

Glossary: Contract Terms - Phrases - Provisions

Key Contract Terms and Phrases

Agreement or Contract: A formalized written document explaining the expectations, obligations and interests between the County and contractor signed by each party. An agreement or contract is legally binding and enforceable by law. Oral promises are not considered part of the contract unless they are memorialized in writing and signed by each party.

Agreement for Services: See Service Agreements.

Amendment: Since oral promises are not legally binding, all changes to a contract must be in writing and signed by both parties. Changing the terms of the contract should be handled with the same diligence that was afforded the original contract. An amendment changes the termination date or increases the maximum financial obligation, or Memorandum of Understanding (MOU). An amendment must be in writing and reviewed and approved by both the Office of Budget and Analysis (OBA) where applicable and the Director of Procurement or as delegated by the Board. A Service Agreement Amendment form must be used for this process.

Assignment/Subcontracting: Every contract should address whether or not a contractor can transfer his interest and obligations to another person or entity, also called an assignment. If the contractor was selected because his services are unique and personal in character, the contract should disallow the contractor to assign his interest. If assignment is permissible, the contract must bind the new assignee to the same obligations as the party who signed the contract. A contractor may hire an individual or entity to complete a portion of his obligations to the County (also known as subcontracting), when the County authorizes, it is in writing and at its discretion. If a contract permits subcontracting, the subcontractor should be bound to the same contract terms as the original contractor.

Attachments/Exhibits: All attachments and exhibits should be clearly marked, incorporated by reference in the body of the contract and attached to the contract.

Bid: A legally binding offer for public works or goods procurement. The offer may be referred to as a "proposal" or a "quotation."

Bidder: Any entity that bids on work for "Public Works" (construction) contracts or for procurement of goods. Entities that participate in the Request for Proposal (RFP) process are called "proposers."

Board Policies on Contracting: Guidelines developed and mandated by the Board of Supervisors on contracting policies and procedures. See Chapter 5 of the Board Policy Manual for specific

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policies. All contracts must comply with Board Policy.

Breach of Contract: A failure to perform any promise, which forms a part of a contract.

Change Order: The method and form used to change a term on a public works or goods contract. All service agreements must use a contract amendment or Service Agreement Amendment form. See Contract Amendment and Service agreement Amendment.

Competitive Bidding: A common method of selecting sources for contract awards. Suppliers interested in participating in the process are asked to submit information on prices and other specified elements of performance.

Conflict of Interest Statement: To ensure top quality performance and prevent allegations that the County favored a particular contractor or project over other contractors or projects, a contract should document the contractor's promise that it does not presently and will not in the future provide services for or have economic interests that will conflict with their performance of the contract. The contractor who may have a conflict of interest in the process of doing business with the County must complete the Conflict of Interest Statement form.

Consideration: "Consideration" is the amount of money, services or goods to be exchanged between the parties according to a contract.

Construction Contracts: An agreement or contract for the erection, construction, alteration, repair, demolition or improvement work involving any publicly owned, leased or operated facility or road. Construction contracts are governed by state law and are not equivalent to a Service Agreement. (Also see Public Works Contracts).

Contract: See Agreement or Contract.

Contract Administrator: The Santa Clara County employee responsible for administering an executed contract, from contract award to contract closeout. The duties may include follow up and many management functions. The contract administrator may also act as the negotiator and assume the responsibilities of both roles.

Contract Amendment: A document used to change the terms of a contract or Agreement and requires OBA review where applicable and Procurement Director's approval or as delegated by the Board. The amendment must clearly state the changes and modifications and must be signed by both the contractor and the appropriate County designee. Note: all amendments to Service Agreements

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must use the Service Agreement Amendment form. Service Agreement forms and amendment forms can be downloaded from the Contracts Intranet website.

Contract Authorization: A determination of which County Officer has received a delegation of authority by the Board of Supervisors to execute an agreement or set of agreements. See Delegation of Authority.

Contracting Principles: The Contracting Principles is a Santa Clara County Board of Supervisors resolution that is mandatory for every County contract. It was adopted in 1997. Contact your County Counsel or see Section 5 of the Policy Manual for more information. The Contracting Principles is intended to provide the County with information about a contractor's business practices to consider during a selection process for service contracts. The "Contracting Principles" resolution requires the contract among other requirements to (1) comply with all applicable regulations and laws; (2) be fiscally responsible; (3) provide additional specific information required of a responsible bidder (4) identify whether it meets the Type I or Type II criteria as defined by the resolution, (5) include the "Contracting Principles" language in the body of all contracts and (6) review and retain the documentation required for all Type II contracts. Many County contracts meet the Type II criteria and require submission of wage, benefit, training, and personnel, and other documentation. See Board Policy Manual 5.2.14.

