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NO. 64628-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

PROFESSIONAL NETWORK, INC., a Washington corporation,

Appellant,

v.

WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

**BRIEF OF RESPONDENT WASHINGTON DEPARTMENT OF
SOCIAL AND HEALTH SERVICES**

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I. INTRODUCTION AND SUMMARY

This appeal arises from the trial court's grant of summary judgment to Defendant, Washington Department of Social and Health Services ("DSHS"), dismissing all three claims of Professional Network, Inc. ("PNI") because PNI was unable to establish an essential element of each claim. The dismissed claims were (1) tortious interference with a contract or business expectancy (the missing essential element was a third party intermeddler: DSHS was a party to the contract and the primary component of any business expectancy as the only party who could authorize and pay for PNI's services); (2) breach of contract (the missing essential element was any failure of DSHS to pay for authorized services, the only enforceable obligation of DSHS under the unilateral contract; PNI did not allege or claim a failure to pay); and (3) tort against public policy (the missing essential element was an employment relationship: TAPP is a limited application employment remedy to which PNI, an independent contractor, was not legally entitled).

PNI was a contract service provider to DSHS, providing parent-child visitation ("PCV") services pursuant to a series of contracts in support of that agency's Division of Child and Family Services ("DCFS"), until June 30, 2005, at which time PNI's last PCV contract expired and no new contract was signed. DSHS provides parent-child visitation for

children in its temporary custody as part of its responsibilities to those children and its efforts at reuniting the families. Those visitations are provided, in part, by service providers such as PNI, whose services include transportation of the children and some visitation supervision.

All of the clients served by PNI were children or adults who were authorized to receive services by DSHS as part of its temporary custodial status. PNI's PCV contract with DSHS specifically provided that the clients were these children or adults, that DCFS had the sole responsibility for authorizing any services by PNI to those clients and must initiate all such authorizations in writing, that DCFS would request those services on an as-needed basis and was not obligated to authorize any services from PNI, that DSHS would only pay PNI for properly authorized services, and that PNI was an independent contractor and not an employee of the state. The contract further provided that PNI was to cease performing any services upon expiration or termination of the contract.¹

DSHS's administration of those client service contracts was governed by the Washington State Office of Financial Management General Policies for Client Service Contracting Guidelines, which call for agency flexibility in selecting client service providers to effectively and efficiently meet the needs of its clients, and periodic review to determine

¹ The last PNI/DSHS contract is included as Appendix A. RAP 10.4(c).

if competition is warranted. PNI's position in this appeal, reflecting its attitude in providing services, is that DSHS was obligated to renew its contract year after year and there was no limit to the amount of money that PNI could collect from DSHS under the contracts. *Br. Appellant*, pp. 5, 32. 2004 and 2005 were a time of budgetary concern for DSHS, and in particular Region 4. PNI was billing Region 4 approximate \$1.2 million each year, when the region's entire budget for such PCV services by all providers was only \$800,000. Review of PNI's contract status was clearly warranted.

DSHS's PCV contract with PNI provided several methods for termination prior to expiration, including "when it is in the best interest of DSHS". Pursuant to this "Termination for Convenience" provision, DSHS did initiate efforts to terminate PNI's contract before its expiration, but ultimately decided to allow the contract to run its full term through June 30, 2005. No new contract was awarded to PNI. Subsequently, a tortious interference lawsuit was brought against DSHS by PNI, who later amended its complaint to raise the three separate claims which have been dismissed on summary judgment.

PNI's claims are all premised upon legal fictions: (1) that PNI had a valid business relationship with the clients of DSHS separate and apart from its contract with the agency; (2) that DSHS was obligated to renew

PNI's client service contract [said differently, that PNI was absolutely entitled to the award of a state contract for as many years as PNI wished]; (3) that DSHS was subject to any enforceable obligations under the unilateral contract in the absence of its employees properly authorizing services by PNI; and (4) that PNI enjoyed the status and rights of an at-will employee of the state.

PNI's relationship to the children and parents (DSHS's clients) was that of a third-party service provider on behalf of DSHS. The children and parents did not choose the service providers; the DSHS social workers had sole authority to make those referrals. DSHS was under no obligation to authorize any services from PNI, and the clients served could not authorize any work by PNI. There was no business relationship or expectancy between PNI and DSHS's clients outside of the PCV contract.

PNI's relationship to DSHS is that of an independent contractor, in no way akin to an at-will employee; the governing contract specifically provided that PNI enjoyed no rights as an employee of the state. PNI has insisted that the agency was obligated to renew its client service contract, while asserting that there is no limit to the amount a service provider can collect under such a fee for service contract. To support its claim of entitlement to renewal of the PCV contract, Appellant's brief repeatedly misquotes and misrepresents contract guidance provided by the Office of

Financial Management (“OFM”). This effort to mislead the Court failed in the superior court and should fail here. Representing that client service contracts are automatically renewed, PNI’s brief challenges the OFM’s statutory authority for issuing guidelines, and repeatedly misquotes the OFM guidance itself, out of context, asserting that such contracts “are continually renewed year after year based upon a non-competitive award.” The OFM guidance governing client service contracts actually provides that agencies need flexibility in selecting contractors to effectively and efficiently meet the needs of its clients, and that where such contracts are renewed on a non-competitive basis, they should be reviewed periodically to determine if competition is warranted. Review of PNI’s contract status was clearly warranted in light of DSHS’s budgetary problems and the fact that PNI was billing 50% more than Region 4’s entire budget for PCV services by all providers.²

The trial court was not confused by PNI’s voluminous complaints and misstatements of fact and law, and properly granted summary judgment dismissing all of the claims of PNI. This Honorable Court should affirm that grant of summary judgment to DSHS.

² The full text of the relevant OFM guidelines is included as Appendix B. RAP 10.4(c).

II. COUNTERSTATEMENT OF THE ISSUES

(1) Did the Trial Court err in granting summary judgment dismissing PNI's claim for tortious interference with a contract or business expectancy, where that business expectancy arose solely out of PNI's contract with DSHS, and under which PNI merely provided services to clients of DSHS at the sole discretion of DSHS, and for which PNI could only be compensated by DSHS?

(2) Did the Trial Court err in granting summary judgment dismissing PNI's claim for breach of a unilateral contract under which DSHS's only obligation was to pay for services performed after proper authorization, where no claim was made that DSHS failed to pay for any properly authorized services?

(3) Did the Trial Court err in granting summary judgment dismissing PNI's claim for a Tort Against Public Policy where PNI was an independent contractor, not an employee of DSHS, and had no right to a new contract with DSHS?

III. COUNTER STATEMENT OF THE CASE

RAP 10.3 requires that the Appellant provide (1) "a fair statement of the facts and procedure" (2) "relevant to the issues presented for review," (3) "without argument." PNI's statement of the case satisfies none of these requirements, but constitutes instead a lengthy recitation of

allegations and arguments that are irrelevant to the issues on appeal. It also includes factual misrepresentations regarding OFM guidelines for managing PCV contracts. The relevant facts, fairly stated, are as follows.

This appeal arises out of the grant of summary judgment by the Superior Court for King County entered on November 20, 2009, dismissing all claims advanced by PNI in this action. CP at 548. PNI originally filed a Complaint on June 30, 2008, alleging a claim for tortious interference with a contract. CP at 3. PNI amended that complaint March 23, 2009, alleging in its First Amended Complaint three claims arising out of the same set of operative facts: tortious interference with a business relationship arising out of a Parent Child Visitation contract, breach of contract relating to that PCV contract and two other contracts, and a tort against public policy arising out of an overpayment collection procedure under the PCV contract. CP at 21. PNI appeals the dismissal of each of those claims.

A. The Contractual Background

Professional Network, Inc. (PNI), and DSHS's Division of Children and Family Services (DCFS) entered into a parent child visitation services (PCV) contract on July 1, 2004, expiring on November 30, 2004. CP at 117. PNI and DCFS entered into a second contract on December 1, 2004, expiring on June 30, 2005. CP at 141. Those contracts provided

that “the purpose of this Contract is to provide services that facilitate and support parent-child visitation for children in the temporary custody of DSHS/CA for the purpose of reunification of the parent(s) and child”, and defined “Client” as “any child or adult who is authorized to receive services by DSHS.” CP at 119, 143. All of the children served by DCFS were or were about to become wards of the state; all service authorizations were made by DSHS social workers. CP at 540-42. DSHS was the only entity with whom PNI contracted to provide parent child visitation services.

Both contracts also provided that DSHS had sole responsibility to authorize services and no obligation to authorize any services from PNI:

- a. DCFS shall have **sole responsibility for authorizing services**. All authorizations must be initiated **in writing** by DCFS and signed by the referring social worker.
- b. DCFS shall request services from the Contractor on **as needed basis**. This Contract **does not obligate DCFS** to authorize services from the Contractor. CP at 121, 145 (emphasis added).

Further, each contract also provided that “DSHS shall pay the Contractor only for authorized services provided in accordance with this Contract. If this Contract is terminated for any reason, DSHS shall pay only for services authorized and provided through the date of termination.” CP at 122, 146. The “Statement of Work” in each contract added the following further provision: “DSHS will not pay for any services that are not

authorized by DCFS”. CP at 131, 155. The contracts also provided that DSHS may terminate the contract “when it is in the best interest of DSHS” by providing thirty days’ written notice. CP at 125, 149. The provisions for termination or for expiration of the contracts were the same for each; if the contract terminated or expired, “[t]he Contractor shall cease to perform any services required by this contract as of the effective date of termination or expiration.” CP at 126, 150.

Pursuant to these DSHS contracts, PNI was a Contractor to DSHS, defined as follows: “Contractor’ means the individual or entity performing services pursuant to this Contract and includes the Contractor’s owners, members, officers, directors, partners, employees, and/or agents, unless otherwise stated in this Contract.” CP at 118, 142. Those contracts further defined PNI as an independent contractor with no rights as an employee of the state:

Contractor Not an Employee of DSHS. For purposes of this Contract, the Contractor acknowledges that the **Contractor is an independent contractor** and not an officer, employee, or agent of DSHS or the State of Washington. The contractor shall not hold the Contractor of any of the Contractor’s employees out as, nor claim status as, an officer, employee or agent of SDSHS or the State of Washington. The **Contractor shall not claim for the Contractor or the Contractor’s employees any rights, privileges, or benefits which would accrue to an employee of the State of Washington.** The Contractor shall indemnify and hold DSHS harmless from all obligations to pay or withhold federal or state taxes or

contributions on behalf of the Contractor or the Contractor's employees, unless otherwise specified in this Contract. CP at 123,147. *See Appendix A* (emphasis added).

Contrary to PNI's oft-repeated statement that non-competitive contracts are renewed year after year, the Office of Financial Management guidance regarding management of state contracts actually calls for agency selectivity and periodic review to determine whether contracts should be renewed:

“Agencies need flexibility in selecting contractors to effectively and efficiently meet the needs of state clients. Therefore, agencies may select client service contractors by using procurement methods most appropriate to their need, e.g., competitive, non-competitive (direct award) or sole source methods. *** Some client service contracts are continually renewed year after year based on a non-competitive or sole source award. These contracts should be reviewed periodically to determine whether competition is warranted.” CP at 374. *See Appendix B*.

In 2004 and 2005, DSHS faced budget pressures which led to a state-wide, complete review of services being provided. CP at 488. As part of that review, PNI's contract status came under scrutiny as Region 4 was trying to get a handle on its contracting process to become more efficient, in part because it was overspending its budget for visitation services. CP at 323, 492-3. At that time, PNI was billing and collecting \$1.2 million against Region 4's entire PCV budget of only \$800,000.

CP at 501, 513. In light of this budget problem, review of PNI's contract status was warranted under OFM guidelines.

B. PNI's Allegations

In its count alleging tortious interference, PNI claimed that it had a "valid business expectancy of supervised visitation referrals and utilization." CP at 26. PNI's business expectancy was governed by the written unilateral contracts between PNI and DSHS described above, which provided that DSHS had sole responsibility for authorizing services and that DSHS was not obligated to authorize any services by PNI. CP at 121, 145.

PNI's claim for breach of contract alleged that "DSHS breached the supervised visitation services contract between its Region 4 DCFS and PNI on December 27, 2004." CP at 27. PNI's parent-child visitation services contract with DSHS remained in effect until it expired by its own terms on June 30, 2005.³ No additional parent-child visitation contracts were executed between DSHS and PNI. CP at 369-70. PNI's complaint, as amended, did not allege or claim any failure by DSHS to pay for properly authorized services. CP at 21-29.

³ DSHS did attempt to terminate the contract for convenience in March of 2005, but mailed the required notice to PNI's original contracting address. The termination for convenience was never completed.

