual disputes to be resolved through alternative dispute resolution. An agency is without authority to agree to mandatory mediation or arbitration. “The director of [OMB], in consultation with the head of the state agency involved and the attorney general, may agree to submit a claim covered by the state risk management fund to mediation or binding arbitration.” N.D.C.C. § 32-12.2-05.

Although alternative dispute resolution may be helpful as a cost-effective alternative to litigation, the Attorney General does not recommend this type of dispute resolution as the required first step in resolving a dispute. The Attorney General has the authority to determine the best course of action for an agency to resolve a dispute, including instituting litigation as the first option if it is determined to be for the best interests of the state.

“The attorney general and the attorney general’s assistants are authorized to institute and prosecute all cases in which the state is a party, whenever in their judgment it would be for the best interests of the state to do so.” N.D.C.C. § 54-12-02

This is not to say that an agency is prohibited from resolving contractual disputes through a mutually agreed upon process between the agency (in consultation with its assigned legal counsel) and the contractor. Generally, resolving disputes or disagreements at the lowest level is viewed as being in the best interests of all parties.

HOWEVER, it should be noted that mandating any form of alternative dispute resolution as the first step in resolving a dispute, or mandating the agency bind the state to a specific dispute process prior to pursuing litigation in a court of law, is something to which an agency is without authority to agree.

An agency should not waive the right to litigate if the parties are unable reach a resolution or settlement that is authorized by law. Generally, an agency should not waive any right to a jury trial. However, although uncommon, there may be certain contracts that are better suited for a bench trial if litigate. An agency’s assigned legal counsel should be consulted when determining this language.

Recommended Language

ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

By entering this Contract, STATE does not agree to binding arbitration, mediation, or any other form of mandatory Alternative Dispute Resolution. The Parties may enforce the rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

ATTORNEY FEES AND COSTS

Purpose

The Attorney Fees and Costs clause should be used to allocate responsibility for paying attorneys’ fees and costs incurred by the agency in litigation to enforce the contract. Contracts between private parties commonly include this clause however it is reciprocal in nature, awarding attorneys’ fees and costs to the prevailing party. A reciprocal provision in favor of the contractor is not allowed without an appropriation for expenditure of public funds for such purpose.

This type of expense would not be covered by the North Dakota Risk Management fund and could only be paid pursuant to an appropriation for such expenditure.

Recommended Language

ATTORNEY FEES

In the event a lawsuit is initiated by STATE to obtain performance due under this contract, and STATE is the prevailing Party, CONTRACTOR shall, except when prohibited by N.D.C.C. § 28-26-04, pay STATE's reasonable attorney fees and costs in connection with the lawsuit.

NONDISCRIMINATION - COMPLIANCE WITH LAWS

Purpose

The Nondiscrimination – Compliance with Laws clause shall be included in state contracts. Because the public's confidence in its government could be undermined if contractors for the state are allowed to discriminate or violate the laws that other members of the public are expected to follow, failure to comply with these requirements may be deemed a material breach of contract giving the agency the remedy of termination for cause.

The North Dakota Department of Labor and Human Rights is responsible for enforcing North Dakota labor and human rights laws. Wage and hour laws may be found throughout N.D.C.C. Title 34 and N.D.A.C. Chapter 46-02-07. It is in the best interest of the agency to have contractors affirmatively verify the contractor operates in compliance with these requirements.

This clause also addresses a contractor's obligations to timely file any required reports, make required payroll deductions, and timely pay all applicable taxes and premiums, including sales and use taxes, unemployment insurance compensation and workers' compensation premiums as required by law.

This clause also addresses statutory changes enacted by the 68th Legislative Assembly regarding contractors who may participate in boycotting Israel. (*See* N.D.C.C § 54-44.4-15.) HB 1368 prohibits state entities from contracting with companies that engage in commercial actions intended to limit commercial relations with persons doing business in Israel or in Israeli-controlled territories.

Recommended Language

NONDISCRIMINATION – COMPLIANCE WITH LAWS

CONTRACTOR agrees to comply with all applicable federal and state laws, rules, and policies, including those relating to nondiscrimination, accessibility, and civil rights (*See* N.D.C.C. Title 34 – Labor and Employment, specifically N.D.C.C. ch. 34-06.1 Equal Pay for Men and Women).

CONTRACTOR agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes, unemployment compensation and workers' compensation premiums.

CONTRACTOR shall have and keep current all licenses and permits required by law during the Term of this Contract.

CONTRACTOR is prohibited from boycotting Israel for the duration of this Contract. (*See* N.D.C.C. § 54-44.4-15.) CONTRACTOR represents that it does not and will not engage in a boycotting Israel during the term of this Contract. If STATE receives evidence that CONTRACTOR boycotts Israel, STATE shall determine whether the company boycotts Israel. The foregoing does not apply to contracts with a total value of less than \$100,000 or if CONTRACTOR has fewer than ten (10) full-time employees.

CONTRACTOR's failure to comply with this section may be deemed a material breach by CONTRACTOR entitling STATE to terminate in accordance with the Termination for Cause section of this Contract.

STATE AUDIT

Purpose

The State Audit clause informs a contractor of the State Auditor's authority to "...examine the books and accounts of all private institutions with which the state has any dealings so far only as the same related to such dealings." N.D.C.C. § 54-10-19. This clause is included to inform a contractor of the State Auditor's obligations to audit agencies when required under law. An agency is without authority to limit the State Auditor's ability to perform statutory duties and obligations. Agencies should not accept language proposing to limit the number or occurrences of audits conducting under this contract clause.

Recommended Language

STATE AUDIT

Pursuant to N.D.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this Contract are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors, if required. CONTRACTOR shall maintain these records for at least three (3) years following completion of this Contract and be able

to provide them upon reasonable notice. STATE, State Auditor, or Auditor's designee shall provide reasonable notice to CONTRACTOR prior to conducting examination.

COUNTERPARTS

Purpose

The Counterparts clause allows for parties to the contract, often located in different cities or states, may each sign a different, but identical, copy of the contract. In other words, not all parties need to sign the same page or sign in person.

Recommended Language

COUNTERPARTS

This Contract may be executed in multiple, identical counterparts, each of which is deemed an original, and all of which taken together shall constitute one and the same contract.

EFFECTIVE DATE OF AGREEMENT

Purpose

All contracts should contain an effective date which will indicate when work on the contract should begin and when the terms of the contract are enforceable. Contracts may specify a begin date in the Term of Contract clause or a contract may begin on the Effective Date as defined in the Effectiveness of Contract clause.

Recommended Language

EFFECTIVENESS OF CONTRACT

This Contract is not effective until fully executed by both Parties. If no start date is specified in the Term of Contract, the most recent date of the signatures of the Parties shall be deemed the Effective Date.

SIGNATURES

Purpose

The signatures on the contract should match the parties identified in the introduction to the contract. When contracting with a corporation or business, the person who signs the contract should be an officer or other person with authority to act for the corporation or business. If the person is not an officer with apparent authority, insist on a board resolution, power of attorney from an officer, or some documentation showing that the person is authorized to act on behalf of the corporation or business.

All signatures must be dated, accurately reflecting the date on which the contract was signed, and if not signed electronically, written in ink, preferably in blue ink for easy identification of an original signature. The official title or position of the individuals executing the contract should appear below each signature line.

Electronic signatures are provided for in N.D.C.C. ch. 9-16. The state's ITD has created guidelines for agencies to consult when electronic signatures are requested. The ITD guidelines are available at: <https://www.nd.gov/itd/standards/electronic-signature-guidelines>.

CHAPTER 6 – LEASE CLAUSES

This chapter covers leases of real property (i.e. office space, storage space). (Leases for equipment are covered under contracts for goods.)

PARTIES – IDENTIFYING THE PARTIES AND PURPOSE

A lease should begin with a recital identifying the parties to the lease. The state should be identified as follows: “This lease (Lease) is between the State of North Dakota acting through its [agency] (STATE) and [ABC Company] (LANDLORD).”

Use one-word descriptive terms, introduced in the opening clause identifying the parties, to refer to the parties throughout the lease. Check to be sure that references to the parties are consistent throughout the lease. Check to be sure that references to the parties are consistent throughout the lease. An example of an acceptable paragraph identifying the parties is: “This agreement is between the State of North Dakota, acting through its Commissioner of Labor (STATE), and ABC Company (LANDLORD).” Note that when this is done the one-word descriptive term is considered a proper noun and, in most cases, no longer needs to be preceded by the definite article “the.” Example: “LANDLORD and STATE will ...” rather than “The LANDLORD and the STATE will ...”.

Recommended Language

PARTIES

The parties to this lease (Lease) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (LANDLORD);

SCOPE OF LEASE

Purpose

Describe the property to be leased in sufficient detail so that there is no confusion as to the precise location.

Recommended Language

SCOPE OF LEASE

LANDLORD, in consideration of the rent to be paid and the covenants to be performed by STATE, hereby leases to STATE the following described premises (Premises) situated in the city of *[city]*, county of *[county]* and state of North Dakota:

[Insert property description of the specific premises to be leased by agency.]

OWNERSHIP OF PREMISES

Purpose

Identify the individuals who may have an ownership interest in the premises being leased by the state entity. "A lease or rental agreement entered under this section must include a list of all owners of the leased property, including each individual with an ownership interest in a business or businesses that directly or indirectly own the leased property if the individual's aggregate ownership interest in the leased property is ten percent or more." N.D.C.C. § 54-21-24.1.

Recommended Language

OWNERSHIP OF PREMISES

Pursuant to North Dakota Century Code (N.D.C.C.) § 54-21-24.1, LANDLORD identifies the following individual(s) as an owner(s) of the Premises, including each individual(s) having an ownership interest in a business or businesses that directly or indirectly own the Premises if the individual's aggregate ownership interest in the Premises is ten percent or more.

Individual Owner	Business Affiliation	Percentage of Ownership

[Insert individuals and ownership percentage of the specific premises to be leased by agency. Add additional rows if necessary.]

TERM OF LEASE

Purpose

Identify the period during which the agency and landlord are subject to the lease's commitments. An agency generally lacks authority to commit funds beyond the term of the current biennium. A lease may extend beyond the current biennium if the agency has express authority to enter the lease or if the Termination clause in the lease allows the agency to terminate the lease if sufficient funds are unavailable, if the law regarding the lease is changed, or space becomes available in a state-owned government building. See [Termination](#); and N.D.A.G. 77-01. In addition, for most leases, an agency will want to prohibit the landlord from terminating the lease on short notice.

Term of Lease

The Term of Lease clause identifies the start and end of the lease's initial term.

No Automatic Renewal

Leases should only be considered renewed when the agency specifically exercises a unilateral right to renew the lease, both parties mutually agree the lease will be renewed, or the Holding Over clause of the Lease is triggered. Any language (excluding the Holding Over clause) referencing automatic renewal should be struck from a lease. Automatic renewal clauses run the risk of the agency unintentionally entering a renewal term.

Renewal Option

A renewal option is normally used when a multi-year lease is anticipated. A renewal option provides the agency the unilateral right to renew the lease beyond the current lease Term end date. The renewal provision allows the existing lease terms and conditions to be renewed for additional lease terms after the completion of the initial lease term.

When exercising a renewal option, the new term should be specified and acknowledged by the parties in writing in the form of a lease amendment.

Recommended Language

TERM OF LEASE

The term of this Lease (Initial Term) is for a period of *[number]* months, commencing on *[day]* day of *[month]*, *[year]*, and terminating on the *[day]* day of *[month]*, *[year]*.

Renewal Option

STATE may renew this Lease upon satisfactory completion of the Initial Term. STATE reserves the right to execute up to *[Number]* options to renew this Lease under the same terms and conditions for a period of *[Number]* months each (Renewal Term).

HOLDING OVER

Purpose

The Holding Over clause may be necessary if an agency wants to retain possession of a leased premises on a short-term basis under the same lease terms. If an agency remains in possession of the premises after the expiration of the lease, and the landlord accepts rent from the agency, the parties are presumed to have renewed the lease on the same terms and for the same time, not exceeding one year. N.D.C.C. § 47-16-06. Because this statute provides for extension up to one year, agencies are encouraged to use the recommended language specifying any renewal under the Holding Over clause is on a month-to-month basis.