Contractor: An entity or individual entering into an contract or agreement with Santa Clara County that may also be referred to as vendor, contractor, supplier, consultant or successful bidder.

County Counsel: A County Attorney that may be assigned to assist different departments with legal questions or advice. County Counsel can review, draft or approve contract language and advise on Board policies and procedures.

Delegation of Authority: The Board of Supervisors is the only body that may enter into contracts on behalf of the County unless that power has been delegated by state law, local ordinance or an expressed action of the Board. The Board has delegated authority to the Director of Procurement to enter into service agreements totaling \$100,000 or less per budget unit per fiscal year, per vendor and \$500,000 for IT related services. County Departments must obtain Board approval to enter into contracts, agreements or MOU's with a non-County entity. The Board may delegate authority through state law, County ordinance or express permission such as a transmittal to allow other County officials (such as Department Heads) to execute certain contracts.

All delegation of authority related contracts are not valid unless

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approved by the County Counsel and the Office of the County Executive.

Deliverables: All items identified in the RFP that will be provided by the contractor in consideration for payment.

Determination of Contractor Status: When a contractor is an individual, the County must determine whether or not the contractor is subject to tax withholdings or is eligible for certain benefits. An “independent” contractor is not subject to tax withholdings or eligible for benefits. Looking at the type of work to be performed and relationship that exists between the contractor and the County helps make the determination. Check out the “*Factors to consider when completing the questionnaire*” link on the Contract’s Forms Page for more information on determination of a contractor status.

Duties Upon Termination: To comply with County policies and/or obligations with State or federal funding, the contractor has certain responsibilities to the County when the contract ends. For example, a provision might state that a contractor must turn over all documents related to his work under the contract.

Draft Contract: A contract in its draft form, unsigned by the parties to the contract.

Encumbrance: A claim on funds, an obligation in the form of a purchase order, contract etc., that is chargeable to an appropriation and for which a part of the appropriation is reserved. An encumbrance is basically the accrual of an expense and the funds to pay for it. A claim ceases to be an encumbrance when it is paid; or when the actual liability is set up; or when it is canceled. Agreements for services, purchase orders and change orders are encumbered by the Procurement Department. Contract releases, Board contracts and priority purchases are encumbered by the County agency/department.

Executed Contract: A contract or agreement that is signed by all parties creating an enforceable agreement.

Governing Law; Venue. This provision protects the County from incurring great cost to travel to another state or county to sue a contractor or defend itself. Each contract should have a provision stating that if there should be a disagreement about the contract, California law shall be used to resolve the issue and legal proceedings shall take place in Santa Clara County.

Indemnification and Insurance: These provisions ensure that the County has minimum levels of financial protection for a contractor’s conduct and that the contractor is legally responsible to claims and losses related to its conduct. “*Indemnification*” is written assurance

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that a contractor accepts full financial responsibility, and will repay the County for liability based on its own negligent or improper conduct. Indemnification language may not be altered without the approval of County Counsel. The Employee Services Agency's Risk Management sets insurance requirements and a waiver must be obtained to change the requirements for a particular contract.

Integrated Agreement: An agreement is "integrated" where the parties adopt the written (contract) as the final and complete expression of the agreement. Details that were discussed orally must be written in the body of the contract, attachment or exhibit.

Interpretation: It is important to make clear terms that could be misinterpreted. An "*Interpretation*" clause makes clear certain key terms contained in the contract. For example, the provision may define the term "days," as meaning either calendar days or business days.

Independent Contractor: The following elements are essential to establishing the relationship of an independent contractor to its client, as contrasted with the relationship of an agent to its principal. An independent contractor must: (1) exercise independent judgment as to the means used to accomplish the result; (2) be free from control or orders from any other person; and (3) be responsible only under the contract with the client for the result obtained.

Insurance/Indemnification: See the Contract Term Definitions. These are legal terms that are mandatory in every contract to protect the County from liability resulting from that contract.

Invitation to Bid: A form of competitive bidding used in the bid process to solicit bids for a particular scope of work.