PNI's tort against public policy claim alleged that "DSHS retaliated against PNI because PNI exercised its administrative and legal rights to challenge the overpayment assessment" and that the State's decision not to renew PNI's parent-child visitation services contract constituted retaliation. CP at 28. Paragraph 8 of the PCV contracts provided DSHS a right to recover fees for services "that DSHS later finds were either (a) not delivered or (b) not delivered in accordance with applicable standards or the requirements of [the contracts]" and "the Contractor shall fully cooperate during the recovery process." CP at 122, 146. Pursuant to that provision, in January 2005, DSHS notified PNI of an overpayment of fees in the amount of \$25,969.72 for the month of July 2004. CP at 84. PNI and DSHS participated in an administrative review of the overpayment claims and the parties entered into a Stipulated and Agreed Order of Dismissal on December 30, 2005, whereby PNI repaid DSHS a portion of the disputed fees. CP at 86-7.

PNI's brief on appeal argues for the first time that PNI's status vis-a-vis the state was "similar to that of at-will employment."⁴ *Br. Appellant*, p. 34. Should this Court choose to consider PNI's argument, the fact is that the governing contract provided that PNI was an independent

⁴ On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. RAP 9.12.

contractor enjoying none of the rights, privileges or benefits of an employee of the state. CP at 123, 147.

This Honorable Court should rely on the material facts as clearly and objectively laid out above, rather than the misleading, argumentative and intentionally distracting statement provided by Appellant.

IV. ARGUMENT

A. This Court Should Employ The Same Standard For Determining Summary Judgment That Supported The Trial Court's Decision.

An appellate court engages in the same inquiry as the trial court when reviewing the propriety of the grant of summary judgment. *Keytronic Corporation, Inc., v. Aetna Fire Underwriters Insurance Company*, 124 Wn.2d 618, 881 P.2d 2001 (1995).

A court may grant summary judgment when the admissible evidence establishes the absence of a dispute as to any material fact. CR 56(c). A material fact is one upon which the outcome of litigation depends. *Kinney v. Cook*, 150 Wn. App. 187, 192, 208 P.3d 1 (2009). “A defendant can move for summary judgment in one of two ways. First, the defendant can set out its version of the facts and allege that there is no genuine issue as to the facts as set out. Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case.”

Guile v. Ballard Comm. Hosp., 70 Wn. App. 18, 21-2, 851 P.2d 689 (1993). Once the absence of a material fact is established, the non-moving party must show that a basis in fact creates a genuine issue for the fact finder. *Meyer v. University of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). A genuine issue of fact exists, precluding summary judgment, only when reasonable minds could reach different factual conclusions after considering the evidence. *Ranger Ins. Co. v. Pierce Co.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

Summary judgment may be defeated only by establishing that there are material issues of fact in dispute or that the mover is not entitled to judgment on the law. Instead of establishing material issues of fact, PNI repeatedly attempts to mislead this Court, relying on conclusory and unsupported assertions that are not material to the real issues on appeal. Appellant's brief burdens the Court with a mountain of argumentative assertions, mostly irrelevant to the issues, in an attempt to imply through sheer volume that there must be material facts in dispute. However, "[t]he 'facts' required by CR 56(e) are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice." *Grimwood v. Puget Sound*, 110 Wn.2d 355, 359-360, 753 P.2d 517 (1988) (citations omitted). "The nonmoving party's burden is not met by responding with conclusory allegations, speculative

statements, or argumentative assertions.” *Pagnotta v. Beall Trailers*, 99 Wn. App. 28, 36, 991 P.2d 728 (2000).

Appellant goes to great lengths in its attempts to create disputed issues of fact. However, the existence of a factual issue in and of itself is not sufficient to defeat a motion for summary judgment if that factual issue is not material to the ultimate outcome of the case. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). “A party opposing summary judgment may not rely on ‘mere allegations or denials’ set forth in the pleadings, but rather ‘must set forth specific facts showing that there is a genuine issue for trial.’” *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 328-29, 119 P.3d 325 (2005) (quoting CR 56(e)). Where issues of material fact do not exist, an order of dismissal is necessary to avoid a useless trial. *Olympia Fish Prod., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980).

Far from presenting specific material facts in dispute, PNI instead sets forth its own speculative assertions and conclusory allegations suggesting conspiracy and intrigue to denigrate DSHS’s contract administration. Those unfair assertions and allegations are irrelevant to the issues on appeal, which arise from unilateral contracts whose terms clearly provided that all discretion lay with DSHS, who was tasked with

providing effective and efficient services for the children in its temporary custody.

PNI cannot establish an essential element for each cause of action claimed. If the non-moving party “fails to make a showing sufficient to establish the existence of an element to that party’s case, and on which the party bears the burden of proof at trial,” then summary judgment should be granted. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

B. The Trial Court Properly Dismissed PNI’s Tortious Interference Claim; PNI Cannot Establish A Claim For Tortious Interference With A Business Relationship Where DSHS Was A Party To The Contract Governing The Relationship.

PNI claims that DSHS tortiously interfered with the relationship between PNI and the clients it served. Appellant’s own brief admits that PNI provided services to DSHS clients, and that the agency compensated the service provider. *Br. Appellant*, p. 2. The contractual relationship or business expectancy arose out of and was governed by the parent-child visitation services contracts between DSHS and PNI. PNI contracted with DSHS to provide parent-child visitation services to clients of DSHS. The children under supervision were DSHS’s clients, not PNI’s clients. The sole referral sources were DSHS employees. Appellant complains that DSHS tortiously interfered with its business expectancy by telling its own

employees not to authorize PNI's services; under the terms of the unilateral contract, DSHS had sole responsibility for authorizing services and no obligation to authorize any services from PNI. DSHS was entitled to summary judgment dismissal of this claim because under Washington law, a party to a contract, as DSHS is here, cannot tortiously interfere with its own contract.

Appellant identifies five requirements of a claim for tortious interference with contractual relations or business expectancy: 1) the existence of a valid contractual relationship or business expectancy; 2) knowledge of that relationship or business expectancy; 3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; 4) interference for an improper purpose or used improper means; and 5) resulting damages. *Hudson v. City of Wenatchee*, 94 Wn. App. 990, 998, 974 P.2d 342 (1999) citing *Havsy v. Flynn*, 88 Wn. App. 514, 518-19, 945 P.2d 221 (1997). However, as a threshold matter, Washington law establishes that a party cannot tortiously interfere with its own contract. *Reninger v. State*, 134 Wn.2d 437, 448, 951 P.2d 782 (1998) (citation omitted) (dismissing the tortious interference claim on collateral estoppel grounds); *Houser v. City of Redmond*, 91 Wn.2d 36, 39, 586 P.2d 482 (1978); *Hein v. Chrysler Corp.*, 45 Wn.2d 586, 277 P.2d 708 (1954); *Vasquez v. State*, 94 Wn. App. 976, 974 P.2d 348 (1999); *Olson v.*

Scholes, 17 Wn. App. 383, 563 P.2d 1275 (1977) (“cause of action exists only against outsiders who interfere with the contractual relationships or business expectancies of others.”). Recovery under tortious interference “requires that the interferor be an intermeddling third party.” *Houser*, 91 Wn.2d at 39. The appropriate remedy for wrongful acts by a party to a contract is an action for breach of that contract. *See Id.* (citing *Hein*, 45 Wn.2d 586); *Olson*, 17 Wn. App. at 390 (citations omitted).

PNI also cannot establish the essential element of a valid business expectancy. It attempts to obviate this shortcoming by arguing a fictitious business relationship with the DSHS clients it served. However, PNI’s relationship to those clients was that of a third-party service provider. The children and parents did not choose the service provider. The children and parents were all clients of DSHS, receiving services for which DSHS was paying. The contractual relationship from which any claimed business expectancy arose was a unilateral contract, explicitly providing DSHS with sole responsibility to authorize services and no obligation to authorize any services from PNI. The clients of DSHS being served had no ability to authorize or pay for any services by PNI. Appellant cannot demonstrate any valid business expectancy outside of its contract with DSHS.

PNI glosses over the absence of any valid business expectancy from its relationship with DSHS's clients by citing cases for the propositions that the existence of an enforceable contract is not necessary for a tort against public policy claim, and that a party can be liable in tort for interfering with its own contract. These broad propositions and those cases provide no support for PNI's claim, however. *Scymanski v. Dufault*, 80 Wn.2d 77, 491 P.2d 1050 (1972) discussed a potential contract with pecuniary value to the plaintiff, "a relationship between parties contemplating a contact, with at least a reasonable expectancy of fruition." 80 Wn.2d at 84-5. It was never contemplated that there would be a contract between PNI and DSHS's clients, let alone any pecuniary value to PNI; only DSHS could pay for PNI's services. Similarly, *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn.2d 595, 564 P.2d 1137 (1977) dealt with a landlord's interference with his tenant's business expectancy with the tenant's customers, who were third parties to the lease, not the landlord's own clients and the objects of the contract. PNI simply had no valid business relationship or expectancy of pecuniary value with the children in the temporary custody of DSHS. Its only business expectancy arose out of the contract with DSHS to provide services on behalf of DSHS to those DSHS clients.

PNI also based its tortious interference claim on DSHS's communications with its own employees and their interactions with PNI employees. All of these communications arose out of the existing PCV contracts between DSHS and PNI. To the extent it informed its own employees not to authorize PNI's services, DSHS acted under the explicit authority of its contract with PNI. DSHS had sole discretion to authorize services, or none at all. DSHS was an essential party to the contract and the business relationship it governed; PNI simply had no valid business expectancy that did not involve DSHS. The trial court properly dismissed PNI's tortious interference claim because of the lack of any intermeddling third party or any valid business expectancy on the part of PNI. This Honorable Court should affirm the trial court's summary dismissal of PNI's tortious interference claim.

C. The Trial Court Properly Dismissed PNI's Breach Of Contract Claim Because DSHS Did Not Violate The Terms Of Its Unilateral Contract.

PNI claimed that DSHS breached its parent child visitation services contract when it advised its staff not to authorize the services of PNI. The PCV contract was a unilateral contract that explicitly provided that DSHS had sole responsibility to authorize services and no obligation to authorize any services from PNI. Accordingly, whether DSHS chose to authorize PNI to perform any services under the contract was within the

sole discretion of DSHS; PNI was not entitled to have any services authorized, so no breach could be triggered by DSHS's decision not to authorize any services. The PCV contract expired by its own terms; there was no breach and no damage to PNI.

Washington law recognizes two types of contracts: bilateral and unilateral. *Multicare Med. Ctr. v. State, Dept. of Soc. and Health Serv.*, 114 Wn.2d 572, 583, 790 P.2d 124 (1990), *superseded by statute on other grounds*. A bilateral contract is formed from reciprocal promises—one party's promise is consideration for the promise of another. *Ebling v. Grove's Cove, Inc.*, 24 Wn. App. 495, 499, 663 P.2d 132 (1983). In a unilateral contract, the offer or promise of one party does not become binding or enforceable until there is performance by the other party. *Higgins v. Egbert*, 28 Wn.2d 313, 317-18, 182 P.2d 58 (1947); *Multicare Med. Ctr.*, 114 Wn.2d at 584 (court held that the contract was unilateral where the hospital provided patient care under a contract with DSHS); *St. John Med. Ctr. v. State ex rel. Dept. of Soc. and Health Serv.*, 110 Wn. App. 51, 64-5, 38 P.3d 383 (2002) (unilateral contract existed where DSHS promised to pay St. John for its services at such time as St. John rendered the services and billed DSHS). Like the contracts in *Multicare* and *St. John Medical Center*, PNI's contract with DSHS was unilateral. DSHS was obligated to compensate PNI for its services contingent upon

PNI providing those services, after such services were properly authorized by DSHS. Because there was no obligation on the part of DSHS until services had been performed by PNI as authorized by DSHS, the PCV contract was a unilateral contract. PNI's only remedy under the PCV contract was to enforce payment for services rendered, and no such claim was made in this action. DSHS paid PNI, as promised, for the services PNI provided.

Contrary to PNI's assertions, DSHS was not obligated to authorize any work by PNI: "This Contract does not obligate DCFS to authorize services from the Contractor." Consequently, if DSHS instructed its employees not to use PNI's services, this did not constitute a breach under the terms of the contract, because DSHS was not obligated to use PNI. The only obligation on DSHS was to pay PNI if services were authorized and performed. Furthermore, because DSHS had sole discretion to authorize services, and PNI was not entitled to any work under the terms of the contract, there could be no damage to PNI from getting less work than PNI expected, or no work at all. PNI was properly paid for all of the authorized work it did perform, and no allegation has been made of a failure of DSHS to pay for work PNI performed. Accordingly, there can be no material issue of fact in dispute regarding breach of contract. The

trial court properly dismissed the breach of contract claim because PNI cannot establish a breach of this unilateral contract.