An agency should be reluctant to consider alternatives to this language and should only do so after consulting its assigned legal counsel.

Recommended Language

HOLDING OVER

If STATE remains in possession of the Premises after this Lease expires, and LANDLORD accepts rent from STATE, this Lease shall be deemed renewed on a month-to-month basis with all other terms and conditions of this Lease remaining in effect until otherwise agreed in writing.

RENTAL PAYMENTS

Purpose

The Rental Payments clause identifies the amount of money the agency must pay pursuant to the lease. The lease should indicate the amount **per square foot** for the specific location being leased and provide a total amount per annum that the agency will pay landlord for rent.

This clause should be specific as to when rental payments will be due landlord and to where rental payments may be made by the agency.

Recommended Language

RENTAL PAYMENTS

STATE shall pay rent (Rent) for the Premises, consisting of *[number]* square feet, at *[amount]* per square foot per annum, or *[amount]* per annum.

Rent shall be paid in advance by the 10th day of each month in an amount of *[amount]* which is 1/12 of the annual amount, commencing on the *[day]* day of *[month]*, *[year]* and continuing monthly thereafter for the Term of this Lease.

Rent is payable at the address of LANDLORD, *[insert Landlord's address]*, unless STATE is notified otherwise in writing by LANDLORD.

LANDLORD'S OBLIGATIONS

Purpose

Leases usually contain a Landlord's Obligations clause identifying the duties owed by the landlord to the agency as a tenant. These duties often include utilities, janitorial services, and grounds keeping. The inclusion of these items will largely depend upon how the lease is negotiated. The list of duties identified below is not exhaustive or required, but is merely a suggested starting point, and the agency is encouraged to review the duties and requirements to ensure their needs are met. An agency should, however, make parking access a priority for office space leases.

Recommended Language

LANDLORD'S OBLIGATIONS

- a. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the Premises.
- b. To perform all required maintenance and repairs, including all janitorial services, which shall be done daily, including furnishing of related supplies.
- c. To perform all maintenance and repairs requested by STATE which are related to use and habitability of the Premises.
- d. To keep the walkways and parking areas of the Premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants, and trees on the Premises.
- e. That if other portions of the building are leased to other parties, LANDLORD shall not permit any activity to be conducted in other portions of the building or grounds that will materially interfere with STATE's use and enjoyment of the Premises.
- f. That STATE may install items it deems necessary for maximum and optimum use of the Premises. STATE may, at any time, remove from the Premises all fixtures and other equipment owned by STATE; provided the removal is completed before termination of this Lease, including any Renewal Term. STATE agrees to repair any damages that may be done to the Premises resulting from the removal of these items, if any.

- g. That STATE may place decorations, wall hangings, signs, and directories upon entrance doors, in hallways leading to its Premises, or doors and walls within the Premises.
- h. To furnish *[number]* automobile parking stalls for use by STATE, its agents, or designees, in the lot provided for use by the building tenants.
- i. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the Premises.
- j. To pay all real estate taxes and special assessments on the Premises during the Term of the Lease.

STATE'S OBLIGATIONS

Purpose

Similarly, many leases contain a State's Obligations clause that identifies the duties owed by the agency as a tenant to the landlord. These obligations will also depend, in large part, upon how the lease is negotiated. Obviously, an agency wishing to keep its costs down will want to limit the obligations it is willing to assume.

Recommended Language

STATE's OBLIGATIONS

- a. To pay the Rent when due;
- b. To pay for its own telephone service;
- c. To keep the Premises in a reasonable condition the same as at the commencement of the Term or as it may be put by LANDLORD, except for reasonable use and wear, or damage by fire and unavoidable casualty;
- d. Not to make any unlawful, improper, or offensive use of the Premises, and to observe all the laws of the state of North Dakota and the ordinances of the city of *[Premises location]* in force from time to time relating to the leased Premises;
- e. To permit LANDLORD at all reasonable times to enter and examine the Premises and to make necessary repairs for the protection of the Premises;
- f. To surrender the Premises to LANDLORD at the end of the Term; and, in default of the payment of Rent due or failure to perform its obligations under this Lease, to surrender the Premises upon demand by LANDLORD; and
- g. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by STATE.

TERMINATION OF LEASE

Purpose

A lease should contain a Termination clause so the lease may be cancelled under the appropriate circumstances. An agency should not enter a lease that allows the landlord to terminate the lease with little or no notice to the agency.

Recommended Language

TERMINATION OF LEASE

STATE has no obligation under this Lease for the initial or succeeding terms if the North Dakota Legislature fails to appropriate to STATE sufficient funds to defray the full rental costs. STATE, without any liability, may terminate this Lease by providing thirty (30) days' written notice, if space becomes available within a state-owned government building, if its legislative appropriations are reduced or if its authority to spend its appropriations is reduced or limited by law, government directive (e.g. by Governor for executive branch agencies or agency heads), or by reductions in federal or other grant funds to a point, STATE, in its sole discretion, deems insufficient to pay the full rental cost for the remainder of the Term of this Lease.

During the Term of this Lease or any renewal or extension, STATE may terminate this Lease by providing thirty (30) days' written notice to LANDLORD if LANDLORD fails to comply with any of its obligations under this Lease or if STATE determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other state or federal law or rules.

TERMINATION OF LEASE IN THE EVENT OF DESTRUCTION OF PREMISES

If the leased Premises are destroyed or damaged by fire or the elements to the extent it becomes untenable, unless LANDLORD, within twenty (20) days of the happening of the event, gives written notice of intention to restore the building and fully restores the Premises within a reasonable time then STATE may terminate the Lease. During the time between destruction and restoration of the Premises Rent shall not be due, and if Rent has already been paid, LANDLORD shall refund to STATE all that portion of the prepaid Rent attributable to the time during which STATE was unable to use the Premises for its intended use.

MERGER AND MODIFICATION

Purpose

The Merger and Modification clause is necessary to confirm the provisions of the lease supersede any prior oral negotiations and prevent subsequent, unwritten communications from being considered amendments to the lease. The clause should also explain how the lease may be amended.

Recommended Language

MERGER AND MODIFICATION

This Lease constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Lease. This Lease may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

SEVERABILITY

Purpose

The Severability clause should be included in a lease so that if one or more provisions in the lease are declared illegal, and performance of the lease without the illegal clause is possible, the remaining terms of the lease will remain enforceable. Lease termination could be an option if it suited the situation.

Recommended Language

SEVERABILITY

If any term of this Lease is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Lease did not contain that term.

ASSIGNMENT – SALE OF PREMISES

Purpose

The Assignment – Sale of Premises clause allows an agency to maintain its status as tenant if the landlord sells the premises to another party. This clause also restricts the agency from assigning or subleasing the premises to a third party, excluding other agencies, without the landlord's written consent.

Recommended Language

ASSIGNMENT – SALE OF PREMISES

This Lease must not be assigned or subleased by STATE without LANDLORD’s written consent, unless to another state entity. This Lease does not terminate if the Premises are sold but continues throughout its entire Term, including any exercised or remaining Renewal Term(s).

NOTICE

Purpose

The lease should contain a Notice clause identifying the representative of each contracting party to whom notices required under the lease must be provided. Notice requirements, however, do not replace or supersede any other statutory notice requirement.

Recommended Language

NOTICE

All notices or other communications required under this Lease must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses:

STATE	LANDLORD
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

APPLICABLE LAW AND VENUE

Purpose

The Applicable Law and Venue clause is necessary to identify the law governing the lease and the court or courts in which lease disputes may be heard. The goal of this provision is to have a lease interpreted according to North Dakota law (i.e., applicable law) and any dispute resolved in North Dakota state courts (i.e., venue).

Absent legislative authority, an agency may not agree to submit to the jurisdiction of the federal courts, or to the court of another state or foreign country. N.D. Const. art. I, § 9. If an agency were to agree to federal court jurisdiction, the state’s 11th Amendment immunity could be waived. Generally, the federal courts lack jurisdiction because a state is not considered a citizen for purposes of diversity jurisdiction.

Subjecting the agency to another state’s laws or jurisdiction or that of a foreign country may not be in the agency’s (the state’s) best interests and any risks involved must be weighed against those interests through legal consultation.

If a landlord is unwilling to agree to be bound by North Dakota law or to be subject to the jurisdiction of North Dakota courts, the state agency must consult with its assigned legal counsel, the Office of Attorney General, and the OMB Risk Management Division.

Recommended Language

APPLICABLE LAW AND VENUE

This Lease is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Lease must be adjudicated exclusively in the state District Court of *[Premises location]* County, North Dakota. Each Party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens*.

ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

Purpose

Occasionally a landlord will propose a clause that requires lease disputes to be resolved through alternative dispute resolution. An agency is without authority to agree to mandatory mediation or arbitration. “The director of [OMB], in consultation with the head of the state agency involved and the attorney general, may agree to submit a claim covered by the state risk management fund to mediation or binding arbitration.” N.D.C.C. § 32-12.2-05.

Although alternative dispute resolution may be helpful as a cost-effective alternative to litigation, the Attorney General does not recommend this type of dispute resolution as the required first step

Without specific, legislative authority, agencies are without the authority to bind the state to an alternative dispute resolution process.

in resolving a dispute. The Attorney General has the authority to determine the best course of

action for an agency to resolve a dispute, including instituting litigation as the first option if it is determined to be for the best interests of the state.

“The attorney general and the attorney general’s assistants are authorized to institute and prosecute all cases in which the state is a party, whenever in their judgment it would be for the best interests of the state to do so.” N.D.C.C. § 54-12-02

This is not to say that an agency is prohibited from resolving disputes through a mutually agreed upon process between the agency (in consultation with its assigned legal counsel) and the landlord. Generally, resolving disputes or disagreements at the lowest level is viewed as being in the best interests of all parties.

HOWEVER, it should be noted that mandating any form of alternative dispute resolution as the first step in resolving a dispute, or mandating the agency bind the state to a specific dispute process prior to pursuing litigation in a court of law, is something to which an agency is without authority to agree.

An agency should not waive the right to litigate if the parties are unable reach a resolution or settlement that is authorized by law. Generally, an agency should not waive any right to a jury trial. However, although uncommon, there may be certain lease that are better suited for a bench trial if litigate. An agency’s assigned legal counsel should be consulted when determining this language.

Recommended Language

ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

By entering this Contract, STATE does not agree to binding arbitration, mediation, or any other form of mandatory Alternative Dispute Resolution. The Parties may enforce the rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

SPOILIATION (DESTRUCTION OR SEVERE MODIFICATION OF EVIDENCE)

Purpose

The Spoliation clause is included in a lease to require a landlord be responsible for preventing spoliation (destruction or severe modification of evidence), particularly when the scene of an accident or claim is beyond the state’s control. It also identifies responsibilities for controlling the scene of an accident or potential claim and for preserving any relevant evidence of the circumstances surrounding the accident or potential claim.

Determining the cause of an accident is important for future loss prevention and for determining responsibility for the accident. Spoliation can interfere with proper investigation of an accident, jeopardize, or nullify applicable insurance coverage, and even result in a separate lawsuit against the party responsible for the spoliation. However, controlling the scene of an accident and preservation of evidence should not take priority over public safety.

For further information on spoliation, consult the Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB. The manual can be found under “Risk Services” of the “Team Member Resources” tab at:

<https://ndgov.sharepoint.com/sites/TeamND>.

Recommended Language

SPOILIATION – PRESERVATION OF EVIDENCE

LANDLORD shall promptly notify STATE of all potential claims that arise from or result from this Lease. LANDLORD shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect such evidence, including the scene of an accident.

INDEMNIFICATION

Absent legislative authority or specific statutory authority, an agency may NOT agree to indemnify a party to a lease.

Purpose

The Indemnification clause is often the most contentious in any lease negotiation. The purpose of the clauses is to allocate responsibility for risks of liability and costs of legal defense that may arise out of the lease. The clause ensures that the party exercising control over the activities governed by the lease, and in the best position to implement safety and loss control practices, retains as much risk of liability and costs of legal defense as is commercially reasonable.