Justification: A written statement explaining why a specific decision in the contracting process was made. For instance, a sole source justification should include a list of other vendors contacted and reasons why the sole source is the only vendor who can provide the services sought.

Memorandum of Understanding (MOU): A formalized written document between two or more parties that defines the interests, expectations, and obligations of each party. There are two types of MOU: (1) one between two or more County agencies, or (2) one between the County and a non-County entity. An MOU between two County agencies is not a legally enforceable contract whereas an agreement involving a non-County entity is. Whether an agreement between the County and a non-County entity is titled an MOU, agreement or contract, it is a legally enforceable contract and must be approved as to form and legality by County Counsel. It is

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advised that all MOUs be reviewed by County Counsel because they may raise legal issues. MOUs are often used between County agencies working together on a common project or where at least one County agency and a non-County entity need a formalized agreement to memorialize the interests and obligations of each party.

No Special Damages: If the County were to be involved in litigation with a contractor, there are several kinds of money awards each party can seek based on the other party's conduct. These money awards are called damages. Special damages are money awards for specific conduct such as negligence, which may entitle the prevailing party up to three times the amount of money loss. This provision limits the type of money award a contractor can seek if it sues the County. For example, County breaches contract with consultant by making a late payment. Consultant takes out a short-term loan to pay her expenses due to County's late payment. Assuming that County breached the contract, consultant cannot recover the cost or interest for the short-term loan.

Nondiscrimination Language: It is the policy of the Board of Supervisors that every service contract contains nondiscrimination language. Also, the County often receives funding from the State and Federal governments. Both entities require nondiscrimination language in contracts that relate to the use of their funds. State or Federally required language might differ from the County's standard language. The Board of Supervisors must approve any contract without nondiscrimination language.

Non-Exclusive Remedies: A remedy is a legal recourse one party has against the other when one party fails to perform according to the contract. A remedy may include suing for money or an injunction, or terminating the contract. This provision states that the County will have all legal recourse available to it if the contractor violates the contract. For example, if the County hires a consultant and subsequently terminates the contract because the consultant was under the influence of controlled substances on the job and caused an accident, the County is not limited to terminating the contract but may sue for breach of contract (including but not limited to negligence).

Non-Waiver of Rights: This provision protects the County's interest in the contract by ensuring that the County does not waive its right to legally enforce the contract if it allows the contractor to fix a breach. For example, if the contractor fails to perform an obligation under the contract, the County in good faith may allow him extended time to perform. If the contractor continues to fail to perform, he cannot claim that by allowing him extra time to perform, the County relieved him of all other obligations according to the original contract.

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Notices: This is a clause that provides that all notices should be in writing and that all parties must contact each other if there is a change in address. Since all changes to the contract terms must be in writing, written correspondence and contact information is critical.

Payment and Record Keeping: The County and its contractors are required by State and Federal law or County policy to retain pertinent records for auditing, monitoring and performance evaluation purposes. This provision details the contractor's responsibilities in submitting invoices for payment and retaining or keeping records. This section should detail the contractor's remuneration for work accomplished and how the contractor is to be paid. For example, payment methods include hourly, project based, by invoice or according to the completion of specific deliverables.

Performance Monitoring/Status Reports: It is the Board of Supervisors' policy that all service contracts include standards and criteria for measuring a contractor's performance. Each department handles performance monitoring differently.

Performance of Contractor: A complete and detailed description of the contractor's expected performance including the scope of service, expected outcome, standards of performance, review or auditing procedures, how payment is to be made, compensation amount, expense reimbursement procedures, record keeping responsibilities and service limitations must be contained in the contract. An inaccurate or incomplete description of the contractor's performance may cause a misunderstanding resulting in the County obtaining different services than expected, difficulty in enforcing the County's expectations and the possibility of litigation.

Milestones: Identifiable results in the contract's scope of work that can be tied to deliverables and payment to the contractor.

Negotiation: In the purchasing context, negotiation is an exploratory and a bargaining process (planning, reviewing, analyzing, compromising) involving a buyer and seller, each with their own viewpoints and objectives, seeking to reach a mutually satisfactory agreement on all phases of a transaction, including price, service, specifications, technical and quality requirements, payment terms, etc.

Negotiator: The Santa Clara County employee, who negotiates, drafts and prepares a contract, change order, or "RFP".

