



NEW MEXICO CORRECTIONS DEPARTMENT

Secretary
Alisha Tafoya Lucero

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| CD-025100 Contracts | Issued: 4/14/90 Effective: 4/14/90 | Reviewed: 07/31/23 Revised: 5/14/15 |
| Alisha Tafoya Lucero, Cabinet Secretary | | <i>Original Signed and Kept on File</i> |

AUTHORITY:

- A. NMSA 1978, Sections 13-1-28 through 13-1-199 as amended.
- B. NMSA 1978, Sections 9-3-5 and 33-1-6 as amended.
- C. Internal Revenue Code, Section 6041, 1986.

REFERENCES:

- A. *Department of Finance and Administration (DFA) Manual of Central Accounting*, Policy Statement No. IX.F, effective November 1, 1989 re Form 1099 MISC.
- B. DFA SHARE System, Policies and Procedures Manual.
- C. DFA Professional Services Contracts Publication dated May, 1988, "Technical Assistance Guide."
- D. DFA Rule 2 NMAC 40.2, "Governing the Approval of Contracts for the Purchase of Professional Services" effective May 15, 1997.
- E. ACA Expected Practices 5-ACI-1A-11, 5-ACI-1B-15, *Performance Based Standards and Expected Practices for Adult Correctional Institutions*, 5th Edition.
- F. ACA Standards 2-CO-1B-10, 2-CO-1C-17, *the Administration of Correctional Agencies*, 2nd Edition.
- G. General Services Department 1 NMAC 5.2 (supersedes GSD Rule 93-601).
- H. GSD-Purchasing Division, Request for Proposals Procurement Guide, January 1997.
- I. Current Corrections Department Administrative Services Division directives concerning internal processing procedures and requirements for all contracts.

PURPOSE:

- A. To provide a method of determining whether an individual providing services is an employee of or a self-employed contractor to the Corrections Department;
- B. To provide guidance in the procurement of professional and other contracted services; and
- C. To provide information concerning appropriate filing of reporting documents to comply with IRS (Internal Revenue Service) requirements.

APPLICABILITY:

All Corrections Department divisions, bureaus and sections/units requesting approval of contracts for services.

FORMS:

Campaign Contribution and Disclosure form;
Contract Checklist form;
Contract Routing form;
Contract Boilerplate form;
Contract Amendment form (if applicable);
Contracts Brief form;
DFA Affidavit of Former or Current State Employment; and DFA
Certification form.

ATTACHMENTS:

- A. **Twenty Common Law Factors Used in Determining Employee Status Attachment (CD-025101.A)** (2 Pages)
- B. **Comparative Approach of Twenty Common Law Factors Attachment (CD-025101.B)** (2 Pages)

DEFINITIONS:

- A. *Contract*: A binding agreement by and between the Corrections Department and a Contractor for the purchase of professional services such as, but not limited to, architects, archaeologists, engineers, land surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, lawyers, psychologists, planners, researchers, and persons or businesses providing similar services; and other services.
- B. *Employee*: Individuals who perform services subject to the specific direction and control of the Corrections Department, both as to what is to be done and how it is done.
- C. *Independent Contractor*: An individual or business that performs services independently, not subject to the specific direction and control of the Corrections Department, neither as to what is to be done nor as to the method used to deliver contracted services.

POLICY:

- A. The Corrections Department shall distinguish between individuals performing services as employees and individuals performing services as independent contractors and will treat such individuals appropriately for purposes of income reporting and tax withholding according to applicable IRS laws, rules, and regulations;
- B. The Corrections Department will avoid entering into Contracts with individuals which would constitute an employee/employer relationship as defined by the IRS; and
- C. The Corrections Department will comply with all IRS laws, rules, regulations, and directives pertaining to payment of rents, salaries, wages, premiums, annuities, compensation,

remuneration, emoluments, or other fixed or determined gains, profits, and income; and will render a true and accurate return to the Secretary of the U. S. Treasury (IRS), setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment, whether that individual is an employee or an independent Contractor.