Appellant's brief raises three new issues on appeal as alleged breaches, which arguments will be addressed seriatim.⁵ The first claim, that DSHS failed to follow the termination process of the contract, ignores the fact that the contract was not terminated, but instead was allowed to run to its course and no new contract was signed. The termination process in the contract was not implicated.

Secondly PNI, for the first time on appeal, argues that DSHS breached an obligation of good faith and fair dealing, citing the implied duty as recognized in *Frank Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 766, 150 P.3d 1147 (2007). Pretermitted that PNI did not raise this issue in the trial court and should therefore be precluded from arguing it here, Appellant's argument ignores the thorough discourse on the implied duty of good faith and fair dealing set out in the Supreme Court decision of *Badgett v. Security State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991), upon which *Coluccio* relied. *Badgett* made clear that the duty does not inject substantive terms into the contract or create obligations on the parties in addition to those contained in their contract;

⁵ On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. RAP 9.12.

in short, the implied duty of good faith does not exist apart from the terms of the contract.

“The duty to cooperate exists only in relation to performance of a specific contract term. (citations omitted). As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.” 116 Wn.2d at 570.

Finding no additional obligation arising out of the implied good faith duty, *Badgett* affirmed summary judgment dismissal of the plaintiffs’ claims.

The PCV contract at issue specifically provided that DSHS had sole discretion to authorize any services by PNI, or none at all. With no reciprocal obligations until services were authorized, good faith and fair dealing could only come into play in the payment for those services. DSHS promptly paid all PNI invoices; PNI made no claim of failure to pay for properly authorized services. When overpayment to PNI was identified, DSHS properly followed the contractual overpayment process through administrative review, which resulted in a settlement and repayment of some fees by PNI. DSHS stood on its rights under the contract; there could be no breach of any implied duty of good faith and fair dealing as a matter of law.

Finally, PNI claims that DSHS breached an obligation to renew PNI’s client services contract. The contract contained no such obligation.

Instead, PNI has challenged the Office of Financial Management's citation of statutory authority [RCW 39.29.040(6)] for issuing client service guidelines, and then misrepresented that section. PNI claims that RCW 39.29.040(4) should control OFM's guidelines, implying that a contract is available to all qualified applicants. Subsection (4) applies to standard fee contracts when the fee is established by the agency and a contract is available to all qualified applicants; this is inconsistent with the PCV contract, which is fee for services at a standard rate, and inconsistent with OFM's guidelines which mandate flexibility in selecting contractors. Subsection (6), as quoted by OFM, applies by its own terms to "contracts for client services", the controlling type of PCV contract at issue. PNI also claims that OFM's guidelines provide that such contracts "are continually renewed year to year based upon a non-competitive award." *Br. Appellant*, p. 29. This is a misrepresentation of the guidelines. OFM's guidelines actually provide for selection of contractors, stress effectiveness and efficiency, and call for periodic review to determine if contracts should be competitively awarded:

"Agencies need flexibility in selecting contractors to effectively and efficiently meet the needs of state clients... Therefore, agencies may select client service contractors by using procurement methods most appropriate to their need, e.g., competitive, non-competitive (direct award) or sole source methods. *** Some client service contracts are continually renewed year after year based on a non-

competitive or sole source award. These contracts should be reviewed periodically to determine whether competition is warranted.” *See Appendix B.*

Misstatements and misrepresentations notwithstanding, PNI simply cannot demonstrate a right to a client service contract with the State. State law and OFM guidance make it clear that the agency is tasked with selecting contractors for effectiveness and efficiency, and is given flexibility to accomplish these goals. No contractor is guaranteed a contract, and no contractor may collect unlimited monies from the agency. PNI collected all of the money it was owed and had no other enforceable right under the contract. No breach occurred. This Honorable Court should affirm the trial court’s summary judgment dismissal of PNI’s breach of contract claim.

D. The Trial Court Properly Dismissed PNI’s Claim For A Tort Against Public Policy Because PNI Was Not An Employee Of DSHS And Had No Right To A Contract With DSHS.

PNI claimed that DSHS committed a tort against public policy by retaliating against it for challenging the claim of overpayment, arguing that DSHS’s decision not to enter into a new contract after the PCV contract expired on June 30, 2005, constituted retaliation. However, tort against public policy is a limited remedy applicable only in an employment situation. PNI was an independent contractor, not an employee of DSHS, and had no rights, privileges or benefits as an

employee of DSHS. Further, the PCV contract expired by its own terms. PNI was not discharged; DSHS simply chose not to award a new contract. PNI had no right to a public contract in perpetuity, and DSHS acted within its statutory authority by exercising flexibility in selecting its contractors.

PNI relies for its tort against public policy claim on the legal framework that has developed around wrongful discharge in violation of public policy. Under Washington law, courts have found that a violation of public policy exists where an employer wrongfully terminates its employee. See *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 80, 196 P.3d 691 (2008). A prima facie claim requires the employee to establish “(1) the existence of a clear public policy (*clarity* element); (2) that discouraging the conduct in which they engaged would jeopardize the public policy (*jeopardy* element); and (3) that the public-policy-linked conduct caused the dismissal (*causation* element).” *Hubbard v. Spokane Co.*, 146 Wash. 2d 699, 707, 50 P.3d 602 (2002) (emphasis added, citation omitted). *Hubbard* cited and relied upon *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), in which the Supreme Court first recognized and defined the tort against public policy action in Washington: “an employer can be liable in tort if he or she discharges an employee for a reason that contravenes a clear mandate of public policy,” explaining that “[w]e believe that this narrow public policy exception (to

terminable at will employment) should be adopted because it properly balances the interest of both the employer and employee.” 102 Wn.2d at 232 (emphasis added). By definition, a wrongful discharge depends upon termination of employment. *Awana v. Port of Seattle*, 121 Wn. App. 429, 433, 89 P.3d 291 (2004). Tort against public policy claims have only been recognized in the employment context.

PNI cannot establish that it was an employee of DSHS. The PCV contract explicitly stated that PNI was an independent contractor, not an employee:

Contractor Not an Employee of DSHS. For purposes of this Contract, the Contractor acknowledges that the **Contractor is an independent contractor** and not an officer, employee, or agent of DSHS or the State of Washington. The contractor shall not hold the Contractor of any of the Contractor’s employees out as, nor claim status as, an officer, employee or agent of SDSHS or the State of Washington. The **Contractor shall not claim for the Contractor or the Contractor’s employees any rights, privileges, or benefits which would accrue to an employee of the State of Washington.** The Contractor shall indemnify and hold DSHS harmless from all obligations to pay or withhold federal or state taxes or contributions on behalf of the Contractor or the Contractor’s employees, unless otherwise specified in this Contract. *See Appendix A* (emphasis added).

Appellant's brief argues for the first time to this Court that PNI's relationship with the state was similar to at will employment.⁶ *Br. Appellant*, p. 34. This is not true. PNI was an independent contract service provider, and even characterized itself as a service provider in its First Amended Complaint: "PNI was a provider of supervised parent child visitation services." A service provider is a supplier, and not an employee. *See San Bernardino Physicians' Serv. Med. Group, Inc. v. San Bernardino Co.*, 825 F.2d 1404, 1409 (9th Cir. 1987) (holding that a service provider did not have a constitutional interest in its contract, differentiating it from an employment contract). Because PNI was not an employee of DSHS, it may not maintain an action for a tort against public policy, and the trial court properly dismissed this claim.

Furthermore, implicit in PNI's argument is the assumption that it was entitled to automatic renewal of its client services contract. As discussed above, DSHS is tasked with the selection of contractors to provide client services, and must remain flexible in the selection of those contractors who can provide effective and efficient services to DSHS clients. Periodic review of contractors is mandated by OFM guidelines.

⁶ On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. RAP 9.12

There simply is no automatic right to a client service contract, under Washington statute or agency guidelines.

PNI was an independent contractor with no rights, benefits or privileges as an employee. Because PNI was not an employee of DSHS, it cannot establish the required status element of a claim for a tort against public policy. The law provides no such remedy for an independent contractor. Furthermore, the contract expired on its own terms and PNI had no right to a new contract. The trial court properly dismissed PNI's claim for a tort against public policy because PNI cannot establish an essential element of such a claim. This Honorable Court should affirm the trial court's summary judgment dismissal of PNI's tort against public policy claim.

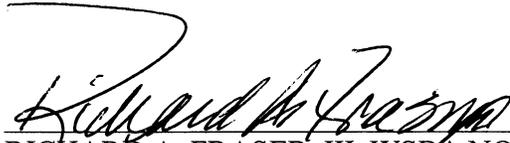
V. CONCLUSION

There are no genuine issues as to any material fact and the State is entitled to summary judgment as a matter of law on all three claims asserted in Plaintiff's First Amended Complaint. PNI cannot establish an essential element of each of its claims, and summary judgment was warranted. For the reasons stated, this Honorable Court should affirm the

trial court's grant of Defendant's Motion for Summary Judgment and dismissal of PNI's First Amended Complaint in its entirety.

RESPECTFULLY SUBMITTED this 25th day of March, 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Richard A. Fraser, III", is written over a horizontal line.

RICHARD A. FRASER, III, WSBA NO. 37577
KATHRYN C. LEONARD, WSBA NO. 38762
Assistant Attorneys General
Attorneys for Respondent Washington
Department of Social and Health Services

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Brief of Respondent Washington Department of Social and Health Services were hand-delivered by messenger, to the following address:

Court of Appeals of Washington, Division I
One Union Square
600 University Street
Seattle, WA 98101

And that one copy was served by ABC Legal Messenger on counsels for Appellant Professional Network, Inc. at the following addresses:

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DATED this 25th day of March, 2010 at Seattle, Washington.


MICHELLE SORENSEN

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 MAR 26 AM 10:40

APPENDIX A



CLIENT SERVICE CONTRACT

Parent Child Visitation Services (PCV)

DSHS Contract Number:
0412-64427
Resulting From Solicitation Number:

This Contract is between the State of Washington Department of Social and Health Services (DSHS) and the Contractor identified below.

Program Contract Number:
Contractor Contract Number:

CONTRACTOR NAME		CONTRACTOR doing business as (DBA)	
Professional Network, Inc.			
CONTRACTOR ADDRESS		WASHINGTON UNIFORM BUSINESS IDENTIFIER (UBI)	DSHS INDEX NUMBER
19502 56th Ave W		601-807-795	2097
Lynnwood, WA 98036			
CONTRACTOR CONTACT	CONTRACTOR TELEPHONE	CONTRACTOR FAX	CONTRACTOR E-MAIL ADDRESS
Priscilla Coy-Monahan	(425) 672-8787 Ext: 11	(425) 640-5423	
DSHS ADMINISTRATION	DSHS DIVISION	DSHS CONTRACT CODE	
Children's Administration	Division of Children and Family Services	2000XC	
DSHS CONTACT NAME AND TITLE		DSHS CONTACT ADDRESS	
Paula Williams Regional Manager of Contracts		100 W Harrison, South Tower Suite 400 Seattle, WA 98119-4141	
DSHS CONTACT TELEPHONE	DSHS CONTACT FAX	DSHS CONTACT E-MAIL ADDRESS	
(206) 691-2505 Ext:	(206) 281-6288	apau300@dshs.wa.gov	
IS THE CONTRACTOR A SUBRECIPIENT FOR PURPOSES OF THIS CONTRACT?		CFDA NUMBER(S)	
No			
CONTRACT START DATE	CONTRACT END DATE	CONTRACT MAXIMUM AMOUNT	
12/01/2004	06/30/2005	\$0.00	
EXHIBITS. When the box below is marked with an X, the following Exhibits are attached and are incorporated into this Contract by reference: <input checked="" type="checkbox"/> Exhibits (specify): Exhibit A - Statement of Work Exhibit B - Program Requirements Exhibit C - Required Forms			
This Contract contains all of the terms and conditions agreed upon by the parties. No other understandings or representations, oral or otherwise, regarding the subject matter of this Contract shall be deemed to exist or bind the parties. The parties signing below warrant that they have read and understand this Contract and have authority to enter into this Contract.			
CONTRACTOR SIGNATURE	PRINTED NAME AND TITLE	DATE SIGNED	
<i>[Signature]</i>	Priscilla Coy-Monahan	12-1-04	
DSHS SIGNATURE	PRINTED NAME AND TITLE	DATE SIGNED	
<i>[Signature]</i>	Contracts Manager DSHS, Children's Administration	12/22/04	