When leasing with political subdivisions, an agency’s ability to limit its liability is statutorily constrained. N.D.C.C. § 32-12.2-13. An agency should consult with its assigned legal counsel regarding any lease with a political subdivision.

Recommended Language

INDEMNIFICATION

NOTE: The Risk Management Division of OMB has sample indemnity and limitation of liability language that should be used in each lease with the state. Depending upon the

type of lease, different provisions may be used. It is therefore imperative that you review the language provided by the Risk Management Division and determine which clause is best suited for your specific situation. The Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB can be found under “Risk Services” of the “Team Member Resources” tab at: <https://ndgov.sharepoint.com/sites/TeamND>.

INSURANCE

Purpose

The Insurance clause is necessary to ensure that sufficient coverage is in place to cover all claims against the landlord, and any claims and costs the state might incur. Thus, it is important to identify the types and amounts of insurance coverage that will be maintained by the parties to the lease. An agency should make sure the insurance coverage required by the lease will cover the types of claims that may arise under that lease.

The benefit of requiring a landlord to indemnify the state or have certain levels of insurance coverage, or both, can be easily neutralized if the details of the landlord’s insurance policy are written in a way to effectively exclude from coverage the very claims the state wants covered by the policy. For example, an insurance policy offers little protection if it is offered by an insolvent insurer or if the policy has an unusually high deductible.

It is common for a landlord to omit or remove any clause requiring the state be named as an additional insured.²⁰ However, agencies should be aware of the significant risk this poses to the state and decreased protection from liability. Without an additional insured endorsement, the insurance coverage will generally cover claims against the landlord but disregard claims against the state. An attempt to seek indemnity from the landlord personally may be unsuccessful because the landlord may have insufficient assets to fulfill the landlord’s duty to indemnify the state.

Required Coverages

INSURANCE

NOTE: The Risk Management Division of OMB has sample insurance language that should be used in each lease with the state. Depending upon the type of lease, different provisions may be used. It is therefore imperative that you review the language provided by the Risk Management Division, and determine, which clause is best suited for your specific situation. The Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB can be found under “Risk Services” of the “Team Member Resources” tab at: <https://ndgov.sharepoint.com/sites/TeamND>.

²⁰ “If indemnification is required, the contract must require that the state be endorsed on the contractor’s commercial general liability policy as an additional insured or must require an equivalent form of protection for the state.” N.D.C.C. § 32-12.2-17.

CONFIDENTIALITY

Purpose

The Confidentiality clause is used by parties to ensure that certain information remains confidential. This clause should explain the obligations of the parties in maintaining, releasing, and discarding information that is confidential.

Unique to leases, an agency must also ensure that the landlord understands and acknowledges that some information stored on the premises may be confidential and landlord must protect that information in accordance with state law.

Regardless the language of the lease, all parties must abide by applicable confidentiality laws.

Landlords frequently ask the agency to keep all information provided by a landlord confidential. The public records law does not allow an agency to deny a request for records unless the records are closed or confidential under a specific law.

Further information regarding public records and meetings may be found at: <https://attorneygeneral.nd.gov/open-records-meetings>.

An agency is without authority to agree to keeping records confidential under a contract that are not specifically excluded from public disclosure in accordance with applicable laws.

Recommended Language

CONFIDENTIALITY

LANDLORD shall not use or disclose any information it receives from STATE under this Lease that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Lease or as authorized in advance by STATE. STATE shall not disclose any information it receives from LANDLORD that LANDLORD has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of STATE and LANDLORD to maintain confidentiality of information under this section continues beyond the Term of this Lease.

LANDLORD acknowledges STATE possesses substantial amounts of information at the leased Premises that is confidential pursuant to state law. LANDLORD, if it views, comes into possession of, or otherwise becomes knowledgeable of

confidential information located at the leased Premises, shall maintain the confidentiality of that information and shall refrain from re-disclosing that information to any third party. LANDLORD shall require, by contract, any agent it retains to fulfill its obligations otherwise set out in this Lease to similarly maintain the confidentiality of any information it views, comes into possession or of which otherwise becomes knowledgeable. Those indemnity provisions otherwise set out in this Lease specifically apply to this confidentiality requirement.

COMPLIANCE WITH PUBLIC RECORD LAWS

Purpose

A state lease should contain a clause notifying a landlord the lease is subject to the state public records laws, and advise the landlord of its responsibilities under the public records law.

As previously indicated, the parties must comply with the public records laws even if this clause is omitted. Including this clause in the lease places landlords on notice regarding the requirements of the public records laws and prevents misunderstandings about how those laws may apply to certain records.

An agency should consult with its assigned legal counsel to determine whether a lease should also include language notifying a landlord that it could be considered a public entity under N.D.C.C. ch. 44-04 and N.D.C.C. § 44-04-17.1(13)© which would subject the landlord to the public meetings laws.

Recommended Language

COMPLIANCE WITH PUBLIC RECORDS LAWS

Under the North Dakota public records law and subject to the Confidentiality clause of this Lease, certain records may be open to the public upon request.

Public records may include: (a) records STATE receives from LANDLORD under this Lease, (b) records obtained by either Party under this Lease, and (c) records generated by either Party under this Lease.

LANDLORD agrees to contact STATE immediately upon receiving a request for information under the public records law and to comply with STATE's instructions on how to respond to such request.

STATE AUDIT

Purpose

The State Audit clause informs a landlord of the State Auditor's authority to "...examine the books and accounts of all private institutions with which the state has any dealings so far only as the same related to such dealings." N.D.C.C. § 54-10-19. This clause is included to inform a landlord of the State Auditor's obligations to audit agencies when required under law. An agency is without authority to limit the State Auditor's ability to perform statutory duties and obligations. Agencies should not accept language proposing to limit the number or occurrences of audits conducting under this lease clause.

Recommended Language

STATE AUDIT

Pursuant to N.D.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of LANDLORD relevant to this Lease are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors, if required. LANDLORD shall maintain these records for at least three (3) years following completion of this Lease and be able to provide them upon reasonable notice. STATE, State Auditor, or Auditor's designee shall provide reasonable notice to LANDLORD prior to conducting examination.

COUNTERPARTS

Purpose

The Counterparts clause allows for parties to the lease, often located in different cities or states, may each sign a different, but identical, copy of the lease. In other words, not all parties need to sign the same page or sign in person.

Recommended Language

COUNTERPARTS

This Lease may be executed in multiple, identical counterparts, each of which is be deemed an original, and all of which taken together shall constitute one and the same lease.

EFFECTIVE DATE OF LEASE

Purpose

All leases should contain an effective date which will indicate when the lease should begin, and when the terms of the lease are enforceable.

Recommended Language

EFFECTIVENESS OF LEASE

This Lease is not binding on STATE until it is reviewed and executed by the Office of Attorney General and approved and executed by the Director of Facility Management Division, OMB, as required in N.D.C.C. § 54-21-24.1.

APPROVAL

All leases to which an agency is a party MUST be approved by OMB Facility Management and be reviewed by the Office of Attorney General in compliance with N.D.C.C. § 54-21-24.1 and OMB Facility Management policies and procedures.

The procedure for completing a state office lease may be found under “Leasing Office Space” of the “Purchasing and Leasing” tab found at: <https://ndgov.sharepoint.com/sites/TeamND>.

SIGNATURES

Purpose

The signatures on the lease should match the parties identified in the introduction to the leasing. When leasing with a corporation or business, the person who signs the lease should be an officer or other person with authority to act for the corporation or business. If the person is not an officer with apparent authority, insist on a board resolution, power of attorney from an officer, or some documentation showing the person is authorized to act on behalf of the corporation or business.

All signatures must be dated, accurately reflecting the date on which the lease was signed, and if not signed electronically, written in ink, preferably in blue ink for easy identification of an original signature. The official title or position of the individuals executing the lease should appear below each signature line.

Electronic signatures are provided for in N.D.C.C. ch. 9-16. The state's ITD has created guidelines for state agencies to consult when electronic signatures are requested. The ITD guidelines are available at: <https://www.nd.gov/itd/standards/electronic-signature-guidelines>.

APPENDICES

APPENDIX 1

1. GOODS and SERVICES CONTRACTS

- a. Contract Checklist
- b. Template, Contract

APPENDIX 2

2. PUBLIC IMPROVEMENT (CONSTRUCTION) Contract Checklist

APPENDIX 3

3. LEASES

- a. Agency as Tenant**
 - 1) Lease Checklist
 - 2) Template, Lease
- b. Agency as Landlord**
 - 1) Lease Checklist
 - 2) Template, Lease
- c. Interagency Lease**
 - 1) Lease Checklist
 - 2) Template, Lease

APPENDIX 4

4. INTERAGENCY AGREEMENTS

- a. Agreement Checklist
- b. Template, Agreement

APPENDIX 5

6. JOINT POWERS AGREEMENTS

CONTRACT CHECKLIST

- 1. Does the agency or official have the authority to enter the contract?
- 2. Does the agency have an appropriation for the subject matter of the contract?
- 3. Does the other party have the authority to enter the contract?
- 4. Has the proposed contract been reviewed by the agency's assigned legal counsel?
- 5. Is the contract in writing with all pages numbered?
 - Does the contract contain any exhibits or attachments?
 - Are all the documents appropriately numbered or labeled and attached?
- 6. Are all payment amounts and dates correct?
- 7. Are there any handwritten changes or other alterations to the contract?
 - If so, have all the changes or alterations been initialed by all signers?
- 8. Are the parties properly identified in the introductory paragraph or first clause?
- 9. Has the agreement been checked for the following ambiguities and inconsistencies:
 - If recitals are used, are they unambiguous and consistent with the terms of the contract?
 - Are all references to parties, exhibits and other things internally consistent?
 - Are all references to other clauses, attachments or other applicable documents correct?
- 10. Are all terms unambiguous or clearly defined?
 - Is the contract written in plain English using the present tense and the active voice?
 - Are the terms "shall," "may," and "must" used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
 - Is the connective "and" used properly in the conjunctive?
 - Is "or" used properly in the disjunctive?
 - Is it clear to what any modifier or dependent clause refers?
 - Where particulars are listed, is it clear whether the list is exhaustive?
- 11. If the contract contains a "liquidated damages" provision, was it drafted and approved by the agency's assigned legal counsel?
- 12. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 13. Is the name and title or position of each person signing the document listed below the signature line?
 - Do all signatures match the typed or printed names?
- 14. If contracting with a corporation:
 - Has at least one officer of the corporation signed the document?

- If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- 15. Does the contract specify both the date on which it begins and the date on which it ends?
- 16. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term?
- 17. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- 18. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed as required by law?
- 19. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the contract are assigned among the parties?
- 20. Is approval needed from the Attorney General and the director of the OMB?
- 21. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
 - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

TEMPLATE, CONTRACT

1. PARTIES

The parties to this contract (Contract) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (CONTRACTOR);

2. SCOPE OF WORK

CONTRACTOR, in exchange for the compensation paid by STATE under this Contract, shall provide the following:

[Describe what is to be done under the contract. If the description is too vague, it will be difficult for the state to enforce the contract or establish a breach of contract by the contractor. If the Scope of Work is a lengthy document, you may consider referencing the Scope of Work as a separate exhibit at the end of the contract.]

3. COMPENSATION – PAYMENTS

a. Contractual Amount

STATE shall pay for the accepted services provided by CONTRACTOR under this Contract an amount not to exceed *[Amount]* (Contractual Amount).

The Contractual Amount is firm for the duration of this Contract and constitutes the entire compensation due CONTRACTOR for performance of its obligations under this Contract regardless of the difficulty, materials or equipment required, including fees, licenses, overhead, profit and all other direct and indirect costs incurred by CONTRACTOR, except as provided by an amendment to this Contract.

b. Payment

- 1) Payment made in accordance with this Compensation section shall constitute payment in full for the services and work performed and the deliverables and work(s) provided

under this Contract and CONTRACTOR shall not receive any additional compensation hereunder.