- D. The Corrections Department will follow State Purchasing and Department of Finance and Administration guidelines in procuring contractual services, including the form, content and timeliness of all documents and procedures, as provided in the references cited by this policy.
- E. Employees of other public or private organizations providing services to the department shall be accountable to the administrative officer of the program in which they work. This policy and procedure shall be reviewed annually and updated as necessary. **[2-CO-1C-17][5-ACI-1A-11]**
- F. The Secretary of Corrections or designated staff meets at least annually with the contractor to review the program when the agency contracts for program services. **[2-CO-1B-10]**
- G. Funds are available for purchasing community services to supplement existing programs and services. **[5-ACI-1B-15]**

H. Security Clearances and Background Checks:

The Contractor and its employees, agents, or independent agents agree to cooperate with and abide by any and all rules and regulations set forth by the Agency so as not to interfere with the daily operations of the user agency or to jeopardize the health and safety of any employees, inmates or the general public. The Contractor and its employees, sub-contractors, or their agents who will have access to NMCD properties and inmates are subject to security clearances and/or background checks.

Any security clearances and/or background checks required by the Agency for the Contractor's employees, contractor's agents, employees or other agent must be obtained prior to commencement of the job. User agency reserves the right to deny any employee, agent, or independent agent of the Contractor access to the Agency property should that individual fail the criteria required for the security clearance or be found to be in violation of NMCD policies and procedures.

Agency reserves the right to provide and escort and/or require full time supervision for the Contractor and its employees, agents, or independent agents during any or all phases of a project should user agency feel it is necessary.

Agency reserves the right to escort any employee, sub-contractor or other agent of the Contractor off of the Agency property for any inappropriate conduct or actions that jeopardizes the safety, security, or well-being of the facility. If such conduct or action should occur, then, this agreement may be terminated immediately.

I. Cooperation with NMCD Investigations:

In addition to the foregoing, the Contractor must furnish all information and reports required by, or pursuant to, the rules, regulations, and policies of the NMCD, and will permit access to, and the interview of, its employees, sub-contractors or other agents as well as the examination

and copying of its records unless such materials are legally privileged by the NMCD Office of Professional Standards, the Security Threat Intelligence Unit and the Equal Employment

Opportunity Officer and by investigators for the United States Department of Justice, the New Mexico Department of Public Safety, the New Mexico General Services Department, Risk Management Division, and/or the New Mexico Workforce Solutions Department, and will otherwise fully cooperate with any such investigation. Any willful violation of this requirement will be grounds for immediate termination of this agreement and removal of the Contractor from the property.



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AUTHORITY:

Policy *CD-025100*

PROCEDURES:

A. Services Secured Under Contract: [2-CO-1C-17] [5-ACI-1A-11]

1. Professional and other services to be obtained under contract shall be analyzed by the submitting program activity as to whether the individual performing such services is an employee or independent contractor, prior to the submittal of the contract to the ASD (Administrative Services Division) for approval and processing.
2. Under the common law definition, if the proposed contracted services are being provided by an individual who performs service subject to the specific direction and control of the contracting activity, both as to what is to be done and how it is to be done, then the individual is providing services as an employee not an independent contractor.
 - a. Workers are employees if the person, bureau or division for whom they work has the right to direct and control the worker in the way the work is to be done, both as to the final result and as to the details of when, where, and how the work is to be done.
 - b. The person, bureau or division need not actually exercise control in order to be indicative of an employer/employee relationship; it is sufficient that they have the right to do so.
 - c. Signing of a contract does not necessarily indicate the Contractor is self-employed and exempted from employment taxes.
3. After development of the "Scope of Services" portion of the proposed contract the **Twenty Common Law Factors Used in Determining Employee Status** Attachment (*CD-025101.A*) shall be completed and submitted with the proposed contract. This form attempts to determine whether the proposed contract constitutes services being provided by an employee subject to all federal and state employment taxes.
4. For guidance in answering Yes/No questions on Attachment (*CD-025101.A*) above, activities may refer to the **Comparative Approach of Twenty Common Law Factors** Attachment (*CD-025101.B*).