Payment Methods: Payment to a contractor can be based on time spent (hourly, monthly) or a flat fee contingent upon project milestones (deliverables received). Payment methods can be upon receipt of an invoice or based on a time line. The Payment method

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must be clearly described in the contract.

Performance Measurements: Pre-determined items that measure the performance of the contractor during the life of the contract. Often the performance measurements are tied to the Scope Of Work to determine if the contractor has met the conditions of the contract.

Proposer: The vendor who submits a proposal for Request for Proposals (RFP). This term is to be distinguished from a “bidder” who is a vendor who bids on Public Works or procurement of goods contracts.

Public Works Contracts: See construction contracts.

Request for Information or “RFI”: A pre-selection process used for the purpose of obtaining planning information.

Request for Proposal or “RFP”: A competitive selection process requesting or inviting vendors to submit proposals to perform work based on a detailed specification. The RFP is not a contract but sets forth the terms and conditions of doing business with the County so the vendor has clear expectations of the contract if it becomes the winning proposer.

Request for Qualifications or “RFQ”: A competitive selection process used to identify the qualifications of particular vendors.

Request for Quote or RFQ: A competitive selection process used for the purpose of obtaining pricing.

Scope of Work or Statement of Work: A detailed description of what the contractor is expected to do. The scope of work should include responsibilities, tasks, timelines, and schedules. This statement should read like a job description.

Service Agreement Form: A Santa Clara County form used for contract for services less than or equal to \$100,000, or less than or equal to \$500,000 for IT projects per budget unit per fiscal year approved by the Director of Procurement or as delegated by the Board. The Service Agreement form can be used for contracts over \$100,000 but requires County Counsel approval.

Service Agreement Amendment Form: A change or modification form used to change a term or terms for the Service Agreement only. For non-Service Agreements use the contract amendment process. See contract amendment.

Severability: This provision protects the purpose and execution of the contract as a whole, in instances where one provision of the

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contract becomes invalid or unenforceable.

Survival: The County may obligate the contractor to responsibilities related to his performance of the contract after the contract has ended. For example, the County may require the contractor to maintain financial records for a period of years (due to State or federal law), after the contract term has ended. This provision states: “where the contract is terminated or cancelled, any term of the agreement, that expressly states it survives such termination or cancellation, will still be in force and affect”.

Single Source: See sole source.

Sole Source: The use of one source because that source is the only available Contractor possessing the ability to fulfill the County’s needs. For example, a sole source vendor may possess a patent, copyright, secret process or unique qualifications eliminating another vendor from being able to provide the same service or product. Review Board Policy 5.15 for more information on criteria and how to write an appropriate justification. A justification must include the reason the vendor is the only source that can supply the product or service. For example, Company XYZ is the sole source for Case Management System ABC because they own the copyright on it and no other vendor can provide it. Lack of planning and/or lack of time (with the exception of a true emergency) do not justify a request for a sole source contract.

Solicitation: The process in which the County invites or requests bids or proposals.

Specification: A specification is a detailed description of the work to be performed by the contractor. A specification is usually incorporated into a draft contract or RFP, or both, and is subject to the County Counsel’s review and approval requirements.

Term of Agreement: Every contract must specify a beginning and end date for which the contract will be in effect. No contract should have an indefinite term.

Termination: Each contract must contain a provision explaining how the County or contractor can end the agreement. “Termination for convenience” allows the County and/or contractor to end the contract after written notice specifying an end date. The notice requirement is to give the other party time to plan for any consequences that may result from the termination. “Termination for cause” allows the contract to come to an immediate end without notice due to failure by the County or contractor to perform according to the contract.

Tax Determination: See “County Tax Rate and Information”

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Manual.

Terms and Conditions: Specific provisions that protect the County's interests and define the obligations and expectations of each party. Some terms or conditions are mandatory, others can be added if the contract is for a high dollar amount or is for a unique purpose. Contact your County Counsel for questions about mandatory or suggested terms and conditions. See the Contract Term Definitions for a more complete explanation of terms and conditions or consult with your County Counsel.

Type I Contracts: See Board of Supervisors' Policy Manual, Contracting and Bidding Section 5.2.16, Adopted 10-28-97.

Type II contracts: See Board of Supervisors' Policy Manual, Contracting and Bidding Section 5.2.16, Adopted 10-28-97.

Vendor: An individual or entity that may participate in bidding or proposing on a County Contract. The vendor will become a contractor or a supplier if it wins the selection process.