- 2) STATE shall make payment under this Contract within forty-five (45) calendar days after receipt of a correct invoice.
- 3) Payment of an invoice by STATE will not prejudice STATE's right to object to or question that or any other invoice or matter in relation thereto. CONTRACTOR's invoice will be subject to reduction for amounts included in any invoice or payment made which are determined by STATE, on the basis of audits conducted in accordance with the terms of this Contract, not to constitute allowable costs. At STATE's sole discretion, all payments shall be subject to reduction for amounts equal to prior overpayments to CONTRACTOR.
- 4) For any amounts that are or will become due and payable to STATE by CONTRACTOR, STATE reserves the right to deduct the amount owed from payments that are or will become due and payable to CONTRACTOR under this Contract.

NOTE: In the event that your contract will allow for separately billed travel expenses (i.e.: outside of fixed price contract). Modify or delete the following clauses as applicable:

c. Travel

CONTRACTOR acknowledges travel costs are covered by the Contractual Amount and shall not invoice STATE for travel costs.

OR

STATE shall reimburse CONTRACTOR for expenses related to travel at amounts not to exceed those outlined below:

- 1) **Lodging:** Reimbursement shall not exceed the then-current, published GSA rate for the travel location. Copies of receipts are required for lodging reimbursement. STATE shall not reimburse for incidental and miscellaneous expenses charged to the room, including: alcohol, telephone charges, or entertainment (e.g., movies).
- 2) **Transportation:** Air travel shall be reimbursed by STATE at the actual cost of air fare for coach class travel only. CONTRACTOR shall make air travel arrangements at least fourteen (14) days in advance whenever possible. Reimbursement for rented, chartered, or contracted vehicle transportation shall be limited to reasonable rates as determined by STATE.
- 3) **Meals:** Meals shall be paid on a per diem basis for each day of travel at then-current, published GSA per diem rate for the travel location. Per diem for the first and last day of travel shall be paid at seventy-five percent (75%) of the GSA per diem rate.

Requests for per diem payments must include the start and end dates of travel, the location where the services are performed, and the allowable per diem amount for each trip on the billing/invoice.

Payment for any travel expenses that exceed the travel budget as agreed upon by the Parties must be approved by STATE.

d. Prepayment

STATE will not make any advance payments before performance or delivery by CONTRACTOR under this Contract.

e. Payment of Taxes by STATE

STATE is not responsible for and will not pay local, state, or federal taxes. STATE sales tax exemption number is E-2001. STATE will furnish certificates of exemption upon request by the CONTRACTOR.

f. Taxpayer ID

CONTRACTOR'S federal employer ID number is: *[Insert FEIN]*.

g. Purchasing Card

STATE may make payment using a government credit card. CONTRACTOR will accept a government credit card without passing the processing fees for the government credit card back to STATE.

4. TERM OF CONTRACT

This Contract term (Term or Initial Term) begins on *[Month, Day], 20[Year] or its Effective Date*, and ends on *[Month, Day], 20[Year]*.

a. No Automatic Renewal

This Contract will not automatically renew.

Note: Any exercise of an Extension, Renewal, or Renegotiation requires a written contract amendment identifying the amended terms and conditions. Contract amendments should be drafted in consultation with an agency's assigned legal counsel.

b. Renewal Option

NOTE: A Renewal provision is normally used when a multi-year contract is anticipated. The renewal provision allows the contract to be renewed for additional terms after the completion of the initial contract period.

STATE may renew this Contract upon satisfactory completion of the Initial Term. STATE reserves the right to execute up to *[Number]* options to renew this Contract under the same terms and conditions for a period of *[Number]* months each (Renewal Term).

c. Extension Option

Note: An Extension provision is a brief period used to wrap up ongoing work that could not be completed by the end of the contract. It may also be used when all renewal options have been exercised and additional time is needed to close out the Contract.

STATE reserves the right to extend this Contract for an additional period, not to exceed *[Number]* months, beyond the current termination date of this Contract.

d. Renegotiation Option

NOTE: A Renegotiation option would normally be used for a strategic solution/product, for example a critical line-of-business application that is expected to be used for an extended period of time and where it is in the state's best interest to have the ability to renegotiate the contract. Renegotiation occurs after completion of the initial term and any extensions and renewals.

Because it is unknown how long the solution and services will be used by STATE and ongoing maintenance and support are required for as long as the system is operational, STATE and CONTRACTOR may renegotiate this Contract. After completion of the initial Term, renewals, and extensions, STATE and CONTRACTOR may renegotiate the pricing and Term of this Contract. New pricing and Term shall be mutually agreed upon by the parties and executed in writing.

If, during the initial Term, any renewal, or extension, STATE determines a realignment of the Term is needed (e.g. to align with STATE'S fiscal biennium), the parties may mutually agree, in writing, to a new Term with a termination date not to exceed the total available length of Contract including its initial Term, renewals, and extensions.

5. TIME IS OF THE ESSENCE

NOTE: Generally, if time is not of the essence, reasonable delay in performance does not constitute a material breach; unreasonable delay constitutes a material breach. If time is not of the essence, DELETE this clause.

CONTRACTOR hereby acknowledges that time is of the essence for performance under this Contract unless otherwise agreed to in writing by the Parties.

6. TERMINATION

a. Termination for Convenience or by Mutual Agreement

This Contract may be terminated by STATE upon thirty (30) days' written notice to CONTRACTOR. This Contract may be terminated by mutual consent of both Parties executed in writing.

b. Early Termination in the Public Interest

STATE is entering this Contract for the purpose of carrying out the public policy of the State of North Dakota, as determined by its Governor, Legislative Assembly, Agencies and Courts. If this Contract ceases to further the public policy of the State of North Dakota, STATE, in its sole discretion, by written notice to CONTRACTOR, may terminate this Contract in whole or in part.

c. Termination for Lack of Funding or Authority

STATE by written notice to CONTRACTOR, may terminate the whole or any part of this Contract under any of the following conditions:

- 1) If funding from federal, state, or other sources is not obtained or continued at levels sufficient to allow for purchase of the services or goods in the indicated quantities or term.
- 2) If federal or state laws or rules are modified or interpreted in a way that the services or goods are no longer allowable or appropriate for purchase under this Contract or are no longer eligible for the funding proposed for payments authorized by this Contract.
- 3) If any license, permit, or certificate required by law or rule, or by the terms of this Contract, is for any reason denied, revoked, suspended, or not renewed.

Termination of this Contract under this subsection is without prejudice to any obligations or liabilities of either Party already accrued prior to termination.

d. Termination for Cause.

STATE may terminate this Contract effective upon delivery of written notice to CONTRACTOR, or any later date stated in the notice:

- 1) If CONTRACTOR fails to provide services or goods required by this Contract within the time specified or any extension agreed to in writing by STATE; **or**

- 2) If CONTRACTOR fails to perform any of the other provisions of this Contract, or so fails to pursue the work as to endanger performance of this Contract in accordance with its terms.

The rights and remedies of STATE provided in this subsection are not exclusive and are in addition to any other rights and remedies provided by law or under this Contract.

7. FORCE MAJEURE

Neither Party shall be held responsible for delay or default caused by fire, riot, terrorism, pandemic (excluding COVID-19), acts of God, or war if the event was not foreseeable through the exercise of reasonable diligence by the affected Party, the event is beyond the Party's reasonable control, and the affected Party gives notice to the other Party promptly upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default. If CONTRACTOR is the affected Party and does not resume performance within fifteen (15) days or another period agreed between the Parties, then STATE may seek all available remedies, up to and including termination of this Contract pursuant to its Termination Section, and STATE shall be entitled to a pro-rata refund of any amounts paid for which the full value has not been realized, including amounts paid toward software subscriptions, maintenance, or licenses.

NOTE: In the event a contractor requests force majeure exceptions for COVID-19, the OPTIONAL language from the Manual may be used:

8. INDEMNIFICATION

[Please see the "Guidelines to Managing Contractual Risk Manual" of OMB's Risk Management Division found under "Risk Services" of the "Team Member Resources" tab at: <https://ndgov.sharepoint.com/sites/TeamND>.]

9. INSURANCE

[Please see the "Guidelines to Managing Contractual Risk Manual" of OMB's Risk Management Division found under "Risk Services" of the "Team Member Resources" tab at: <https://ndgov.sharepoint.com/sites/TeamND>.]

10. WORKS FOR HIRE

CONTRACTOR acknowledges that all work(s) under this Contract is "work(s) for hire" within the meaning of the United States Copyright Act (Title 17 United States Code) and hereby assigns to STATE all rights and interests CONTRACTOR may have in the work(s) it prepares under this Contract, including any right to derivative use of the work(s). All software and related materials developed by CONTRACTOR in performance of this Contract for STATE shall be the sole property of STATE, and CONTRACTOR hereby assigns and transfers all its right, title, and interest therein to STATE. CONTRACTOR shall execute all necessary documents to enable STATE to protect STATE's intellectual property rights under this section.

11. WORK PRODUCT

All work product, equipment or materials created for STATE or purchased by STATE under this Contract belong to STATE and must be immediately delivered to STATE at STATE's request upon termination of this Contract.

12. NOTICE

All notices or other communications required under this Contract must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses:

STATE	CONTRACTOR
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

13. CONFIDENTIALITY

CONTRACTOR shall not use or disclose any information it receives from STATE under this Contract that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Contract or as authorized in advance by STATE. STATE shall not disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, [N.D.C.C. ch. 44-04](#). The duty of STATE and CONTRACTOR to maintain confidentiality of information under this section continues beyond the Term of this Contract.

14. COMPLIANCE WITH PUBLIC RECORDS LAWS

Under the North Dakota public records law and subject to the Confidentiality clause of this Contract, certain records may be open to the public upon request.

Public records may include: (a) records STATE receives from CONTRACTOR under this Contract, (b) records obtained by either Party under this Contract, and (c) records generated by either Party under this Contract.

CONTRACTOR agrees to contact STATE immediately upon receiving a request for information under the public records law and to comply with STATE's instructions on how to respond to such request.

15. INDEPENDENT ENTITY

CONTRACTOR is an independent entity under this Contract and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. CONTRACTOR retains sole and absolute discretion in the manner and means of carrying out CONTRACTOR's activities and responsibilities under this Contract, except to the extent specified in this Contract.

16. ASSIGNMENT AND SUBCONTRACTS

CONTRACTOR may not assign or otherwise transfer or delegate any right or duty without STATE's express written consent, provided, however, that CONTRACTOR may assign its rights and obligations hereunder in the event of a change of control or sale of all or substantially all of its assets related to this Contract, whether by merger, reorganization, operation of law, or otherwise. Should Assignee be a business or entity with whom STATE is prohibited from conducting business, STATE shall have the right to terminate in accordance with the Termination for Cause section of this Contract.

CONTRACTOR may enter subcontracts provided that any subcontract acknowledges the binding nature of this Contract and incorporates this Contract, including any attachments. CONTRACTOR is solely responsible for the performance of any subcontractor with whom CONTRACTOR contracts. CONTRACTOR does not have authority to contract for or incur obligations on behalf of STATE.

17. SPOILIATION – PRESERVATION OF EVIDENCE

CONTRACTOR shall promptly notify STATE of all potential claims that arise or result from this Contract. CONTRACTOR shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect such evidence, including the scene of an accident.

18. MERGER AND MODIFICATION, CONFLICT IN DOCUMENTS

NOTE: For brevity, only four documents have been included. Please make sure you list all documents to be considered including amendments to the RFP or proposal, Best and Final Offers, Questions and Answers to the RFP, etc. In addition, make sure the order of these documents always has STATE's documents first, and CONTRACTOR's documents last, in order to ensure that STATE's documents always take precedence. Consult with your assigned legal counsel if you have questions on the order of precedence.

This Contract, including the following documents, constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Contract. This Contract may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

Notwithstanding anything herein to the contrary, in the event of any inconsistency or conflict among the documents making up this Contract, the documents must control in this order of precedence:

- a. The terms of this Contract as may be amended;
- b. STATE's Solicitation Amendment #1 to Request for Proposal ("RFP") number _____ dated _____;
- c. STATE's Request for Proposal ("RFP") number _____, dated _____;
- d. CONTRACTOR's proposal dated _____ in response to RFP number _____.
- e. All automated end-user agreements (e.g., click-through, shrink-wrap, or browse-wrap) are specifically excluded and null and void. Clicking shall not represent acknowledgement or agreement to any terms or conditions contained in those agreements.