5. If after the analysis required in A.1 above and the application of the Twenty Common Law Factors Attachment (*CD-025101.A*), it is determined that the individual performing services is, in fact, an independent contractor, then the activity may proceed with the contract process as outlined in DFA Rule 2 NMAC 40.2.
6. IRS Form W-9 shall be completed and submitted with the contract to ASD.

B. Contracts Creating Employee/Employer Relationships:

If the common law test in “A” above reveals an employer/ employee relationship, the program activity requesting such a contract shall immediately stop the process and attempt to obtain the needed services via other means. Such other means would include contracting with tax- exempt entities; or subject to prior approval by the Secretary of the Corrections Department and State Personnel, attempting to obtain authorization for term and temporary positions.

In all cases, accountability to the agency and the program administrator must be provided for in the contract or memorandum of agreement.

C. Review of Contracts by ASD:

ASD shall review all Contracts submitted by activities to verify that the contracts do not commit the Corrections Department to employee/employer relationships. After ASD review, if it is determined that the contract commits the Corrections Department to an employee/employer relationship, then ASD shall disapprove and return the Contract to the submitting program activity.

D. Reporting and Recording of Income Meeting IRS Form 1099MISC Requirements:

In the case of services provided by a contractor, ASD shall meet all recording and reporting requirements as outlined in DFA policy and procedures referenced in policy *CD-025100*.

Twenty Common Law Factors Used in Determining Employee Status

Activity Name: _____ Activity Number: _____

Name of Individual to Perform Service: _____

Tax I.D. Number: _____ Date: _____

1. Instructions: Does your organization have the right to require compliance with the timing, place, and method used in completing the work being done? Yes No
2. Training: Will your organization apprentice, train, or instruct in the details of the work, or correspond in any way the manner or method in which the work is to be performed? Yes No
3. Integration: Will the work be done in such close proximity and involvement so as to cause your organization's success or continuation of business to be dependent on those performing the work? Yes No
4. Services Rendered Personally: Will the work be done personally? Yes No
5. Hiring, Supervising, and Paying of Assistants: Will your organization hire, supervise, or pay any assistants to aid those performing the work? Yes No
6. Continuing Relationship: Does your organization expect that those performing the work will continue in the same function or another function for the foreseeable future, although not necessarily continuously or at frequent intervals? Yes No
7. Set Hours of Work: Will your organization dictate the hours during which the work will be performed? Yes No
8. Full Time Required: Will those performing the work devote substantially full time to it?
(Implies the inability to perform other work of the same character for other organizations.) Yes No
9. Doing Work on Employer's Premises: Will the work be performed on your premises or at a location required by your organization? Yes No
10. Order or Sequence Set: Will your organization have the right to require that the work be performed in a specific order, routine, or sequence? Yes No
11. Oral or Written Reports: Will your organization require regular written reports from those performing the work? Yes No
12. Payment by Hour, Week, or Month: Will your organization pay those performing the work on an hourly, weekly, or monthly schedule other than as a convenient payment of an agreed upon lump-sum cost of the work? Yes No

**Twenty Common Law Factors Used in Determining Employee Status
(Continued)**

- 13. Payment of Business and/or Traveling Expense: Will your organization pay the business and/or traveling expenses of those performing the work? Yes No
- 14. Furnishing of Tools and Materials: Will your organization furnish the tools, equipment, or materials necessary to complete the work performed? Yes No
- 15. Significant Investment: Will those performing the work invest, or have they invested, in facilities (offices, factories, etc.) that employees ordinarily are not required to have? Yes No
- 16. Realization of Profit or Loss: Will those performing the work stand to realize a profit above the ordinary compensation for services or a loss as a result of the work performed? Yes No
- 17. Working for More Than One Firm at a Time: Will those performing the work be performing work for other organizations unrelated to your organization? Yes No
- 18. Making Service Available to General Public: Will those performing the work continue to make their services available to the general public? Yes No
- 19. Right to Discharge: Will your organization have the right to discharge those performing the work prior to the completion of the work? Yes No
- 20. Right to Terminate: Will those performing the work have the right to stop working for your organization at any time without incurring legal liability? Yes No

(Excerpted from Financial and Estate Planning, Commerce Clearinghouse, Inc., 1987, where it appeared as an excerpt from Revenue Ruling 87-41 in which the Internal Revenue Service provides guidance relating to the determination of employee status.)