1. **Definitions.** The words and phrases listed below, as used in this Contract, shall each have the following definitions:
- a. "Abuse of Client" means the injury, sexual abuse or exploitation, negligent treatment or maltreatment of a client by any person under circumstances which indicate that the client's health, welfare or safety is harmed thereby.
 - b. "Agency" means a public or private agency or other organization providing services to DSHS clients.
 - c. "Authorized" means approved by a DSHS social worker as evidenced by receipt of an SSPS Social Services notice or other written notice.
 - d. "CA" means Children's Administration, which is an Administration under DSHS.
 - e. "Central Contract Services" means the DSHS Office of Legal Affairs, Central Contract Services, or successor section or office.
 - f. "Client" means any child or adult who is authorized to receive services by DSHS.
 - g. "Contract" means the entire written agreement between DSHS and the Contractor, including any Exhibits, documents, and materials incorporated by reference.
 - h. "Contracting Officer" means the Contracts Administrator, or successor, of DSHS Central Contract Services or successor section or office.
 - i. "Contractor" means the individual or entity performing services pursuant to this Contract and includes the Contractor's owners, members, officers, directors, partners, employees, and/or agents, unless otherwise stated in this Contract. For purposes of any permitted Subcontract, "Contractor" includes any Subcontractor and its owners, members, officers, directors, partners, employees, and/or agents.
 - j. "Corporal Punishment" means any act that willfully inflicts or causes the infliction of physical pain on a child.
 - k. "DCFS" means the Division of Children and Family Services, which is a division of Children's Administration.
 - l. "DLR" means the Division of Licensed Resources, which is a division of Children's Administration.
 - m. "DSHS" or "the department" or "the Department" means the State of Washington Department of Social and Health Services and its employees and authorized agents.
 - n. "Personal Information" means information identifiable to any person, including, but not limited to, information that relates to a person's name, health, finances, education, business, use or receipt of governmental services or other activities, addresses, telephone numbers, social security numbers, driver license numbers, other identifying numbers, and any financial identifiers.
 - o. "PCV" means Parent Child Visitation.
 - p. "RCW" means the Revised Code of Washington. All references in this Contract to RCW chapters or sections shall include any successor, amended, or replacement statute. RCW can be accessed at <http://www/leg.wa.gov/rcw/index.cfm>

- q. "Regional PCV Gatekeeper" means regional staff designated by the DCFS Regional Administrator or designee to manage or oversee the PCV Program for the region.
- r. "Regulation" means any federal, state, or local regulation, rule, or ordinance.
- s. "SSPS" means the DSHS Social Service Payment System, the service authorization and payment system used by DSHS for this Contract.
- t. "Staffings" means formal or informal meetings of two or more DCFS or professional staff, consultants, parent, or others to review, discuss, or make decisions concerning a client or case.
- u. "Subcontract" means any separate agreement or contract between the Contractor and an individual or entity ("Subcontractor") to perform all or a portion of the duties and obligations that the Contractor is obligated to perform pursuant to this Contract.
- v. "WAC" means the Washington Administrative Code. All references in this Contract to WAC chapters or sections shall include any successor, amended, or replacement regulation. WAC can be accessed at <http://www.leg.wa.gov/wac/>.

2. Purpose of Contract.

The purpose of this Contract is to provide services that facilitate and support parent-child visitation for children in the temporary custody of DSHS/CA for the purpose of reunification of the parent(s) and child. Services provided may include transportation of the child to the scheduled visit with the parent(s).

3. Statement of Work.

- a. The Contractor shall provide Parent-Child Visitation Services and/or transportation services as described in the Statement of Work attached as Exhibit A.
- b. This Contract shall supersede any previous contract between DSHS and the Contractor and any previous contract's statement of work for these services.

4. Compensation.

DSHS will pay the Contractor on the basis of the total number of hours spent, and not by the number of children served, in accordance with the regional rate(s) in effect at the time the services are provided per that region's current regional published rate schedules; as follows:

a. Supervision/Monitoring Time: Hourly Rate for Direct Client Time

- (1) Direct Client Time: The time spent supervising or monitoring visits as described in the Statement of Work, Exhibit A. Direct client time for Monitored Visits shall mean the entire time the service worker is on site during the parent-child visit.
- (2) Direct client time does not include time spent for administrative tasks, such as time spent scheduling visits, completing forms or reports required under this Contract, or completing other paper work or tasks related to performing this Contract. Administrative tasks are considered as support of parent-child visits. Administrative support is included in the hourly rate.

b. Transportation Time: Separate Hourly Rate for Transportation Time

- (1) Transportation Time: Round trip time to and from the child's current residence or other agreed upon location, to the location of the parent-child visit.

- (2) Allowable travel time is portal to portal. Travel time shall be calculated as the shortest distance from the service worker's residence, Contractor's place of business, or the county line, whichever is the shortest distance.
- (3) No reimbursement for travel shall be paid for travel between the service worker's residence and the Contractor's place of business. If the Contractor does not have a place of business in the DSHS region served, allowable travel time shall be delineated in the Regional Protocol. No reimbursement for travel shall be paid outside the county where services are provided without written approval from the Regional PCV Gatekeeper, or designee.

c. Cancellations or Missed Appointments

- (1) Confirmed Visit: A visit that is confirmed by all parties within at least 24 hours before the scheduled visit. Per the Statement of Work, the Contractor is responsible for confirming the first scheduled visit at least 24 hours in advance of the visit with all parties, and for confirming a later visit if the client was a "no show" at the previous scheduled visit.
- (2) Client Cancellations or Missed Appointments for confirmed visits:
 - (a) Advance Cancellation: Payment for one (1) hour when a client cancels a confirmed visit with less than 24-hour notice. DSHS will only pay the Contractor for up to three (3) cancellations of confirmed visits per client, unless DSHS re-authorizes services.
 - (b) Missed Appointment: Payment for actual time spent, not to exceed two (2) hours, and mileage if a parent fails to appear for a confirmed scheduled visit, except as approved by the Regional PCV Gatekeeper or designee. DSHS will only pay the Contractor for up to three (3) missed appointments of confirmed visits per client, unless DSHS re-authorizes services.

d. Court Testimony

- (1) Court testimony is not reimbursable under this Contract when requested by or subpoenaed by someone other than DSHS. However, this does not preclude the Contractor from seeking reimbursement from the party who subpoenaed or requested the testimony or court appearance.
- (2) Court testimony is reimbursable as a service provided under this Contract only when requested by DSHS, which request must be in writing, as specified in the Statement of Work attached as Exhibit A.

e. Mileage and Ancillary Costs

- (1) Mileage and ancillary costs shall be paid in accordance with current rates and regulations set by the Washington State Office of Financial Management.
- (2) Allowable mileage is portal to portal. Mileage shall be calculated as the shortest distance from the service worker's residence, Contractor's place of business, or the county line, whichever is the shortest distance. No reimbursement for travel shall be paid for travel between the service worker's residence and the Contractor's place of business. If the Contractor does not have a place of business in the DSHS region served, allowable mileage shall be delineated in the Regional Protocol.

f. Vendor Rate Increase

In the event of a legislatively mandated general cost of living vendor rate increase, the rates shall be adjusted accordingly and shall be incorporated into this Contract on the date the rate(s) become effective. Vendor rate increases that are not a general cost of living increase shall be tied to

increased minimum expectations for service.

5. **Billing and Payment.**

- a. The Contractor shall render a monthly invoice for services performed under this Contract on Invoice Voucher A-19 or other regional approved invoice, prepared in the manner prescribed by DSHS.
- b. The voucher shall clearly indicate that it is "FOR SERVICES RENDERED IN PERFORMANCE UNDER DSHS CONTRACT NO. _____ FOR THE MONTH OF _____."
- c. The Contractor shall bill for each month of service on a separate A-19. The A-19 shall state the month services were provided.
- d. The Contractor shall submit with each invoice the "Driver/Supervisor: Weekly Visitation and Transportation Billing Log", per attached Exhibit A, which documents Contractor's invoice to claim reimbursement for the month billed. The log shall track actual time to the tenth of one hour:

Minutes	Hour (in Tenths)
1 - 6	0.1
7 - 12	0.2
13 - 18	0.3
19 - 24	0.4
25 - 30	0.5
31 - 36	0.6
37 - 42	0.7
43 - 48	0.8
49 - 54	0.9
55 - 60	hour

The Contractor shall round up the cumulative total for the month to the nearest hour.

- e. Claims for payment submitted by the Contractor shall be paid by DSHS if received by DSHS no later than sixty (60) days from the date services were rendered.
- f. A payment will be generated at the end of the month in which an invoice is submitted.
- g. DSHS may stop payment to the Contractor if reports required under this Contract are not received within 10 working days following the due date.

6. **Authorization of Services**

- a. DCFS shall have sole responsibility for authorizing services. All authorizations must be initiated in writing by DCFS and signed by the referring social worker.
- b. DCFS shall request services from the Contractor on an as needed basis. This Contract does not obligate DCFS to authorize services from the Contractor.

7. **Funding Stipulations**

- a. Information for Federal Funding. The Contractor shall cooperate in supplying information to DSHS to determine client's eligibility for federal funding.
- b. Duplicate Billing. The Contractor must not bill other funding sources for services rendered under this Contract which would result in duplicate billing to different funding sources for the same service. Furthermore, the Contractor shall ensure that no subcontractor bills any other funding sources for services rendered under this Contract, which would result in duplicate billing to different

funding sources for the same service.

- c. No Federal Match. The Contractor shall not use funds payable under this Contract as match toward federal funds.
- d. Supplanting. The Contractor shall use these funds to supplement, not supplant the amount of federal, state and local funds otherwise expended for services provided under this Contract.

8. Recovery of Fees for Noncompliance

In the event the Contractor bills for services provided and is paid fees for services that DSHS later finds were either (a) not delivered or (b) not delivered in accordance with applicable standards or the requirements of this Contract, DSHS shall have the right to recover the fees for those services from the Contractor, and the Contractor shall fully cooperate during the recovery process.

9. Overpayments and Assertion of Lien

In the event that DSHS establishes overpayments or erroneous payments made to the Contractor under this Contract, DSHS may secure repayment, plus interest, if any, through the filing of a lien against the Contractor's real property, or by requiring the posting of a bond, assignment of deposit, or some other form of security acceptable to DSHS, or by doing both.

10. Prohibition of Use of Funds for Lobbying Activities

The Contractor shall not use funds payable under the Contract for lobbying activities of any nature. The Contractor certifies that no state or federal funds payable under this Contract shall be paid to any person to influence, or attempt to influence, either directly or indirectly, an officer or employee of any state or federal agency, or an officer or member of any state or federal legislative body or committee, regarding the award, amendment, modification, extension, or renewal of a state or federal contract or grant.

Any act by the Contractor in violation of this prohibition shall be grounds for termination of this Contract, at the sole discretion of DSHS, and shall subject Contractor to such monetary and other penalties as may be provided by law.

11. Advance Payment and Billing Limitations.

- a. DSHS shall not make any payments in advance or anticipation of the delivery of services to be provided pursuant to this Contract.
- b. DSHS shall pay the Contractor only for authorized services provided in accordance with this Contract. If this Contract is terminated for any reason, DSHS shall pay only for services authorized and provided through the date of termination.
- c. Failure to provide any or all of the services as specified in the Statement of Work and authorized by DSHS may result in nonpayment by DSHS.
- d. Unless otherwise specified in this Contract, DSHS shall not pay any claims for payment for services submitted more than twelve (12) months after the calendar month in which the services were performed.
- e. The Contractor shall not bill DSHS for services performed under this contract, and DSHS shall not pay the Contractor, if the Contractor has charged or will charge the State of Washington or any other party under any other contract or agreement for the same services.

- 12. Assignment.** The Contractor may not assign this Contract, or any rights or obligations contained in this Contract, to a third party.

13. **Compliance with Applicable Law.** At all times during the term of this Contract, the Contractor shall comply with all applicable federal, state, and local laws and regulations.
14. **Confidentiality.** The Contractor may use Personal Information and other information gained by reason of this Contract only for the purpose of this Contract. The Contractor shall not disclose, transfer, or sell any such information to any party, except as provided by law or, in the case of Personal Information, with the prior written consent of the person to whom the Personal Information pertains. The Contractor shall maintain the confidentiality of all Personal Information and other information gained by reason of this Contract, and shall return or certify the destruction of such information if requested in writing by DSHS.
15. **Contractor Certification Regarding Ethics.** The Contractor certifies that the Contractor is in compliance with Chapter 42.52 RCW, Ethics in Public Service, and shall comply with Chapter 42.52 RCW throughout the term of this Contract.
16. **Contractor Not an Employee of DSHS.** For purposes of this Contract, the Contractor acknowledges that the Contractor is an independent contractor and not an officer, employee, or agent of DSHS or the State of Washington. The Contractor shall not hold the Contractor or any of the Contractor's employees out as, nor claim status as, an officer, employee, or agent of DSHS or the State of Washington. The Contractor shall not claim for the Contractor or the Contractor's employees any rights, privileges, or benefits which would accrue to an employee of the State of Washington. The Contractor shall indemnify and hold DSHS harmless from all obligations to pay or withhold federal or state taxes or contributions on behalf of the Contractor or the Contractor's employees, unless otherwise specified in this Contract.
17. **Debarment Certification.** The Contractor certifies that the Contractor is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in this Contract by any Federal department or agency. If requested by DSHS, the Contractor shall complete a Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion form. Any such form completed by the Contractor for this Contract shall be incorporated into this Contract by reference.
18. **Dispute Resolution.** Either party may submit a request for a resolution of a contract dispute. The amount of any rate set by law, regulation, or DSHS policy is not disputable. A party requesting resolution of a contract dispute shall submit a written statement identifying the issue(s) in dispute, and shall include the Contractor's name, address, and contract number. The request must be mailed to the following address within thirty (30) calendar days after the party could reasonably be expected to have knowledge of the issue which is disputed:

DSHS/Children's Administration
Attention: Contracts Management Unit
P.O. Box 45710
Olympia, WA 98504-5710

This dispute resolution process is the sole administrative remedy available under this Contract.