19. SEVERABILITY

If any term of this Contract is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Contract did not contain that term.

20. APPLICABLE LAW AND VENUE

This Contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Contract must be adjudicated exclusively in the state District Court of Burleigh County, North Dakota. Each Party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens*.

21. ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

By entering this Contract, STATE does not agree to binding arbitration, mediation, or any other form of mandatory Alternative Dispute Resolution. The Parties may enforce the rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

22. ATTORNEY FEES

In the event a lawsuit is instituted by STATE to obtain performance due under this Contract, and STATE is the prevailing Party, CONTRACTOR shall, except when prohibited by N.D.C.C. § 28-26-04, pay STATE's reasonable attorney fees and costs in connection with the lawsuit.

23. NONDISCRIMINATION AND COMPLIANCE WITH LAWS

CONTRACTOR agrees to comply with all applicable federal and state laws, rules, and policies, including those relating to nondiscrimination, accessibility and civil rights. (*See* N.D.C.C. Title 34 – Labor and Employment, specifically N.D.C.C. ch. 34-06.1 Equal Pay for Men and Women.)

CONTRACTOR agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes, unemployment compensation and workers' compensation premiums.

CONTRACTOR shall have and keep current all licenses and permits required by law during the Term of this Contract all licenses and permits required by law.

CONTRACTOR is prohibited from boycotting Israel for the duration of this Contract. (See N.D.C.C § 54-44.4-15.) CONTRACTOR represents that it does not and will not engage in a boycotting Israel during the term of this Contract. If STATE receives evidence that CONTRACTOR boycotts Israel, STATE shall determine whether the company boycotts Israel. The foregoing does not apply to contracts with a total value of less than \$100,000 or if CONTRACTOR has fewer than ten (10) full-time employees.

CONTRACTOR's failure to comply with this section may be deemed a material breach by CONTRACTOR entitling STATE to terminate in accordance with the Termination for Cause section of this Contract.

24. STATE AUDIT

Pursuant to N.D.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this Contract are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors, if required. CONTRACTOR shall maintain these records for at least three (3) years following completion of this Contract and be able to provide them upon reasonable notice. STATE, State Auditor, or Auditor's designee shall provide reasonable notice to CONTRACTOR prior to conducting examination.

25. COUNTERPARTS

This Contract may be executed in multiple, identical counterparts, each of which is be deemed an original, and all of which taken together shall constitute one and the same contract.

26. EFFECTIVENESS OF CONTRACT

This Contract is not effective until fully executed by both Parties. If no start date is specified in the Term of Contract, the most recent date of the signatures of the Parties shall be deemed the Effective Date.

CONTRACTOR	STATE OF NORTH DAKOTA
<i>[insert business]</i>	Acting through its <i>[insert agency]</i>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

CONSTRUCTION CONTRACT CHECKLIST

- 1. If using an AIA®, EJCDC®, or other contractor-provided contract, has an appropriate addendum been drafted by the agency's assigned legal counsel?
- 2. Have all required bonds been provided in a legally enforceable form?
 - If required, is a proper performance bond attached?
- 3. Are the terms of the bond adequate to guarantee all payments required by the contract?
- 4. Does the bond guarantee payment of interest on bills and claims not paid within 90 days?
- 5. Does the bond include a guarantee of payment of workers' compensation premiums?
- 6. Have all necessary licenses and permits been verified?
- 7. Are copies of the contractor's license or renewal certificate and contractor's bond attached?
- 8. Has a certificate been filed with the state by the contractor showing payment of state taxes?
- 9. Unless prohibited by law, does the contract include clauses requiring preference for North Dakota residents, with first preference given to veterans, and for materials produced in the state?
- 10. Does the agency or official have the authority to enter the contract?
 - Have sufficient funds been appropriated?
- 11. Does the other party have the authority to enter the contract?
- 12. Has the proposed contract been reviewed by the agency's assigned legal counsel?
- 13. Is the contract in writing with all pages numbered?
 - If there are any exhibits or attachments referred to in the contract, are all the documents attached?
- 14. Are there any mistakes in addition or other mistakes in connection with payment amounts or other numbers?
- 15. Are there any handwritten changes or other alterations to the contract?
 - If so, have all the changes or alterations been initialed by all signers?
- 16. Are the parties identified in the introductory paragraph or first clause?
- 17. Has the agreement been checked for the following ambiguities and inconsistencies:
 - If recitals are used, are they unambiguous and consistent with the terms of the contract?
 - Are all references to parties, exhibits and other things internally consistent?
- 18. Are all terms unambiguous or clearly defined?
 - Is the contract written in plain English using the present tense and the active voice?

- Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
 - Is the connective “and” used properly in the conjunctive?
 - Is “or” used properly in the disjunctive?
 - Is it clear to what any modifier or dependent clause refers?
 - Where particulars are listed, is it clear whether the list is exhaustive?
19. If the contract contains a “liquidated damages” provision, are damages otherwise difficult to estimate in the event of a breach?
20. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
21. Is the name and title or position of each person signing the document listed below the signature line?
- Do all signatures match the typed or printed names?
22. If contracting with a corporation:
- Has at least one officer of the corporation signed the document?
 - If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
23. Does the contract specify both the date on which it begins and the date on which it ends?
24. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term, a provision terminating the contract without penalty if sufficient funds are not appropriated or otherwise made available, or a provision permitting termination without cause upon notice to the other party?
25. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
26. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed, bonded, or permitted as required by law or otherwise noncompliant with the law?
27. Is there an acceptable indemnification provision indicating how risks arising out of the contract are assigned among the parties?
28. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
29. Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?
- Has the state struck the standard “waiver of subrogation” language? State should not waive subrogation.
 - Is the contractor required to carry builder’s risk or all risk insurance coverage?

LEASE CHECKLIST – AGENCY AS TENANT

- 1. Have OMB and the Office of Attorney General approved the lease?
- 2. Does the lease adequately describe the premises?
- 3. Does the lease identify ownership in accordance with the requirements of N.D.C.C. § 54-21-24.1?
- 4. If a lease requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term?
- 5. Regardless of the specified term of the lease, does the lease include an acceptable termination clause permitting the state to terminate the lease at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- 6. Are the terms and amount of payment stated and correctly calculated?
 - If based on square footage, is the square footage also stated?
- 7. Is the responsibility for utilities, repairs and maintenance, janitorial service, snow removal, etc. clearly stated?
 - Is there a clause governing availability of parking?
 - Is the landlord's responsibility for fire or other insurance stated?
 - Is there a clause governing events of damage or destruction to property?
- 8. Is there a clause concerning accessibility requirements and compliance with ADA?
- 9. Is the lease in writing with all pages numbered?
 - Does the lease contain any exhibits or attachments?
 - Are all the documents appropriately numbered or labeled and attached?
- 10. Are the parties identified in the introductory paragraph or first clause?
- 11. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 12. Is the name and title of position of each person signing the lease listed below the signature line?
 - Do all the signatures match the typed or printed names?
- 13. If leasing from a corporation:
 - Has at least one officer of the corporation signed the document?
 - If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- 14. Does the lease specify both the date on which it begins and the date on which it ends?
- 15. Can the state terminate the lease if it is unable to fulfill any term of the lease, or if the landlord fails to fulfill its obligations under the lease, or if the state determines it must relocate to comply with the Americans with Disabilities Act of 1990 or any rules adopted under the Act, or with any other state or federal laws or rules?

- 16. Is there an acceptable indemnification and hold harmless provision indicating how risks arising from the lease are assigned among the parties?
- 17. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
 - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

TEMPLATE, LEASE (AGENCY AS TENANT)

1. PARTIES

The parties to this lease (Lease) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (LANDLORD);

2. SCOPE OF LEASE

LANDLORD, in consideration of the rent to be paid and the covenants to be performed by STATE, hereby leases to STATE the following described premises (Premises) situated in the city of *[city]*, county of *[county]* and state of North Dakota:

[Insert property description of the specific premises to be leased by agency.]

3. OWNERSHIP OF PREMISES

Pursuant to North Dakota Century Code (N.D.C.C.) § 54-21-24.1, LANDLORD identifies the following individual(s) as an owner(s) of the Premises, including each individual(s) having an ownership interest in a business or businesses that directly or indirectly own the Premises if the individual's aggregate ownership is the Premises is ten percent or more.

Individual Owner	Business Affiliation	Percentage of Ownership

[Insert individuals and ownership percentage of the specific premises to be leased by agency. Add additional rows if necessary.]

4. TERM OF LEASE

The term of this Lease (Initial Term) is for a period of *[number]* months, commencing on *[day]* day of *[month]*, *[year]*, and terminating on the *[day]* day of *[month]*, *[year]*.

Renewal Option

STATE may renew this Lease upon satisfactory completion of the Initial Term. STATE reserves the right to execute up to *[Number]* options to renew this Lease under the same terms and conditions for a period of *[Number]* months each (Renewal Term).

4. HOLDING OVER

If STATE remains in possession of the Premises after this Lease expires, and LANDLORD accepts rent from STATE, this Lease shall be deemed renewed on a month-to-month basis with all other terms and conditions of this Lease remaining in effect until otherwise agreed in writing.

5. RENTAL PAYMENTS

STATE shall pay rent (Rent) for the Premises, consisting of *[number]* square feet, at *[amount]* per square foot per annum, or *[amount]* per annum.

Rent shall be paid in advance by the 10th day of each month in an amount of *[amount]* which is 1/12 of the annual amount, commencing on the *[day]* day of *[month]*, *[year]* and continuing monthly thereafter for the Term of this Lease.

Rent is payable at the address of LANDLORD, *[insert landlord's address]*, unless STATE is notified otherwise in writing by LANDLORD.

6. LANDLORD'S OBLIGATIONS

- a. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the Premises.
- b. To perform all required maintenance and repairs, including all janitorial services, which shall be done daily, including furnishing of related supplies.
- c. To perform all maintenance and repairs requested by STATE which are related to use and habitability of the Premises.
- d. To keep the walkways and parking areas of the premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants, and trees on the Premises.
- e. That if other portions of the building are leased to other parties, LANDLORD shall not permit any activity to be conducted in other portions of the building or grounds that will materially interfere with STATE's use and enjoyment of the Premises.
- f. That STATE may install items it deems necessary for maximum and optimum use of the premises. STATE may, at any time, remove from the premises all fixtures and other equipment owned by STATE; provided the removal is completed before termination of this Lease, including any Renewal Term. STATE agrees to repair

any damages that may be done to the premises resulting from the removal of these items, if any.

- g. That STATE may place decorations, wall hangings, signs, and directories upon entrance doors, in hallways leading to its premises, or doors and walls within the Premises.
- h. To furnish *[number]* automobile parking stalls for use by STATE, its agents or designees, in the lot provided for use by the building tenants.
- i. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the Premises.
- j. To pay all real estate taxes and special assessments on the Premises during the terms of the Lease.

7. STATE'S OBLIGATIONS

- a. To pay the Rent when due.
- b. To pay for its own telephone service.
- c. To keep the Premises in a reasonable condition the same as at the commencement of the Term or as it may be put by LANDLORD, except for reasonable use and wear, or damage by fire and unavoidable casualty.
- d. Not to make any unlawful, improper, or offensive use of the Premises, and to observe all the laws of the State of North Dakota and the ordinances of the city of *[Premises location]* in force from time to time relating to the leased Premises.
- e. To permit LANDLORD at all reasonable times to enter and examine the Premises and to make necessary repairs for the protection of the Premises.
- f. To surrender the Premises to LANDLORD at the end of the Term; and, in default of the payment of Rent due or failure to perform its obligations under this Lease, to surrender the Premises upon demand by LANDLORD.
- g. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by STATE.

8. TERMINATION OF LEASE

STATE has no obligation under this Lease for the initial or succeeding terms if the North Dakota Legislature fails to appropriate to STATE sufficient funds to defray the full rental costs. STATE, without any liability, may terminate this Lease by providing thirty (30) days' written notice, if

space becomes available within a state-owned government building, if its legislative appropriations are reduced or if its authority to spend its appropriations is reduced or limited by law or by reductions in federal or other grant funds to a point STATE, in its sole discretion, deems insufficient to pay the full rental cost for the remainder of the Term of this Lease.