A "YES" answer to any question except numbers 15, 16, 17, 18, or 20 indicates a possible employee/employer relationship.

A "No" answer to either question numbers 15, 16, 17, 18, or 20 indicates a possible employee/employer relationship.

Particular attention should be paid to the wording "the right to . . ." in some of the factors.

CONCLUSION: (state determination as to employee/contractor status and how determination was reached): _____

Comparative Approach of Twenty Common Law Factors

EMPLOYEES

vs.

INDEPENDENT CONTRACTOR

1. Instructions: Receives instructions about when, where, and how work is to be performed. Does the job his or her own way without any kind of instructions.
2. Training: Trained by an experienced employee working with him or her. Required to take training courses. Attendance at meetings for instructions on how the employer wants the services performed. Uses his or her own methods and receives no training from the purchaser.
3. Integration: Services of the individual are merged into the business. Success and continuation of the business depends upon these services. Employer coordinates work with that of other workers. Success and continuation of business are not dependent on his or her services.
4. Services Rendered Personally: Services must be rendered personally. Not able to engage other people to do the work. Contractor able to assign one of his or her employees to do the job.
5. Hiring, Supervising, and Paying Assistants: Hires, supervises, and pays workers at the direction of the employer (acts as foreman or representative of the employer). Hires, supervises, and pays the other workers as the result of a contract under which he or she agreed to provide materials and labor and is responsible for the results.
6. Continuing Relationship: The individual continues to work for the same person year after year. Hired to do one job. No continuous relationship. May or may not be used again at some later date.
7. Set Hours of Work: The hours and days are set by the employer. Is master of his or her own time.
8. Full-Time Required: Must devote full-time to the business of the employer. Restricts him or her from doing other gainful work. Free to work when and for whom he or she chooses.
9. Doing Work on Employer's Premises: Implies that the employer has control, is physically within the employer's direction and supervision. Works off employer's premise, uses own office, desk, telephone, etc.

**Comparative Approach of Twenty Common Law Factors
(Continued)**

| <u>EMPLOYEES</u> | vs. | <u>INDEPENDENT CONTRACTOR</u> |
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| 10. Order or Sequence Set: Performs services in the order or sequence set by the employer. | | Concerned about the end result and sets his or her own sequence as to how that is accomplished. |
| 11. Oral or Written Reports: Required to submit regular oral or written reports to the employer. | | Submits no reports. |
| 12. Payment by Hour, Week, Month: Paid by the employer in regular amounts at stated intervals. | | Paid a flat amount for the job. |
| 13. Payment of Business and/or Traveling Expenses: The employer pays the person's business and/or travel expenses. | | Is responsible for his or her own expenses. They are not reimbursed for these costs. |
| 14. Furnishing of Tools, Material: Employer furnishes tools, materials, etc. | | Furnishes his or her own tools. |
| 15. Significant Investment: Little or no investment; depends on the employer for facilities and equipment necessary for the work. | | Has a real, essential, and adequate investment. |
| 16. Realization of Profit or Losses: Cannot realize a profit or loss; is basically paid for services rendered. | | Can realize a profit or suffer a loss as a result of his or her service. |
| 17. Working for More than One Firm At A Time: Usually works for one employer. | | Works for a number of persons or firms at the same time. |
| 18 Making Service Available to General Public: Does not make his or her services available to the public except through the company for which he or she works. | | Has own office and assistants. Holds business license, listed in business directories or maintains business telephone. Advertises in newspaper, etc. |
| 19. Right to Discharge: Can be discharged at any time. | | Cannot be fired so long as he or she produces a result, which meets contract specifications. |
| 20. Right to Terminate: Can end his or her relationship with employer at any time. | | Is legally responsible for satisfactorily completing a specific job. |