19. **Drug Free Work Place.** The Contractor certifies the Contractor will provide a drug-free workplace in accordance with the Drug-Free Workplace Act of 1988 and implemented at 28 CFR Part 67, Subpart F for grantees, as defined at 28 CFR Part 67, Section 67.615 and 67.620.
20. **Execution, Amendment, and Waiver.** This Contract shall be binding on DSHS only upon signature by DSHS. This Contract, or any provision, may be altered, amended, or waived by a written amendment executed by both parties, except that only the Contracting Officer or the Contracting Officer's designee has authority to waive any provision of this Contract on behalf of DSHS.

21. **Governing Law and Venue.** The laws of the State of Washington shall govern this Contract. In the event of a lawsuit involving this Contract, venue shall be proper only in Thurston County, Washington.
22. **Indemnification and Hold Harmless.** The Contractor shall be responsible for and shall indemnify and hold DSHS harmless from all liability resulting from the acts or omissions of the Contractor and any Subcontractor.
23. **Inspection; Maintenance of Records.**
- a. During the term of this Contract and for one (1) year following termination or expiration of this Contract, the Contractor shall give reasonable access to the Contractor, Contractor's place of business, client records, and Contractor records to DSHS and to any other employee or agent of the State of Washington or the United States of America in order to monitor, audit, and evaluate the Contractor's performance and compliance with applicable laws, regulations, and this Contract.
 - b. During the term of this Contract and for six (6) years following termination or expiration of this Contract, the Contractor shall maintain records sufficient to:
 - (1) Document performance of all acts required by law, regulation, or this Contract;
 - (2) Substantiate the Contractor's statement of its organization's structure, tax status, capabilities, and performance; and
 - (3) Demonstrate accounting procedures, practices, and records, which sufficiently and properly document the Contractor's invoices to DSHS and all expenditures made by the Contractor to perform as required by this Contract.
24. **Nondiscrimination.** The Contractor shall comply with all applicable federal, state, and local nondiscrimination laws and regulations.
25. **Notice of Overpayment.** If the Contractor receives a Vendor Overpayment Notice or a letter communicating the existence of an overpayment from DSHS, the Contractor may protest the overpayment determination by requesting an adjudicative proceeding pursuant to RCW 43.20B.
26. **Obligation to Ensure Health and Safety of DSHS Clients.** The Contractor shall ensure the health and safety of any DSHS client for whom services are provided by the Contractor.
27. **Order of Precedence.** In the event of an inconsistency in this Contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence, in the following order, to:
- a. Applicable federal, state, and local law and regulations;
 - b. The terms and conditions of this Contract; and
 - c. Any Exhibit, document, or material incorporated by reference.
28. **Ownership of Material.** Materials created by the Contractor and paid for by DSHS as a part of this Contract shall be owned by DSHS and shall be "works for hire" as defined by the U.S. Copyright Act of 1976. This material includes, but is not limited to: books, computer programs, documents, films, pamphlets, reports, sound reproductions, studies, surveys, tapes, and/or training materials. Material which the Contractor uses to perform this Contract, but which is not created for or paid for by DSHS, is owned by the Contractor; however, DSHS shall have a perpetual license to use this material for DSHS internal purposes at no charge to DSHS.
29. **Severability; Conformity.** The provisions of this Contract are severable. If any provision of this Contract is held invalid by any court, that invalidity shall not affect the other provisions of this Contract

and the invalid provision shall be considered modified to conform to existing law.

30. **Single Audit Act Compliance.** If the Contractor is a subrecipient of federal awards as defined by Office of Management and Budget (OMB) Circular A-133, the Contractor shall maintain records that identify all federal funds received and expended. Such funds shall be identified by the appropriate OMB Catalog of Federal Domestic Assistance titles and numbers, award names and numbers, award years, if awards are for research and development, as well as names of the federal agencies. The Contractor shall make the Contractor's records available for review or audit by officials of the federal awarding agency, the General Accounting Office, DSHS, and the Washington State Auditor's Office. The Contractor shall incorporate OMB Circular A-133 audit requirements into all contracts between the Contractor and its Subcontractors who are subrecipients. The Contractor shall comply with any future amendments to OMB Circular A-133 and any successor or replacement Circular or regulation.

If the Contractor is a subrecipient and expends \$300,000 or more in federal awards from any and/or all sources in any fiscal year beginning after June 30, 1996, the Contractor shall procure and pay for a single or program-specific audit for that fiscal year. Upon completion of each audit, the Contractor shall submit to the DSHS Contact named in this Contract the data collection form and reporting package specified in OMB Circular A-133, reports required by the program-specific audit guide (if applicable), and a copy of any management letters issued by the auditor.

31. **Subcontracting.** Except as otherwise provided in this Contract, the Contractor may not subcontract any of the contracted services without the prior, written approval of DSHS. The Contractor shall be responsible for the acts and omissions of any Subcontractor.
32. **Survivability.** The terms and conditions contained in this Contract that by their sense and context are intended to survive the expiration or termination of this Contract shall so survive. Surviving terms include but are not limited to: Confidentiality, Indemnification and Hold Harmless, Inspection, Maintenance of Records, Notice of Overpayment, Ownership of Material, Termination for Default, Termination and Expiration Procedure, Treatment of Assets Purchased by Contractor, and Treatment of DSHS Assets.
33. **Termination Due to Change in Funding.** If the funds DSHS relied upon to establish this Contract are withdrawn or reduced, or if additional or modified conditions are placed on such funding, DSHS may immediately terminate this Contract by providing written notice to the Contractor. The termination shall be effective on the date specified in the notice of termination.
34. **Termination for Convenience.** DSHS may terminate this Contract in whole or in part when it is in the best interest of DSHS by giving the Contractor at least thirty (30) calendar days' written notice. The Contractor may terminate this Contract for convenience by giving DSHS at least thirty (30) calendar days' written notice addressed to DSHS at the address listed on page 1 of this Contract.
35. **Termination for Default.** The Contracting Officer may terminate this Contract for default, in whole or in part, by written notice to the Contractor if DSHS has a reasonable basis to believe that the Contractor has:
- a. Failed to meet or maintain any requirement for contracting with DSHS;
 - b. Failed to ensure the health or safety of any client for whom services are being provided under this Contract;
 - c. Failed to perform under, or otherwise breached, any term or condition of this Contract; and/or
 - d. Violated any applicable law or regulation.
 - e. If it is later determined that the Contractor was not in default, the termination shall be considered a

termination for convenience.

36. **Termination and Expiration Procedure.** The following provisions apply if this Contract is terminated or expires:
- a. The Contractor shall cease to perform any services required by this Contract as of the effective date of termination or expiration. If the Contract is terminated, the Contractor shall comply with all instructions contained in the notice of termination.
 - b. The Contractor shall immediately deliver to the DSHS Contact named in this Contract, or to his or her successor, all DSHS assets (property) in the Contractor's possession, including any material created under this Contract. The Contractor grants DSHS the right to enter upon the Contractor's premises for the sole purpose of recovering any DSHS property that the Contractor fails to return within ten (10) calendar days of termination or expiration of this Contract. Upon failure to return DSHS property within ten (10) calendar days, the Contractor shall be charged with all reasonable costs of recovery, including transportation. The Contractor shall protect and preserve any property of DSHS that is in the possession of the Contractor.
 - c. DSHS may withhold a sum from the final payment to the Contractor that DSHS determines necessary to protect DSHS against loss or additional liability.
 - d. The rights and remedies provided to DSHS in this paragraph are in addition to any other rights and remedies provided at law, in equity, and/or under this Contract, including consequential damages and incidental damages. The Contractor may request dispute resolution as provided in this Contract.
37. **Treatment of Assets Purchased by Contractor.** Title to all assets (property) purchased or furnished by the Contractor is vested in the Contractor and DSHS waives all claim of ownership to such property.
38. **Treatment of Client Assets.** Unless otherwise provided in this Contract, the Contractor shall ensure that any adult client receiving services from the Contractor under this Contract has unrestricted access to the client's personal property. The Contractor shall not interfere with any adult client's ownership, possession, or use of the client's personal property. The Contractor shall provide clients under age eighteen (18) with reasonable access to their personal property that is appropriate to the client's age, development, and needs. Upon termination of this Contract, the Contractor shall immediately release to the client and/or the client's guardian or custodian all of the client's personal property.
39. **Treatment of DSHS Assets.** Title to all assets (property) purchased or furnished by DSHS for use by the Contractor during this Contract term shall remain with DSHS. The Contractor shall protect, maintain, and insure all DSHS property in the Contractor's possession against loss or damage and shall return DSHS property to DSHS upon Contract termination or expiration.
40. **Waiver of Default.** Waiver of any breach or default on any occasion shall not be deemed to be a waiver of any subsequent breach or default and shall not be construed to be a modification of the terms and conditions of this Contract.

APPROVED AS TO FORM BY THE OFFICE OF THE ATTORNEY GENERAL

STATEMENT OF WORK

Parent Child Visitation

The Contractor shall provide parent-child visits for children in the temporary custody of DSHS/CA for the purpose of reunification. Visits may occur with extended family members or others who are significant to the child as deemed appropriate by the DCFS Social Worker and approved by the Regional PCV Gatekeeper, or designee. The Contractor shall provide services as follows:

1. Intent of Services

The Contractor shall provide services in a manner that will:

- a. Reunify children and their families to promote permanent placement;
- b. Create an atmosphere and an environment that encourage the parent-child relationship; and
- c. Support and nurture the child.

2. Service Requirements

The Contractor shall ensure that:

- a. Services are scheduled at the convenience of the parent and child and are available during regular workday hours, evenings and weekends;
- b. *Visitations are scheduled at times and locations agreeable to the parent, the out-of-home care provider, and the DCFS referring social worker;*
- c. Consistency of services for the child is provided by the Contractor assigning a single staff to each child with an identified backup staff to provide assistance as necessary;
- d. Safe and neutral visitation sites are selected;
- e. On-going contact and communication with the DCFS referring social worker are maintained on a regular basis;
- f. Staff are available to testify at court hearings when requested in writing by DSHS and to attend meetings, staffings and child fatality reviews with DCFS staff, when requested in writing by DCFS. Contractor will be reimbursed for time spent in meetings and staffings, or when testifying in court, at the Contractor's hourly rate under this Contract.

3. Provision Of Services

The Contractor shall:

- a. Schedule Visits as follows:
 - (1) Notify all parties when visitation services will begin;
 - (2) Develop a visitation appointment schedule and arrange for the meeting location;

- (3) Complete the Parent Child Visitation (PCV) Request Form, in accordance with attached Exhibit C – Forms and Reports, and return it to the referring DCFS social worker upon arrangement of visits;
 - (4) Confirm the first scheduled visit with all parties, at least 24 hours in advance of the visit, and confirm any later scheduled visit if the client was a “no show” at the previous scheduled visit;
- b. Provide Transportation to Parent-Child Visits:
- (1) If transportation is requested by DSHS, the Contractor shall:
 - (a) Pick up the child at the child’s current residence or other agreed upon location;
 - (b) Obtain signature of the out-of-home care provider, parent, or CA approved adult (age 18 or older) at the time of pick-up;
 - (c) Transport the child to the scheduled visitation;
 - (d) Return the child to an agreed upon location;
 - (e) Obtain signature of the out-of-home care provider, parent, or CA approved adult (age 18 or older) at the time of return of the child;
 - (2) The Contractor shall ensure that transportation provided is safe and reliable and in conformance with state and federal safety laws. In particular, the Contractor shall ensure that transportation provided to children served under this Contract complies with the child passenger restraint requirements of RCW 46.61.687 effective July 1, 2002, also known as the Booster Seat Law. See following subsection, “Child Passenger Restraint Requirements.”