During the Term of this Lease or any renewal or extension, STATE may terminate this Lease by providing thirty (30) days' written notice to LANDLORD, if LANDLORD fails to comply with any of its obligations under this Lease, or if STATE determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other state or federal law or rules.

9. TERMINATION OF LEASE IN THE EVENT OF DESTRUCTION OF PREMISES

If the leased Premises are destroyed or damaged by fire or the elements to the extent they become untenable, unless LANDLORD, within twenty (20) days of the happening of the event, gives written notice of intention to restore the building and fully restores the Premises within a reasonable time then STATE may terminate the Lease. During the time between destruction and restoration of the Premises Rent will not be due, and if Rent has already been paid LANDLORD shall refund to STATE all that portion of the prepaid Rent attributable to the time during which STATE was unable to use the Premises for its intended use.

10. MERGER AND MODIFICATION

This Lease constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Lease. This Lease may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

11. SEVERABILITY

If any term of this Lease is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Lease did not contain that term.

12. ASSIGNMENT – SALE OF PREMISES

This Lease must not be assigned or subleased by STATE without LANDLORD's written consent unless to another state entity. This Lease does not terminate if the Premises are sold but continues throughout its entire Term, including any exercised or remaining Renewal Term(s).

13. NOTICE

All notices or other communications required under this Lease must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses:

STATE	LANDLORD
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

14. APPLICABLE LAW AND VENUE

This Lease is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Lease must be adjudicated exclusively in the state District Court of *[Premises location]* County, North Dakota. Each Party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens*.

15. ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

By entering this Lease, STATE does not agree to binding arbitration, mediation, or any other form of mandatory Alternative Dispute Resolution. The Parties may enforce the rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

16. SPOILIATION – PRESERVATION OF EVIDENCE

LANDLORD shall promptly notify STATE of all potential claims that arise from or result from this Lease. LANDLORD shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect such evidence, including the scene of an accident.

17. INDEMNIFICATION

[Please see the “Guidelines to Managing Contractual Risk Manual” of OMB’s Risk Management Division found under “Risk Services” of the “Team Member Resources” tab at: <https://ndgov.sharepoint.com/sites/TeamND.>]

18. INSURANCE

[Please see the “Guidelines to Managing Contractual Risk Manual” of OMB’s Risk Management Division found under “Risk Services” of the “Team Member Resources” tab at: <https://ndgov.sharepoint.com/sites/TeamND.>]

19. CONFIDENTIALITY

LANDLORD shall not use or disclose any information it receives from STATE under this Lease that STATE has previously identified as confidential or exempt from mandatory public disclosure

except as necessary to carry out the purposes of this Lease or as authorized in advance by STATE. STATE shall not disclose any information it receives from LANDLORD that LANDLORD has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of STATE and LANDLORD to maintain confidentiality of information under this section continues beyond the Term of this Lease.

LANDLORD acknowledges that STATE possesses substantial amounts of information at the leased Premises that is confidential pursuant to state law. LANDLORD, if it views, comes into possession of, or otherwise becomes knowledgeable of confidential information located at the leased Premises, shall maintain the confidentiality of that information and shall refrain from re-disclosing that information to any third party. LANDLORD shall require, by contract, any agent it retains to fulfill its obligations otherwise set out in this Lease to similarly maintain the confidentiality of any information it views, comes into possession or of which otherwise becomes knowledgeable. Those indemnity provisions otherwise set out in the Lease agreement specifically apply to this confidentiality requirement.

20. COMPLIANCE WITH PUBLIC RECORDS LAWS

Under the North Dakota public records law and subject to the Confidentiality clause of this Lease, certain records may be open to the public upon request.

Public records may include: (a) records STATE receives from LANDLORD under this Lease, (b) records obtained by either Party under this Lease, and (c) records generated by either Party under this Lease.

LANDLORD agrees to contact STATE immediately upon receiving a request for information under the public records law and to comply with STATE's instructions on how to respond to such request.

21. STATE AUDIT

Pursuant to N.C.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of LANDLORD relevant to this Lease are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors, if required. LANDLORD shall maintain all of these records for at least three (3) years following completion of this Lease and be able to provide them upon reasonable notice. STATE, State Auditor, or Auditor's designee shall provide reasonable notice to LANDLORD prior to conducting examination.

22. COUNTERPARTS

This Lease may be executed in multiple, identical counterparts, each of which is be deemed an original, and all of which taken together shall constitute one and the same lease.

23. EFFECTIVENESS OF LEASE

This Lease is not binding on STATE until it is reviewed and executed by the Office of Attorney General and approved and executed by the Director of Facility Management Division, OMB, as required in N.D.C.C. § 54-21-24.1.

LANDLORD	STATE OF NORTH DAKOTA
<i>[insert business]</i>	Acting through its <i>[insert agency]</i>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

REVIEWED BY ATTORNEY GENERAL	APPROVED BY OMB FACILITY MANAGEMENT
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

LEASE CHECKLIST – AGENCY AS LANDLORD

- 1. Have OMB and the Office of Attorney General approved the lease?
- 2. Does the lease adequately describe the premises?
- 3. Are the terms and amount of payment stated and correctly calculated?
 - If based on square footage, is the square footage also stated?
- 4. Is the responsibility for utilities, repairs and maintenance, janitorial service, snow removal, etc. clearly stated?
 - Is there a clause governing availability of parking?
 - Is the tenant's responsibility for fire or other insurance stated?
 - Is there a clause governing events of damage or destruction to property?
- 5. Is there a clause concerning accessibility requirements and compliance with ADA?
- 6. Is the lease in writing with all pages numbered?
 - Does the lease contain any exhibits or attachments?
 - Are all the documents appropriately numbered or labeled and attached?
- 7. Are the parties identified in the introductory paragraph or first clause?
- 8. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 9. Is the name and title of position of each person signing the lease listed below the signature line?
 - Do all the signatures match the typed or printed names?
- 10. If leasing to a corporation:
 - Has at least one officer of the corporation signed the document?
 - If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- 11. Does the lease specify both the date on which it begins and the date on which it ends?
- 12. Is there an acceptable indemnification and hold harmless provision indicating how risks arising from the lease are assigned among the parties?
- 13. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
 - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

TEMPLATE, LEASE (AGENCY AS LANDLORD)

1. PARTIES

The parties to this lease (Lease) are the state of North Dakota, acting through its *Department/Office* (LANDLORD or STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (TENANT);

2. SCOPE OF LEASE

LANDLORD, in consideration of the rent to be paid and the covenants to be performed by TENANT, hereby leases to TENANT the following described premises (Premises) situated in the city of *[city]*, county of *[county]* and state of North Dakota:

[Insert property description of the specific premises to be leased by agency.]

3. TERM OF LEASE

The term of this Lease (Term) is for a period of *[number]* months, commencing on *[day]* day of *[month]*, *[year]*, and terminating on the *[day]* day of *[month]*, *[year]*.

4. HOLDING OVER

If TENANT remains in possession of the Premises after this Lease expires, and LANDLORD accepts rent from TENANT, this Lease shall be deemed renewed on a month-to-month basis with all other terms and conditions of this Lease remaining in effect until otherwise agreed in writing.

5. RENTAL PAYMENTS

TENANT will pay rent for the Premises, consisting of *[number]* square feet, at *[amount]* per square foot per annum, or *[amount]* per annum.

Rent will be paid in advance by the 10th day of each month in an amount of *[amount]* which is 1/12 of the annual amount, commencing on the *[day]* day of *[month]*, *[year]* and continuing monthly thereafter for the Term of this Lease.

Rent is payable at the address of LANDLORD, *[insert landlord's address]*, unless TENANT is notified otherwise in writing by LANDLORD.

6. LANDLORD'S OBLIGATIONS

- a. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the Premises.
- b. To perform all required maintenance and repairs, including all janitorial services, which will be done on a daily basis, including furnishing of related supplies.
- c. To perform all maintenance and repairs requested by TENANT which are related to use and habitability of the Premises.
- d. To keep the walkways and parking areas of the premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants, and trees on the Premises.
- e. That if other portions of the building are leased to other parties, LANDLORD shall not permit any activity to be conducted in other portions of the building or grounds that will materially interfere with TENANT's use and enjoyment of the Premises.
- f. That TENANT may install items that it deems necessary for maximum and optimum use of the premises. TENANT may, at any time, remove from the premises all fixtures and other equipment owned by TENANT; provided the removal is completed before termination of this Lease or any renewal or extension. TENANT agrees to repair any damages that may be done to the premises resulting from the removal of the items, if any.
- g. That TENANT may place decorations, wall hangings, signs and directories upon entrance doors, in hallways leading to its premises, or doors and walls within the Premises.
- h. To furnish *[number]* automobile parking stalls for use by TENANT, its agents or designees, in the lot provided for use by the building tenants.
- i. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the Premises.
- j. To pay all real estate taxes and special assessments on the Premises during the terms of the Lease.

7. TENANT'S OBLIGATIONS

- a. To pay the rent when due.
- b. To pay for its own telephone service.

- c. To keep the Premises in reasonable condition the same as at the commencement of the Term or as it may be put by LANDLORD, except for reasonable use and wear, or damage by fire and unavoidable casualty.
- d. Not to make any unlawful, improper, or offensive use of the Premises, and to observe all the laws of the State of North Dakota and the ordinances of the city of *[Premises location]* in force from time to time relating to the leased Premises.
- e. To permit LANDLORD at all reasonable times to enter and examine the Premises and to make necessary repairs for the protection of the Premises.
- f. To surrender the Premises to LANDLORD at the end of the Term; and, in default of the payment of rent due or failure to perform its obligations under this Lease, to surrender the Premises upon demand by LANDLORD.
- g. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by TENANT.

8. TERMINATION OF LEASE

During the Term of this Lease or any renewal or extension, TENANT may terminate this Lease by providing thirty (30) days' written notice to LANDLORD, if LANDLORD fails to comply with any of its obligations under this Lease, or if TENANT determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other state or federal law or rules.

LANDLORD has no obligation under this Lease for the initial or succeeding terms and may terminate the Lease if the North Dakota Legislature directs the LANDLORD to utilize the Premises in a manner inconsistent with this Lease. LANDLORD, without any liability, may terminate this Lease with proper notice to TENANT if Legislative or Federal government guidance, if LANDLORD, in its sole discretion, deems necessary. Proper notice to TENANT shall be thirty (30) days' written notice unless LANDLORD is otherwise directed by Legislative or Federal government instructions to terminate under different time conditions.

9. TERMINATION OF LEASE IN THE EVENT OF DESTRUCTION OF PREMISES

If the Premises are destroyed or damaged by fire or the elements to the extent they become untenable, this Lease will terminate immediately, unless LANDLORD, within twenty (20) days of the happening of the event, gives written notice of intention to restore the building and fully restores the Premises within a reasonable time. During the term between destruction and restoration of the Premises rent will not be due, and if rent has already been paid LANDLORD shall refund to TENANT all that portion of the prepaid rent attributable to the time during which TENANT was unable to use the Premises for its intended use.

10. MERGER AND MODIFICATION

This Lease constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Lease. This Lease may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

11. SEVERABILITY

If any term of this Lease is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Lease did not contain that term.

12. ASSIGNMENT – SALE OF PREMISES

This Lease must not be assigned or subleased by TENANT without LANDLORD’s written consent. This Lease does not terminate if the Premises are sold but continues throughout the entire Term.

13. NOTICE

All notices or other communications required under this Lease must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses:

TENANT	LANDLORD
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

14. APPLICABLE LAW AND VENUE

This Lease is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Lease must be adjudicated exclusively in the state District Court of *[Premises location]* County, North Dakota. Each Party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens*.

15. ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

By entering into this Lease, LANDLORD does not agree to binding arbitration, mediation, or any other form of mandatory Alternative Dispute Resolution. The Parties may enforce the rights and remedies in judicial proceedings. LANDLORD does not waive any right to a jury trial.

16. SPOILIATION – PRESERVATION OF EVIDENCE

TENANT shall promptly notify LANDLORD of all potential claims that arise from or result from this Lease. TENANT shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to LANDLORD the opportunity to review and inspect such evidence, including the scene of an accident.