The Contractor shall also ensure that:

 - (a) Drivers shall be age 21 or older; have a current Washington driver’s license that is valid for the classification of motor vehicle operated; have a good driving record; and have proof of liability insurance.
 - (b) Driver and/or other staff accompanying clients in the motor vehicle shall have current first aid and CPR training.
 - (c) Motor vehicle is maintained in safe operating condition.
 - (d) Motor vehicle is equipped with appropriate safety devices and individual seat belts or safety seats for each person to be used when the vehicle is in motion.
 - (e) Children less than four years of age and/or less than 40 lbs. are restrained in a restraint system that complies with the child passenger restraint requirements of RCW 46.61.687 as stated below.
 - (f) Number of passengers does not exceed the seating capacity of the motor vehicle nor the number of seat belts or car seats it contains.
 - (g) Children are attended while walking to and from the vehicle.
 - (3) Child Passenger Restraint Requirements: The Contractor shall at all times comply, and shall ensure that all employees, volunteers and subcontractors at all times comply, with the child

passenger restraint requirements of RCW 46.61.687, effective as of July 1, 2002, when transporting children or providing transportation to children served under this Contract.

(a) Children under 16 years. Whenever a child who is less than sixteen (16) years of age is being transported in a motor vehicle that is in operation and that is required by RCW 46.37.510 to be equipped with a safety belt system in a passenger seating position, the driver of the vehicle shall keep the child properly restrained per RCW 46.61.687 as follows:

- Children under 1 year or less than 20 lbs. – Rear-facing infant seat
If the child is *less than one (1) year of age or weighs less than twenty pounds (20 lbs.)*, the child shall be properly restrained in a rear-facing infant seat.
- Children under 4 years or less than 40 lbs. – Forward facing child safety seat
If the child is more than one year of age but *less than four (4) years of age or weighs less than forty pounds (40 lbs.) but at least twenty pounds (20 lbs.)*, the child shall be properly restrained in a forward facing child safety seat restraint system.
- Children under 6 years or less than 60 lbs. – Child booster seat
If the child is *less than six (6) but at least four years of age or weighs less than sixty pounds (60 lbs.) but at least forty pounds (40 lbs.)*, the child shall be properly restrained in a child booster seat.
- Children 6 years and older or more than 60 lbs. – Safety belt or Booster seat
If the child is *six (6) years of age or older or weighs more than sixty pounds (60 lbs.)*, the child shall be properly restrained with the motor vehicle's safety belt properly adjusted and fastened around the child's body or an appropriately fitting booster seat.

(b) Lap belt only available and child more than 40 lbs. The child passenger restraint requirements stated in a (1) through a (4) of the above subsection do not apply in any seating position where there is *only a lap belt* available and the child weighs *more than forty pounds (40 lbs.)*.

(c) Passenger side air bag – Back seat for child less than 6 years or less than 60 lbs. The driver of a vehicle transporting a child who is *under the age of six (6) years old or weighs less than sixty pounds (60 lbs.)*, when the vehicle is equipped with a *passenger side air bag* supplemental restraint system, and the air bag system is activated, *shall transport the child in the back seat* positions in the vehicle where it is practical to do so.

(d) Booster Seat. As used in this section "child booster seat" means a child passenger restraint system that meets the Federal Motor Vehicle Safety Standards set forth in 49 CFR 571.213 and that is designed to elevate a child to properly sit in a federally approved lap/shoulder belt system.

(e) Child Safety Seat Restraint System. As used in this section "child safety seat restraint system" means a child restraint system that meets the Federal Motor Vehicle Safety Standards set forth in 49 CFR 571.213 and that is secured in the vehicle in accordance with instructions of the manufacturer of the child restraint system.

c. Provide Visits as requested by DSHS at one of three levels of supervision, as follows:

(1) Supervised Visits – Direct Supervision (Highest level of supervision):

(a) The Contractor's staff shall be within sight and sound of the child and all parties to the visit at all times during the visit.

- (b) The Contractor's staff shall situate himself or herself so he or she can hear all conversation and see everything that occurs during the visit.
- (c) At no time shall the child be allowed to be in the presence of the parent without the Contractor's staff present.
- (d) Any of the following actions by the parties to the visit shall be cause for immediate termination of the visit by the Contractor staff supervising the visit:
 - Attempting to distract the Contractor staff;
 - Leaving the area with the child;
 - Hampering or impairing the level of supervision in any other way.
- (e) The Contractor's staff shall complete a Supervision Narrative with a narrative report describing and documenting what occurred during each supervised visit and to and from the visit if transportation is also provided. The Contractor shall submit the narrative report to the referring DCFS social worker not later than 30 days after each visit.

(2) Monitored Visits – Indirect Supervision (Next/second highest level of supervision):

- (a) The Contractor's staff shall be on site during the parent-child visit and shall provide periodic observations approximately every 15 minutes during the visitation.
- (b) The Contractor's staff shall complete a Supervision Narrative with a narrative report describing and documenting what occurred during each monitored visit and to and from the visit if transportation is also provided. The Contractor shall submit the narrative report to the referring DCFS social worker not later than 30 days after each visit.

(3) Unsupervised Visits (Least restrictive level of supervision):

- (a) The Contractor's staff shall pick up and deliver the child to and from agreed upon locations for visits.
- (b) The Contractor's staff shall not be responsible for supervising or monitoring the visits.

4. Reports

The Contractor shall submit the following reports, as listed in attached Exhibit C – Forms and Reports, in a format prescribed by CA/DCFS and at the times stated below. Copies of all reports shall also be provided to the DCFS referring social worker.

- a. Parent Child Visitation (PCV) Request Form: Submit completed form prior to visits to the DCFS referring social worker upon arrangement of visits.
- b. Driver/Supervisor: Weekly Visitation and Transportation Billing Log: Submit with invoice within 5 business days in accordance with section of this Contract titled "Billing and Payment."
- c. Supervision Narrative with Narrative Report: Submit the narrative comments not later than 5 working days after each visit to the referring DCFS social worker.

In the event DSHS develops a standardized reporting format, the Contractor shall adopt and use that reporting format.

5. Referral Process

- a. DCFS shall have sole responsibility for authorizing services. All authorizations must be initiated in writing by DCFS. DSHS will not pay for any services that are not authorized by DCFS.
- b. DCFS shall request services from the Contractor on an as needed basis. This Contract does not obligate DCFS to authorize services from the Contractor.
- c. All authorizations shall expire after 6 months from the date of authorization, or expire if a parent misses 3 confirmed visits, unless DSHS authorizes additional services. In the event services must continue after 6 months, the Contractor shall contact the DCFS referring social worker for a new authorization.
- d. DSHS reserves the right to disallow an individual staff of Contractor from providing services under this Contract if DSHS determines services is not being adequately performed by that individual staff.

6. Notifications

- a. Missed Appointment. The Contractor shall notify the child's DCFS referring social worker in writing within 24 hours if a client misses a scheduled visit or requests to reschedule visits.
- b. Safety Concerns. If the Contractor has any safety concerns related to a missed visit, the Contractor shall immediately notify the child's assigned DCFS social worker by telephone, and shall follow up with written notification by fax to the DCFS social worker within 24 hours.
- c. Change of Address. The Contractor shall notify the referring DCFS social worker within five (5) working days when the Contractor learns a parent has a change of address.

7. Regional or Office Protocols

- a. Upon request by an individual DCFS region or office served, the Contractor shall collaborate with the region or office to develop and adhere to a written local protocol for the day-to-day delivery of services and coordination with DCFS staff under this Contract. Such regional or office protocols shall be in accord with, and not conflict with, this Contract.
- b. Any local protocol shall address at a minimum:
 - (1) Referral process steps;
 - (2) Scheduling process (length, frequency and location of visits);
 - (3) Communication links (contact persons);
 - (4) Training collaboration, if any;
 - (5) Procedures for canceling and rescheduling visits;
 - (6) Report and feedback process;
 - (7) Emergency procedures.
- c. Both parties shall maintain a copy of the written protocol.

8. Qualifications and Training Requirements

- a. Qualifications. The Contractor shall ensure employees, subcontractors, and/or volunteers providing services under this Contract have the following minimum qualifications:
 - (1) High school diploma or GED.
 - (2) One (1) year experience caring for and/or supervising children.
 - (3) Knowledge in the areas of client safety assessment and planning, problem-solving and crisis intervention.

(4) Current certification in first aid and Cardiopulmonary Resuscitation (CPR).

- b. Training Requirements. The Contractor shall ensure employees, sub-contractors and/or volunteers complete, at a minimum, not less than twenty (20) hours overall of training on the following topics prior to providing services under this Contract. Training in a particular topic taken within five (5) years is acceptable for meeting this contract requirement, provided the particular training curriculum has not changed substantially from the time it was taken.

- (1) Child Abuse and Neglect (CAN) Basics
- (2) Orientation/Reporting
- (3) Conflict Resolution or Problem Solving Skills
- (4) Communication Skills
- (5) Family Dynamics
- (6) Substance Abuse
- (7) Child Development
- (8) Grief and Loss
- (9) Behaviorally Specific Documentation
- (10) Sexually transmitted diseases, including HIV

- c. Alternatively, Foster Parent SCOPE training within 5 years will satisfy this requirement. Regardless of how acquired, all training must be documented; and documentation of training must be maintained either in individual personnel files or in the Contractor's training files, cross-referenced to the individual employee or volunteer.
- d. DSHS Visitation Training. If DSHS should provide training on supervising or monitoring visitations, the Contractor shall ensure that Contractor staff attends such training.

PROGRAM REQUIREMENTS

Parent Child Visitation

The Contractor shall comply with the following Program Requirements in providing services under this Contract:

1. Health and Safety of DSHS Clients

In the delivery of services under this Contract, children's health and safety shall always be the first concern of the Contractor.

- a. Contractors are mandated reporters under Chapter 26.44.030 RCW. The Contractor shall immediately report all instances of suspected child abuse to 1) Child Protective Services (CPS) Intake and 2) the referring CA Social Worker. The verbal notification shall be followed by written notification within 72 hours.
- b. CPS Intake shall make the determination of whether the referral constitutes an allegation of Child Abuse or Neglect that shall be accepted for investigation, a possible licensing compliance issue, or a matter of "information only".
- c. If the Contractor determines that there are additional health and safety concerns, suspected substance abuse and/or other presenting problems, which were not stated in the CA referral to the Contractor, the Contractor shall immediately report this information to the referring CA Social Worker. The verbal notification shall be followed by written notification within 72 hours.

2. Mandated Reporter Training

The Contractor shall obtain a copy of the "Making a CPS Referral: A Guide for Mandated Reporters" video from DSHS. The Contractor shall ensure that all current staff view this video within 30 days of the effective date of this contract and that all future employees view the video within two (2) weeks of initial employment. After viewing, each employee shall sign and date a statement acknowledging his or her duty to report child maltreatment and the Contractor shall retain the signed statement in the employee's personnel file.

3. Corporal Punishment Prohibited

Corporal punishment of children in the Department's care or custody is prohibited. The Contractor, and the Contractor's agents and employees shall not administer corporal punishment to children served under this Contract. As defined in this Contract, corporal punishment means any act that willfully inflicts or causes the infliction of physical pain on a child.

4. Background Checks

This requirement applies only to employees, volunteers and subcontractors who may have unsupervised access to children. This requirement does not apply to licensed foster parents who are affiliated with the Contractor. Licensed foster parents are subject to the criminal history background provisions associated with obtaining and maintaining a current foster license.

- a. The Contractor shall ensure a criminal history background check pursuant to RCW 43.43.832, 43.43.834 and 74.15.030 and WAC 388-06 has been completed through DSHS for all current employees, volunteers and subcontractors, and that a criminal history background check shall be initiated for all prospective employees, volunteers and subcontractors, who may have unsupervised access to DSHS clients. Such persons shall not have unsupervised access to children in care until a satisfactory background check is completed and documentation qualifying the individual for

unsupervised access is returned to the Contractor.

- b. In addition to a satisfactory background clearance through DSHS, the Contractor shall obtain a fingerprint background check from the FBI through DSHS for all prospective employees, volunteers, subcontractors and other persons who may have unsupervised access to DSHS clients if such persons have resided for less than three (3) years in the State of Washington. If the Contractor elects, pursuant to RCW 43.43.832 (7), to provisionally hire a person who has resided in this state for less than three years pending the results of the required FBI background check, the Contractor shall not permit that person to have unsupervised access to children who are served under this Contract or any other contract with Children's Administration until a satisfactory FBI background check is completed. If the FBI check disqualifies the applicant, RCW 43.43.832 requires DSHS to notify the Contractor that the provisional approval to hire is withdrawn and that the applicant may be terminated.