17. INDEMNIFICATION

[Please see the “Guidelines to Managing Contractual Risk Manual” of OMB’s Risk Management Division found under “Risk Services” of the “Team Member Resources” tab at: <https://ndgov.sharepoint.com/sites/TeamND.>]

18. INSURANCE

[Please see the “Guidelines to Managing Contractual Risk Manual” of OMB’s Risk Management Division found under “Risk Services” of the “Team Member Resources” tab at: <https://ndgov.sharepoint.com/sites/TeamND.>]

19. CONFIDENTIALITY

TENANT shall not use or disclose any information it receives from LANDLORD under this Lease that LANDLORD has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Lease or as authorized in advance by LANDLORD. LANDLORD shall not disclose any information it receives from TENANT that TENANT has previously identified as confidential and that LANDLORD determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of TENANT and LANDLORD to maintain confidentiality of information under this section continues beyond the Term of this Lease.

20. COMPLIANCE WITH PUBLIC RECORDS LAWS

Under the North Dakota public records law and subject to the Confidentiality clause of this Lease, certain records may be open to the public upon request.

Public records may include: (a) records LANDLORD receives from TENANT under this Lease, (b) records obtained by either Party under this Lease, and (c) records generated by either Party under this Lease.

TENANT agrees to contact LANDLORD immediately upon receiving a request for information under the public records law and to comply with LANDLORD’s instructions on how to respond to such request.

21. STATE AUDIT

Pursuant to N.D.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of TENANT relevant to this Lease are subject to examination by the North Dakota State Auditor, the Auditor’s designee, or Federal auditors, if required. TENANT shall maintain these records for at least three (3) years following completion of this Lease and be able to provide them upon reasonable notice. STATE, State Auditor, or Auditor’s designee shall provide reasonable notice to TENANT prior to conducting examination.

22. COUNTERPARTS

This Lease may be executed in multiple, identical counterparts, each of which is be deemed an original, and all of which taken together shall constitute one and the same lease.

23. EFFECTIVENESS OF LEASE

This Lease is not binding on LANDLORD until it is reviewed and executed by the Office of Attorney General and approved and executed by the Director of Facility Management Division, OMB, as required in N.D.C.C. § 54-21-24.1.

LANDLORD	STATE OF NORTH DAKOTA
<i>[insert business]</i>	Acting through its <i>[insert agency]</i>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

REVIEWED BY ATTORNEY GENERAL	APPROVED BY OMB FACILITY MANAGEMENT
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

LEASE CHECKLIST – INTERAGENCY LEASE

- 1. Have OMB and the Office of Attorney General approved the lease?
- 2. Does the lease adequately describe the premises?
- 3. If a lease requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term?
- 4. Regardless of the specified term of the lease, does the lease include an acceptable termination clause permitting either party to terminate the lease at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- 5. Are the terms and amount of payment stated and correctly calculated?
 - If based on square footage, is the square footage also stated?
- 6. Is the responsibility for utilities, repairs and maintenance, janitorial service, snow removal, etc. clearly stated?
 - Is there a clause governing availability of parking?
- 7. Is there a clause concerning accessibility requirements and compliance with ADA?
- 8. Is the lease in writing with all pages numbered?
 - Does the lease contain any exhibits or attachments?
 - Are all the documents appropriately numbered or labeled and attached?
- 9. Are the parties identified in the introductory paragraph or first clause?
- 10. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 11. Is the name and title of position of each person signing the lease listed below the signature line?
 - Do all the signatures match the typed or printed names?
- 12. Does the lease specify both the date on which it begins and the date on which it ends?
- 13. Can either party terminate the lease if it is unable to fulfill any term of the lease, or if the landlord fails to fulfill its obligations under the lease, or if the party determines it must relocate to comply with the Americans with Disabilities Act of 1990 or any rules adopted under the Act, or with any other state or federal laws or rules?

TEMPLATE, LEASE (INTERAGENCY)

1. PARTIES

The parties to this lease (Lease) are the state of North Dakota, acting through its *Department/Office* (TENANT), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (LANDLORD);

2. SCOPE OF LEASE

LANDLORD, in consideration of the rent to be paid and the covenants to be performed by TENANT, hereby leases to TENANT the following described premises (Premises) situated in the city of *[city]*, county of *[county]* and state of North Dakota:

[Insert property description of the specific premises to be leased by agency.]

3. TERM OF LEASE

The term of this Lease (Term) is for a period of *[number]* months, commencing on *[day]* day of *[month]*, *[year]*, and terminating on the *[day]* day of *[month]*, *[year]*.

4. HOLDING OVER

If TENANT remains in possession of the Premises after this Lease expires, and LANDLORD accepts rent from TENANT, this Lease shall be deemed renewed on a month-to-month basis with all other terms and conditions of this Lease remaining in effect until otherwise agreed in writing.

5. RENTAL PAYMENTS

TENANT will pay rent for the Premises, consisting of *[number]* square feet, at *[amount]* per square foot per annum, or *[amount]* per annum.

Rent will be paid in advance by the 10th day of each month in an amount of *[amount]* which is 1/12 of the annual amount, commencing on the *[day]* day of *[month]*, *[year]* and continuing monthly thereafter for the Term of this Lease.

Rent is payable at the address of LANDLORD, *[insert landlord's address]*, unless TENANT is notified otherwise in writing by LANDLORD.

6. LANDLORD'S OBLIGATIONS

- a. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the Premises.
- b. To perform all required maintenance and repairs, including all janitorial services, which will be done on a daily basis, including furnishing of related supplies.
- c. To perform all maintenance and repairs requested by TENANT which are related to use and habitability of the Premises.
- d. To keep the walkways and parking areas of the premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants, and trees on the Premises.
- e. That if other portions of the building are leased to other parties, LANDLORD shall not permit any activity to be conducted in other portions of the building or grounds that will materially interfere with TENANT's use and enjoyment of the Premises.
- f. That TENANT may install items that it deems necessary for maximum and optimum use of the premises. TENANT may, at any time, remove from the premises all fixtures and other equipment owned by TENANT; provided the removal is completed before termination of this Lease or any renewal or extension. TENANT agrees to repair any damages that may be done to the premises resulting from the removal of the items, if any.
- g. That TENANT may place decorations, wall hangings, signs and directories upon entrance doors, in hallways leading to its Premises, or doors and walls within the Premises.
- h. To furnish *[number]* automobile parking stalls for use by TENANT, its agents or designees, in the lot provided for use by the building tenants.
- i. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the Premises.
- j. To pay all real estate taxes and special assessments on the Premises during the terms of the Lease.

7. TENANT'S OBLIGATIONS

- a. To pay the rent when due.
- b. To pay for its own telephone and data service.

- c. To keep the Premises in reasonable condition the same as at the commencement of the Term or as it may be put by LANDLORD, except for reasonable use and wear, or damage by fire and unavoidable casualty.
- d. Not to make any unlawful, improper, or offensive use of the Premises, and to observe all the laws of the State of North Dakota and the ordinances of the city of *[Premises location]* in force from time to time relating to the leased Premises.
- e. To permit LANDLORD at all reasonable times to enter and examine the Premises and to make necessary repairs for the protection of the Premises.
- f. To surrender the Premises to LANDLORD at the end of the Term; and, in default of the payment of rent due or failure to perform its obligations under this Lease, to surrender the Premises upon demand by LANDLORD.
- g. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by TENANT.
- h. Employees of TENANT are responsible for knowledge of and compliance with all policies when accessing the Premises, including LANDLORD's office safety and emergency procedures.

8. COMMUNICATION WIRING

All costs associated with the installation, wiring, networking, connectivity, and maintenance will be the responsibility of TENANT. TENANT will be billed directly from the State of North Dakota Information Technology Department (ITD). All applicable ITD standards shall be followed for any of the above services.

TENANT shall notify LANDLORD of the requested services including but not limited to; any and all horizontal wiring, wiring within the wire closet, network services, along with the number of data and telephone ports connections necessary to conduct business.

Such requests shall be reviewed and approved by LANDLORD prior to any services being performed.

Upon approval from LANDLORD, TENANT will be responsible for contacting ITD to perform the services.

Communication wiring currently located on the Premises may be used by TENANT, upon approval from LANDLORD. Any additional wiring installed on the Premises by TENANT, will remain intact upon vacating the premises and shall become the property of LANDLORD. TENANT shall notify the LANDLORD of any maintenance issues relating to wiring or services while in their use.

9. TERMINATION OF LEASE

TENANT, without any liability, may terminate this Lease by providing thirty (30) days' written notice, in its sole discretion, deems it has insufficient funds to pay the full rental cost for the remainder of the term of this Lease. During the term of this Lease or any renewal or extension, TENANT may terminate this Lease by providing thirty (30) days' written notice to LANDLORD, if LANDLORD fails to comply with any of its obligations under this Lease, or if TENANT determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other TENANT or federal law or rules. LANDLORD has the right to terminate this Lease at its sole discretion.

LANDLORD has no obligation under this Lease for the initial or succeeding terms and may terminate the Lease if the North Dakota Legislature directs the LANDLORD to utilize the Premises in a manner inconsistent with this Lease. LANDLORD, without any liability, may terminate this Lease with proper notice to TENANT if Legislative or Federal government guidance, if LANDLORD, in its sole discretion, deems necessary. Proper notice to TENANT shall be thirty (30) days' written notice unless LANDLORD is otherwise directed by Legislative or Federal government instructions to terminate under different time conditions.

10. TERMINATION OF LEASE IN THE EVENT OF DESTRUCTION OF PREMISES

If the Premises are destroyed or damaged by fire or the elements to the extent they become untenable, this Lease will terminate immediately, unless LANDLORD, within twenty (20) days of the happening of the event, gives written notice of intention to restore the building and fully restores the Premises within a reasonable time. During the term between destruction and restoration of the Premises rent will not be due, and if rent has already been paid LANDLORD shall refund to TENANT all that portion of the prepaid rent attributable to the time during which TENANT was unable to use the Premises for its intended use.

11. MERGER AND MODIFICATION

This Lease constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Lease. This Lease may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

12. SEVERABILITY

If any term of this Lease is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Lease did not contain that term.

13. ASSIGNMENT

This Lease must not be assigned or subleased by TENANT without LANDLORD's written consent unless to another state entity.

14. NOTICE

All notices or other communications required under this Lease must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses:

TENANT	LANDLORD
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

15. INDEMNIFICATION

LANDLORD and TENANT each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys’ fees which may in any manner result from or arise out of this Lease.

16. INSURANCE

LANDLORD and TENANT each shall secure and keep in force during the Term of this Lease, from an insurance company, government self-insurance pool or government self-retention fund authorized to do business in North Dakota, commercial general liability insurance with minimum limits of \$250,000 per person and \$1,000,000 per occurrence.

17. EFFECTIVENESS OF LEASE

This Lease is not binding on STATE until it is reviewed and executed by the Office of Attorney General and approved and executed by the Director of Facility Management Division, OMB, as required in N.D.C.C. § 54-21-24.1.

LANDLORD	TENANT
<i>[insert AGENCY]</i>	<i>[insert AGENCY]</i>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

REVIEWED BY ATTORNEY GENERAL	APPROVED BY OMB FACILITY MANAGEMENT
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

INTERAGENCY AGREEMENT CHECKLIST

- 1. Does the agency or official have the authority to enter the contract?
 - If necessary, have sufficient funds been appropriated?
- 2. Are the following Contract clauses included:
 - Parties
 - Scope of Work (each Party's obligation)
 - Compensation (if applicable)
 - Contractual Amount
 - Payment
 - Travel
 - Term of Contract
 - If applicable:
 - No Automatic Renewal
 - Extension Option
 - Renewal Option
 - Renegotiation Option
 - Termination (ensure the termination rights are reciprocal between the state agencies)
 - Termination by Mutual Agreement
 - Termination without Cause
 - Termination for Lack of Funding or Authority
 - Termination for Cause
 - Force Majeure
 - Works for Hire (if applicable)
 - Work Product (if applicable)
 - Notice
 - Spoliation
 - Merger and Modification
 - Severability
 - Effectiveness of Contract
- 3. The following Contract clauses may be omitted from Interagency Agreements:
 - Compensation (if applicable)
 - Prepayment
 - Payment of Taxes by STATE
 - Taxpayer ID
 - Time is of the Essence
 - Indemnity
 - Insurance
 - Confidentiality
 - Compliance with Public Records Laws
 - Independent Entity
 - Applicable Law and Venue

- Alternative Dispute Resolution – Jury Trial
 - Nondiscrimination and Compliance with Laws
 - State Audit
4. Has the proposed contract been reviewed by the agency’s assigned legal counsel?
 5. Is the contract in writing with all pages numbered?
 - If there are any exhibits or attachments referred to in the contract, are all the documents attached?
 6. Are there any mistakes in addition or other mistakes in connection with payment amounts or other numbers?
 7. Are there any handwritten changes or other alterations to the contract?
 - If so, have all the changes or alterations been initialed by all signers?
 8. Are the parties identified in the introductory paragraph or first clause?
 9. Has the agreement been checked for the following ambiguities and inconsistencies:
 - If recitals are used, are they unambiguous and consistent with the terms of the contract?
 - Are all references to parties, exhibits and other things internally consistent?
 10. Are all terms unambiguous or clearly defined?
 - Is the contract written in plain English using the present tense and the active voice?
 - Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
 - Is the connective “and” used properly in the conjunctive?
 - Is “or” used properly in the disjunctive?
 - Is it clear to what any modifier or dependent clause refers?
 - Where particulars are listed, is it clear whether the list is exhaustive?
 11. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
 12. Is the name and title or position of each person signing the document listed below the signature line?
 - Do all signatures match the typed or printed names?
 13. Does the contract specify both the date on which it begins and the date on which it ends?
 14. Are termination clauses reciprocal to the state agencies?

TEMPLATE (INTERAGENCY AGREEMENT)

1. PARTIES

The parties to this agreement (Agreement) are the *Department/Office seeking goods or services* (STATE), and *Department/Office/Political Subdivision providing goods or services* (CONTRACTOR), each a “Party” and collectively “Parties”;

2. SCOPE OF WORK

CONTRACTOR, in exchange for the compensation paid by STATE under this Agreement, shall provide the following:

[Describe what is to be done under the agreement. If the description is too vague, it will be difficult for the state to enforce the agreement or establish a breach of agreement by the contractor. If the Scope of Work is a lengthy document, you may consider referencing the Scope of Work as a separate exhibit at the end of the agreement.]

3. COMPENSATION

a. Contractual Amount

STATE shall pay for the accepted services provided by CONTRACTOR under this Agreement an amount not to exceed *[Amount]* (Contractual Amount).

The Contractual Amount is firm for the duration of this Agreement and constitutes the entire compensation due CONTRACTOR for performance of its obligations under this Agreement, unless amended, regardless of the difficulty, materials or equipment required, including fees, licenses, overhead, profit and all other direct and indirect costs incurred by CONTRACTOR, except as provided by an amendment to this Agreement.

b. Payment

STATE shall make payment under this Agreement within forty-five (45) calendar days after receipt of an undisputed invoice from CONTRACTOR.

4. TERM OF AGREEMENT

This Agreement term (Term) begins on *[Month, Day], 20[Year] or its Effective Date*, and ends on *[Month, Day], 20[Year]*.

a. No Automatic Renewal

This Agreement will not automatically renew.

b. Renewal Option

NOTE: A Renewal provision is normally used when a multi-year agreement is anticipated. The renewal provision allows the Agreement to be renewed for additional terms after the completion of the initial Agreement period.

This Agreement may be renewed upon satisfactory completion of the initial Agreement Term and by mutual agreement of the Parties. The Parties may renew this Agreement for up to *[Number]* additional periods, each period of renewal being for up to *[Number]* months. The Parties may negotiate to adjust the firm fixed price for each renewal period.

c. Extension Option

NOTE: An Extension provision is a brief period of time used to wrap up ongoing work that could not be completed by the end of the Agreement. It may also be used when all renewal options have been exercised and additional time is needed to close out the Agreement.

STATE reserves the right to extend this Agreement for an additional period of time, not to exceed *[Number]* months, beyond the current termination date of this Agreement.

5. TERMINATION

a. Termination by Mutual Agreement

This Agreement may be terminated by mutual consent of both Parties executed in writing.

b. Termination for Lack of Funding or Authority

Either Party may terminate the whole or any part of this Agreement, effective upon delivery of written notice to the other Party or on any later date stated in the notice, under any of the following conditions:

- 1) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term.
- 2) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this Agreement or are no

longer eligible for the funding proposed for payments authorized by this Agreement.

- 3) If any license, permit, or certificate required by law or rule, or by the terms of this Agreement, is for any reason denied, revoked, suspended, or not renewed.

Termination of this Agreement under this subsection is without prejudice to any obligations or liabilities of either Party already accrued prior to termination.

c. Termination for Cause

STATE may terminate this Agreement effective upon delivery of written notice to CONTRACTOR, or any later date stated in the notice:

- 1) If CONTRACTOR fails to provide services required by this Agreement within the time specified or any extension agreed to by STATE; **or**
- 2) If CONTRACTOR fails to perform any of the other provisions of this Agreement, or so fails to pursue the work as to endanger performance of this Agreement in accordance with its terms.

CONTRACTOR may terminate this Agreement effective upon delivery of written notice to STATE, or any later date stated in the notice:

- 1) If STATE fails to provide payment required by this Agreement in accordance with Compensation Section of this Agreement and within the time specified or any extension agreed to by the Parties; **or**
- 2) If STATE fails to perform any of the other provisions of this Agreement, or so fails to pursue the payment for services as to endanger performance of this Agreement in accordance with its terms.

The rights and remedies of the Parties provided in this subsection are not exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

6. FORCE MAJEURE

Neither Party shall be held responsible for delay or default caused by fire, riot, terrorism, pandemic (excluding COVID-19), acts of God, or war if the event was not foreseeable through the exercise of reasonable diligence by the affected Party, the event is beyond the Party's reasonable control, and the affected Party gives notice to the other Party promptly upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default. If CONTRACTOR is the affected Party and does not resume performance within fifteen (15) days or another period agreed between the Parties, then STATE may seek all available remedies, up to and including termination of this Contract pursuant to its Termination Section, and STATE shall

be entitled to a pro-rata refund of any amounts paid for which the full value has not been realized, including amounts paid toward software subscriptions, maintenance, or licenses.

7. INDEMNIFICATION

STATE and CONTRACTOR each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this Lease.

8. INSURANCE

STATE and CONTRACTOR each shall secure and keep in force during the Term of this Lease, from an insurance company, government self-insurance pool or government self-retention fund authorized to do business in North Dakota, commercial general liability insurance with minimum limits of \$250,000 per person and \$1,000,000 per occurrence.

9. WORKS FOR HIRE

CONTRACTOR acknowledges that all work(s) under this Agreement is "work(s) for hire" within the meaning of the United States Copyright Act (Title 17 United States Code) and hereby assigns to STATE all rights and interests CONTRACTOR may have in the work(s) it prepares under this Agreement, including any right to derivative use of the work(s). All software and related materials developed by CONTRACTOR in performance of this Agreement for STATE shall be the sole property of STATE, and CONTRACTOR hereby assigns and transfers all its right, title, and interest therein to STATE. CONTRACTOR shall execute all necessary documents to enable STATE to protect STATE's intellectual property rights under this section.

10. WORK PRODUCT

All work product, equipment or materials created for STATE or purchased by STATE under this Agreement belong to STATE and must be immediately delivered to STATE at STATE'S request upon termination of this Agreement.

11. NOTICE

All notices or other communications required under this Agreement must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses:

STATE	CONTRACTOR
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

12. INDEPENDENT ENTITY

CONTRACTOR is an independent entity under this Agreement and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. CONTRACTOR retains sole and absolute discretion in the manner and means of carrying out CONTRACTOR'S activities and responsibilities under this Agreement, except to the extent specified in this Agreement.

13. ASSIGNMENT AND SUBCONTRACTS

Neither Party may assign nor otherwise transfer or delegate any right or duty without the other Party's express written consent.

CONTRACTOR may enter subcontracts provided that any subcontract acknowledges the binding nature of this Agreement and incorporates this Agreement, including any attachments. CONTRACTOR is solely responsible for the performance of any subcontractor with whom CONTRACTOR contracts. Neither Party has the authority to contract for or incur obligations on behalf of the other Party.

14. SPOILIATION – PRESERVATION OF EVIDENCE

CONTRACTOR shall promptly notify STATE of all potential claims that arise or result from this Agreement. CONTRACTOR shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect such evidence, including the scene of an accident.

15. MERGER AND MODIFICATION, CONFLICT IN DOCUMENTS

NOTE: For brevity, only four documents have been included. Please make sure you list all documents to be considered including amendments to the RFP or proposal, Best and Final Offers, Questions and Answers to the RFP, etc. In addition, make sure the order of these documents always has STATE's documents first, and CONTRACTOR's documents last, in order to ensure that STATE's documents always take precedence. Consult with your Attorney General Counsel if you have questions on the order of precedence.

This Agreement, including the following documents, constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Agreement. This Agreement may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

Notwithstanding anything herein to the contrary, in the event of any inconsistency or conflict among the documents making up this Agreement, the documents must control in this order of precedence:

- a. The terms of this Agreement as may be amended;
- b. STATE’s Solicitation Amendment #1 to Request for Proposal (“RFP”) number _____ dated _____;
- c. STATE’s Request for Proposal (“RFP”) number _____, dated _____;
- d. CONTRACTOR’s proposal dated _____ in response to RFP number _____.

16. SEVERABILITY

If any term of this Agreement is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Agreement did not contain that term.

17. EFFECTIVENESS OF CONTRACT

This Agreement is not effective until fully executed by both Parties. If no start date is specified in the Term of Agreement, the most recent date of the signatures of the Parties shall be deemed the Effective Date.

CONTRACTOR	STATE OF NORTH DAKOTA
<i>[insert agency]</i>	Acting through its <i>[insert agency]</i>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

JOINT POWERS AGREEMENT CHECKLIST

- 1. Are the parties to the agreement and its purpose clearly stated?
- 2. Is the purpose of the agreement one which state law authorizes to be carried out through a joint powers agreement?
- 3. Does one of the parties to the agreement possess the power or function to be jointly or cooperatively exercised?
- 4. Does each agency or official have the authority to enter the agreement?
- 5. Does each agency have an appropriation for the subject matter of the contract?
- 6. Is the contract in writing with all pages numbered?
 - Does the contract contain any exhibits or attachments?
 - Are all the documents appropriately numbered or labeled and attached?
- 7. Are all payment amounts and dates correct?
- 8. Are there any handwritten changes or other alterations to the contract?
 - If so, have all the changes or alterations been initialed by all signers?
- 9. Are the parties properly identified in the introductory paragraph or first clause?
- 10. Has the agreement been checked for the following ambiguities and inconsistencies:
 - If recitals are used, are they unambiguous and consistent with the terms of the contract?
 - Are all references to parties, exhibits and other things internally consistent?
 - Are all references to other clauses, attachments or other applicable documents correct?
- 11. Are all terms unambiguous or clearly defined?
 - Is the contract written in plain English using the present tense and the active voice?
 - Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
 - Is the connective “and” used properly in the conjunctive?
 - Is “or” used properly in the disjunctive?
 - Is it clear to what any modifier or dependent clause refers?
 - Where particulars are listed, is it clear whether the list is exhaustive?
- 12. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 13. Is the name and title or position of each person signing the document listed below the signature line?
 - Do all signatures match the typed or printed names?
- 14. Does the agreement specify both the date on which it begins and the date on which it ends?
- 15. Regardless of the specified term of the agreement, does the agreement include an acceptable termination clause permitting either party to terminate at an earlier date

without incurring additional liability if adequate funds are not appropriated or available?

- 16. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the agreement are assigned among the parties?
- 17. Is approval needed from the Attorney General?
- 18. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
 - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?
- 19. Are all applicable provisions of N.D.C.C. § 54-40.3-01(1)(a-i) addressed?