5. Confidentiality of Client Information

The Contractor may use Personal Information and other information gained by reason of this Contract only for the purpose of this Contract. The Contractor shall not disclose, transfer, or sell any such information to any party, except as provided by law or, in the case of Personal Information, except with the prior written consent of the person to whom the Personal Information pertains. If that person is a minor, prior written consent shall be obtained from the minor's parent, legal representative or guardian. If a child is a dependent of Washington State then prior written consent shall be obtained from DSHS. The Contractor shall maintain the confidentiality of Personal Information and other information gained by reason of this Contract, and shall return or certify the destruction of such information if requested in writing by DSHS. Contractor agrees to comply with and, upon request of DSHS, to verify compliance with the provisions of the Health Insurance Portability and Accountability Act of 1996, PL 104-191, (HIPAA) and applicable regulations contained in 45 CFR 160 and 164.

6. Interpretation and Translation

- a. In accordance with DSHS policy, the Contractor shall provide Limited English Proficient (LEP) clients with certified or otherwise qualified interpreters and translated documents.
- b. In accordance with DSHS policy, the Contractor shall provide deaf, deaf-blind, or hard of hearing clients with the services of a certified sign language interpreter.
- c. Interpreter and translation services shall be provided at no cost to the client. All interpreter and translation costs shall be the financial responsibility of the Contractor. These costs are included in the contracted rate.
- d. Extraordinary costs, which create an undue hardship for the Contractor in providing interpretation and/or translation services to an individual client, may be reviewed and addressed for supplemental reimbursement by the DCFS Regional Administrator or designee on a case by case basis.

7. Culturally Relevant Services

The Contractor shall provide appropriate, accessible, and culturally relevant services to clients and their families. Service delivery shall be culturally competent and responsive to each client's cultural beliefs and values, ethnic norms, language needs, and individual differences. Contractors are encouraged to employ a diverse workforce that reflects the diversity of their clientele and the community.

8. Records

The Contractor shall maintain the following records as documentation of compliance with the terms of this Contract:

a. Client Records

- (1) Referral from Children's Administration;
- (2) Parent Child Visitation (PCV) Request(s);
- (3) Supervision Checklist(s) with narrative report;
- (4) Missed Appointment Report(s), if applicable.

b. Administrative Records

The Contractor shall retain the following records:

- (1) Driver/Supervisor: Weekly Visitation and Transportation Billing Logs.
- (2) Fiscal records that shall substantiate costs charged to DSHS under this Contract.
- (3) Audits, license review, contract monitoring and corrective actions required, and action taken.
- (4) Annual Reports.
- (5) Protected group data:

(a) A list of current staff by position that addresses date of birth, sex, and identified protected group status, including race, Vietnam Era Veteran, Disabled Veteran, and person of disability.

(b) A list of all clients served that addresses date of birth, sex, and race.

When collecting protected groups data, the Contractor shall inform staff and clients that (1) the furnishing of the information is entirely voluntary; (2) the refusal to furnish the data shall not have adverse effects.

c. Personnel Records

The Contractor shall retain the following records on (1) all of Contractor's staff and employees, whether full-time or part-time, and (2) volunteers who may have contact with DSHS clients in performing duties or providing services under this Contract:

- (1) Criminal history background checks;
- (2) Current license(s), registration(s), or certification(s) to practice in the state of Washington and/or in the state in which services are provided, as applicable;
- (3) Employment and experience history;
- (4) Job description;
- (5) Annual performance evaluations;
- (6) Verification of training required under this Contract;
- (7) Hours worked and payment records;
- (8) Proof of valid driver's license and current automobile liability insurance, If staff or volunteer provides transportation to DCFS clients.

d. Subcontractor Records

The Contractor shall retain the following records on any subcontractor's staff and employees who may have contact with DSHS clients in performing duties or providing services under this Contract:

- (1) Criminal history background checks;

- (2) Documentation of academic history and credentials, as applicable;
- (3) Current license(s), registration(s), or certification(s) to practice in the state of Washington and/or in the state in which services are provided, as applicable;
- (4) Employment and experience history;
- (5) Job description;
- (6) Annual performance evaluations;
- (7) Verification of training required under this Contract;
- (8) Hours worked and payment records;
- (9) Proof of driver's license and automobile liability insurance, if staff or subcontractor provides transportation to DSHS clients.
- (10) Copy of each signed subcontract or other agreement for any subcontractors.

9. Auditing and Monitoring

- a. If the Contractor is required to have an audit or if an audit is performed, the Contractor shall forward a copy of the audit report to the DSHS Contact listed on page 1 of this Contract.
- b. If federal or state audit exceptions are made relating to this Contract, the Contractor must reimburse the amount of the audit exception, and any other costs including, but not limited to, audit fees, court costs, and penalty assessments.
- c. DSHS may schedule monitoring visits with the Contractor to evaluate performance of the program. The Contractor will provide at no further cost to DSHS reasonable access to all program-related records and materials, staff and/or subcontractor time.

10. Evaluation of Contractor

DSHS may evaluate the Contractor's performance. Areas of review, may include, but are not limited to, the following:

- a. General service provision documentation;
- b. Quality of reports;
- c. Effective collaborative efforts with CA and all parties involved with the child;
- d. Consumer satisfaction;
- e. Compliance with federal and state statutes.

11. Insurance

The Contractor shall, at all times during the term of this Contract, comply with the following insurance requirements:

- a. Commercial General Liability Insurance (CGL)

The Contractor shall maintain Commercial General Liability Insurance, including coverage for bodily injury, property damage, and contractual liability, with the following minimum limits: Each Occurrence - \$1,000,000; General Aggregate - \$2,000,000. The policy shall include liability arising out of premises, operations, independent contractors, products-completed operations, personal injury, advertising injury, and liability assumed under an insured contract, including tort liability of another assumed in a business contract. The State of Washington, DSHS, its elected and

appointed officials, agents, and employees shall be named as additional insureds.

b. Business Auto Policy (BAP)

The Contractor shall maintain Business Automobile Liability Insurance on all vehicles used to transport clients, including vehicles hired by the Contractor or owned by the Contractor's employees, volunteers or others, with the following minimum limits: \$1,000,000 per accident. The Contractor's carrier shall provide DSHS with a waiver of subrogation to prevent the insurer from attempting to recover loss payments from DSHS if the Contractor caused the loss.

c. Professional Liability Insurance (PL)

If the Contractor provides professional services, either directly or indirectly, the Contractor shall maintain Professional Liability Insurance, including coverage for losses caused by errors and omissions, with the following minimum limits: Each Occurrence - \$1,000,000; General Aggregate - \$2,000,000.

d. Worker's Compensation

The Contractor shall comply with all applicable worker's compensation, occupational disease, and occupational health and safety laws and regulations. The State of Washington and DSHS shall not be held responsible for claims filed by the Contractor or its employees under such laws and regulations.

e. Employees and Volunteers

Insurance required of the Contractor under the Contract shall include coverage for the acts and omissions of the Contractor's employees and volunteers. In addition, the Contractor shall ensure that all employees and volunteers who use vehicles to transport clients or deliver services have personal automobile insurance and current driver's licenses.

f. Subcontractors

The Contractor shall ensure that all subcontractors have and maintain insurance with the same types and limits of coverage as required of the Contractor under the Contract.

g. Separation of Insureds

All insurance policies shall include coverage for cross liability and contain a "separation of insureds" provision.

h. Insurers

The Contractor shall obtain insurance from insurance companies authorized to do business within the State of Washington, with a "Best's Reports" rating of A-, Class VII or better. The DSHS Office of Administrative Resources must approve any exception. Exceptions include placement with a "Surplus Lines" insurer or an insurer with a rating lower than A-, Class VII.

i. Evidence of Coverage

The Contractor shall submit Certificates of Insurance to DSHS for each coverage required of the Contractor under the Contract. The Contractor shall submit the Certificates of Coverage to the DSHS Risk Manager, Office of Administrative Resources, Post Office Box 45882, Olympia, Washington 98504-5882. A duly authorized representative of each insurer, showing compliance with the insurance requirements specified in this Contract shall execute each Certificate of Insurance. The Certificate of Insurance for each required policy shall reference the DSHS Contract

Number for the Contract. The Contractor is not required to submit to DSHS copies of Certificates of Insurance for personal automobile insurance required of the Contractor's employees and volunteers under the contract.

The Contractor shall maintain copies of Certificates of Insurance for each subcontractor as evidence that each subcontractor has and maintains insurance as required by the Contract.

j. Material Changes

The insurer shall give DSHS Office of Administrative Resources 45 days advance notice of cancellation or non-renewal. If cancellation is due to non-payment of premium, the insurer shall give DSHS 10 days advance notice of cancellation.

k. General

By requiring insurance, the State of Washington and DSHS do not represent that the coverage and limits specified will be adequate to protect the Contractor. Such coverage and limits shall not be construed to relieve the Contractor from liability in excess of the required coverage and limits and shall not limit the Contractor's liability under the indemnities and reimbursements granted to the State and DSHS in this Contract. All insurance provided in compliance with this Contract shall be primary as to any other insurance or self-insurance programs afforded to or maintained by the State. The Contractor waives all rights against the State of Washington and DSHS for the recovery of damages to the extent they are covered by insurance.

REQUIRED FORMS

1. Parent Child Visitation (PCV) Request and instructions which is attached to this Exhibit as Attachment 1
2. Driver/Supervisor: Weekly Visitation and Transportation Billing Log which is attached to this Exhibit as Attachment 2
3. Visitation Narrative Report as prescribed by the Regional PCV Gatekeeper or designee

DIVISION OF CHILDREN AND FAMILY SERVICES
(Visitation/Transportation Request)

DATE	CHILD'S NAME	ETHNICITY
CASE NUMBER	BIRTH DATE	CHILD'S WEIGHT
SOCIAL WORKER AND PHONE NUMBER		SUPERVISOR
NAME OF FOSTER PARENT (P/RELATIVE)		TE/RELATIVE PHONE NUMBER
PARENT/VISITOR NAME		PARENT/VISITOR PHONE NUMBER

DCFS Emergency Numbers: _____ After hours: _____
 Alternatives to Transportation/Supervision Program Considered: Foster Parents Case Aides/Intern Other:

SERVICES REQUESTED

Transportation: YES NO Type of Visit: SUPERVISED MONITORED UNSUPERVISED

Pickup: YES NO RETURN TRIP: YES NO

Frequency of Visit: _____

Length of Visit: _____ for _____ months.

Pickup Child at (Address): _____

Responsible Person at Pickup: _____

Phone Number: _____

Visit Location: _____

Return Child To: _____

Responsible Person at Return Location: _____

Phone Number: _____

Visit to be Coordinated with Other Cases (Name): _____

Is Time for Visit Negotiable? YES NO If not, required day and time for visit? _____

NOTES: Special Concerns/Limitations: _____

GATEKEEPER SIGNATURE: _____

VISIT SCHEDULE (to be completed by Contracted Provider)

Starting Date: _____ Day(s) of Visit: _____

Time of Pickup: _____ Time of Visit: _____ Time of Return: _____

Assigned Driver: _____ Visit Supervisor (if different): _____

Phone Number: _____ Provider Agency: _____

MANDATORY

Visitation Changes - Effective: _____

Form Returned to DCFS (Visitation/Transportation Coordinator) - Date: _____

DIVISION OF CHILDREN AND FAMILY SERVICES (DCFS)
CONTRACTED SUPERVISED VISITATION/TRANSPORTATION/ PROGRAM
DCFS REFERRAL PROCEDURES

1. Obtain Visitation/Transportation Request form from your Regions Visitation/Transportation Coordinator.
2. Complete top and middle sections of the Request Form: *Top* – Identification of child, foster parents, relatives and visiting parents *Middle* – Services Requested Section.
3. Return completed form to appropriate Visitation/Transportation Coordinator.
4. Be prepared to receive telephone call from the driver/visit supervisor to staff case and confirm schedule. This step is *mandatory* before services start. Please inform contractor of special concerns regarding child or parents.
5. After telephone staffing, Social Worker will receive copy of the request form with the “Visit Schedule” section completed.
6. *Contractor* will notify all parties as to when services will begin and schedule for transporting and visits.
7. All changes in visitation/transportation schedule require approval of Social Worker.
8. If Social Workers are aware of cancellations of visits, need to change schedules or termination of services, they are required to notify contractor.
9. Concerns about the contracted services should be addressed to the Coordinator in the local DCFS office.

The Supervised Visitation/Transportation Services is a fee-for-service contract made possible by an allotment to each Region in DCFS as an effort to deal with Social Worker workload issues and services enhancement.

SUPERVISION CHECKLIST

Agency name _____

Child(ren) name _____ Date _____

Child time of arrival _____ Parent time of arrival _____ LATE? YES NO
 Child time of departure _____ Parent time of departure _____ LEAVE EARLY? YES NO

All present at visit _____

Supervised by: _____

A = ALWAYS F = FREQUENTLY S = SELDON N = NEVER N/A

	A	F	S	N	N/A
Parent/child hug each other					
Parent/child kiss each other					
Siblings interact appropriately					
Parent initiates contact/touch					
Child initiates contact/touch					
Parent smiles at child					
Child smiles at parent					
Parent/child have eye contact					
Parent/child natural flow of conversation					
Parent listens to child communication					
Parent uses reasonable tone of voice					
Parent attends to diaper needs appropriately					
Appropriate food/drink brought					
Parent assists appropriately with feeding					
Appropriate toys and/or play were engaged					
Parent encourages child in positive way					
Parent encourages behaviors allowed					
Parent manages behaviors appropriately					
Parent establishes consequences for behaviors					
Child responds to parent's directions					
Parent sets guidelines for child					
Parent asks about child's school/activities					
Child shares school/activities with parent					

At any time was the child's potential health threatened? YES NO
 At any time did you have to warn/advise the parent? YES NO

Overall rate the child(ren)'s experience: excellent good fair poor very poor
 Overall rate the parent's experience: excellent good fair poor very poor

COMMENTS: (provide comments/narrative on back) _____

APPENDIX B



16.10 General Policies for Client Service Contracting

16.10.10
July 1, 2007

Authority for these policies

State agencies are to effectively and efficiently manage their client service contracts as set forth in chapter 39.29 RCW. Chapter 16 forms the uniform guidelines required by RCW 39.29.100 for the effective and efficient management of client service contracts.

16.10.15
July 26, 2009

Special definitions

Agency – Any state office or activity of the executive and judicial branches of state government, including state agencies, departments, offices, divisions, boards and commissions, and educational, correctional, and other types of institutions.

Client Services – Services provided **directly** to agency clients including, but not limited to, medical and dental services, employment and training programs, residential care, and subsidized housing. Clients are considered to be those targeted or specific **individuals** who the agency has statutory responsibility to serve, protect, or oversee.

Client Service Contract – An agreement, or any amendment thereto, with a firm or individual for the rendering of **direct** services to clients of the state agency.

Contract Management – Activities related to contracting, including the decision to contract, contractor screening and selection, contract preparation, contract monitoring, auditing and post-contract follow-up.

Contract Manager – Any state agency staff involved in the contracting process who is responsible for oversight of a contract (e.g. contract specialists, program managers, state agency executives, etc).

Contract Monitoring – Planned, ongoing or periodic activity that measures and ensures contractor compliance with the terms, conditions, and requirements of a contract.

Contractor – Any business entity, whether a sole proprietor, partnership, corporation, etc., that is providing client services to state agencies. May also be called a “service provider” or “vendor.”

16.10.20

July 26, 2009

Who is a client?

16.10.20.a

Clients are individuals, external to state government, who have social, physical, medical, economic, or educational needs. These individuals require some government assistance to meet their needs. State agencies have statutory responsibility to serve different types of needs for individuals, thus often serve different clients.

Examples of clients served by different agencies include, but are not limited to, the following:

- Clients of the Department of Social and Health Services include nursing home patients, institutionalized individuals, and children in need of therapy;
- Clients of the Employment Security Department include unemployed and displaced workers;
- Clients of the Department of Veterans Affairs include disabled veterans and widows of veterans;
- Clients of the Department of Community, Trade and Economic Development include homeless individuals and crime victims;
- Clients of the Office of Superintendent of Public Instruction include K-12 public school students and their parents; and
- Clients of institutions of higher education include their students.

This definition of clients and client service contracts applies when state agencies buy services, not when the state agency or institution of higher education is providing services to another entity, e.g., funding is coming into the state as revenue not being expended.

The contractor must provide **direct** services to agency clients for the contracts to be classified as client service contracts. Direct service means the contractor is in direct contact with the individual client as part of providing the client service.

For some state agencies where identifying clients may be difficult, it is helpful to review the agency's implementing statute. State agencies that only serve other state agencies do not have client service contracts.

16.10.20.b

The following are not considered clients under this policy:

- **Providers of services.** For example, if a state agency contracts with a firm to provide training to contractors (service providers) who provide counseling services to clients, the contract with the firm to provide the training is not a client service contract.
- **Federal, state, or local government employees.** An exception would be if an employee qualifies for food stamps or other state programs. In that sense, they are clients of an agency.
- **Firms/businesses.** When state agencies are contracting to assist private businesses in increasing their business or trade opportunities, those services are not considered to be client service contracts.
- **General public.** Contracts for services that do not meet the needs of specific individuals under an agency's statutory responsibility, but rather provide services to, or on behalf of, the general public or community groups are not considered client service contracts.

16.10.25
November 1, 2008

Contract procurement

16.10.25.a

Agencies need flexibility in selecting contractors to effectively and efficiently meet the needs of state clients. Therefore, agencies may select client service contractors by using procurement methods most appropriate to their needs, e.g., competitive, non-competitive (direct award) or sole source methods. Federal funding rules and internal agency policies may require a competitive process for certain client service contracts.

16.10.25.b

In general, the higher the dollar amount of the potential contract, the longer its duration, and the more complex the services, the greater the need for formality and competition.

16.10.25.c

Non-Competitive and Sole Source Procurements. Non-competitive or sole source award processes for client service contracts are appropriate to use since competition is not required for these services pursuant to RCW 39.29.040 (6).

Some client service contracts are continually renewed year after year based on a non-competitive or sole source award. These contracts should be reviewed periodically to determine whether competition is warranted.

16
Client Service Contracts

Non-competitive award means a direct award to a contractor when multiple firms are available to provide the same or similar type of service. Multiple contracts for the same or similar services may be awarded using this approach depending on client needs.

Sole source contracts are those which are of such a unique nature that the contractor is clearly the only practical source for the service. Unique services would be those that are highly specialized or one-of-a-kind. Other factors that may be considered include past performance, cost effectiveness (learning curve), and/or follow-up nature of the required services.

16.10.25.d

Competitive Procurement. When competition is deemed appropriate in contracting for client services, the competitive process must be a fair and open process but may be conducted informally or formally. Informal competition may include telephone solicitation, with responses recorded on a standardized form. It may also consist of e-mail and/or facsimile transmissions describing the services needed, proposed schedule, request for qualifications and fees, and due date and time for submission of a response.

For formal competition, agencies may issue a solicitation document such as a Request for Proposals or Request for Qualifications and Quotations to a reasonable number of contractors.

An agency may publish a legal notice of the solicitation in a newspaper, post a notice on their website, use internal bidders' lists, or use other methods that garner the attention of qualified firms. An agency may also notify firms by using the on-line registration and bid notification system called Washington's Electronic Business Solution (WEBS) operated by the Department of General Administration (GA).

WEBS was developed to centralize the location of bid information on multiple types of state purchases for the convenience and benefit of both state agencies and those firms, organizations and individuals that want to participate in state contracting.

WEBS may be accessed at: <http://www.ga.wa.gov/webs/>. For assistance using WEBS, contact GA at (360) 902-7400.

If WEBS does not have the commodity category of service needed, the agency should notify GA to add the category. Also, agencies should encourage firms with which they conduct business to register in WEBS.

Client Service Contracts

WEBS includes names of certified minority and women-owned businesses, and agencies are encouraged to include them in any notification process.

Agencies may also contact the Office of Minority and Women's Business Enterprises for assistance in locating certified firms and/or to use the BizNet System for names of additional firms to contact.

Proposals submitted are evaluated based on the evaluation criteria set forth in the solicitation document.

16.10.30
July 1, 2007

Screening contractor qualifications

Contractor screening criteria and methods will vary depending on program requirements, contract risk, and the type of selection process used. Using screening criteria and methods helps ensure the selection of contractors who are qualified to meet program performance expectations.

Using appropriate screening methods will help contract managers select contractors who are able to meet the following standards:

- The contractor has the appropriate experience, licensure, staffing, technical qualifications, subcontractor relationships, and facilities.
- The contractor is able to comply with the proposed or required time of delivery or the performance schedule.
- The contractor has adequate financial capability, financial management practices and internal controls, and is in sound financial condition.
- The contractor has a satisfactory record of integrity, judgment, and performance.
- The contractor has resolved all audit findings from previous contracts.
- The contractor is otherwise qualified and eligible to receive a contract under applicable laws and regulations.
- The contractor is not on the federal suspended/debarred list, which identifies contractors who cannot be given federally funded contracts, if the contract will be funded with federal money.

16
Client Service Contracts

Contract managers may also want to require contractors to disclose details of any indictment or litigation against the organization, or criminal investigations.

Contract managers should maintain documentation applicable to the contract, considering the type of services, and risks associated with the contract. Examples of screening documentation could include resumes of contractor staff, proof of professional licenses or accreditation, and/or copies of background clearances, if required by the contract and/or state law.

16.10.40

July 26, 2009

Training on client service contracts

16.10.40.a

Training on client service contracts is required for all state agency staff who execute or manage client service contracts. Those employees must complete OFM client service contract training or agency-approved training prior to executing or managing client service contracts. OFM provides ongoing client service contract training for state agency personnel responsible for executing or managing these contracts. The training covers topics from contract planning and procurement through effective and efficient contract management and contract completion.

Agencies may provide their own client service contract training, if the course is approved in writing in advance by OFM. If agencies provide contract training, names of staff who have attended the client service training must be reported to OFM.

16.10.40.b

State agencies shall require agency employees responsible for executing or managing client service contracts to complete the applicable training course to the satisfaction of OFM prior to executing or managing these contracts. (Training is also required for those who execute or manage personal service contracts, so those classes are also listed below.) Staff who execute contracts are those who sign contracts. Staff who manage contracts are those who have responsibility for the day-to-day activities of the client service contract. These activities may include conducting the procurement, drafting and negotiating contracts, providing technical assistance to contractors, monitoring contractor activities, reviewing and approving invoices, etc.

Staff who only execute or manage client service contracts of less than \$5,000 are not required to take the training, however, the training is recommended. Staff who make payments against contracts or log or track contracts, but who do not engage in other contract management activities, are not required to take the training.

Client Service Contracts

Executive Management training is available to a more limited audience of agency directors and assistant directors (or the management equivalent) who execute but do not manage contracts.

The following table provides further information about required classes:

Contract Responsibility	OFM Training Class*
Manage client service contracts	Introduction to Client Service Contracts (1/2 day) or Client Service Contract Overview (full-day)
Manage personal service contracts	Introduction to Personal Service Contracts (1/2 day) or Personal Service Contract Overview (full-day)
Execute client service contracts and personal service contracts	Contracting for Mid-Level Managers (1/2 day) or the client service or personal service classes listed above
Execute client service contracts and personal service contracts for Agency Directors or Assistant Directors (or management equivalent) only	Executive Management Contract Training (1 hour) or the client service or personal service classes listed above
Manage both client service and personal service contracts	One of each class required to manage each type of contract

* If an agency provides its own OFM approved contract training, then that training satisfies the requirements.

State agency staff may register for OFM training through the OFM website at: <http://www.ofm.wa.gov/training/default.asp>.

All internal agency procedures for requesting training must be followed prior to registration with OFM.

Attendance at the half-day *personal* service contracts training offered by OFM will not meet the training requirement for staff who manage or execute *client* service contracts. Likewise, staff who only manage or execute *personal* service contracts would not meet the training requirement by attending the *client* service classes.

Client Service Contracts

16.10.40.c Any request for an employee to be exempt from this training requirement must be submitted to OFM in writing. OFM must grant approval to the agency prior to the employee executing or managing contracts, with few exceptions.

The exemption is to be considered temporary. The employee granted the exemption must attend contract training as soon as feasible after receipt of the exemption from OFM. Multiple requests for exemption for an individual will not be approved. State agencies are responsible to ensure that staff attend the training as soon as possible after receiving the exemption.

16.10.50

July 1, 2007

Annual contract procedures report

16.10.50.a RCW 39.29.110 requires state agencies that have awarded or renewed client service and/or personal service contracts during a calendar year (January to December) to provide a report to OFM detailing the procedures the agency employed in awarding, renewing, and managing the contracts. The contract procedures report is due to OFM by **January 31** of each calendar year.

16.10.50.b This policy addresses client service contracts, but the report applies to both client service and personal service contracts, so both items are included below.

The following items will be required as part of submitting the Annual Contract Procedures Report:

1. **Contract procedures.** A copy of, or a website link for, the agency's procedures on client service contracts; or if an agency does not have written internal contract procedures in place, but the agency utilizes the policies in Chapter 16, those policies should be referenced.
2. **Contract totals.** The total number of and total dollar value of client service contracts awarded by the agency during the calendar year period of January – December. Contracts to be included in these totals are those in the amount of \$5,000 or more.

16.10.55
July 1, 2007

Risk-based audits

OFM conducts risk-based audits of the contracting practices associated with individual client service contracts to ensure agency compliance with the provisions of this Chapter. A risk-based audit means a review of the management and fiscal controls and contracting practices associated with client service contracts.

OFM determines the number of audits to conduct and which agencies to include based on funding provided.

OFM forwards the results of the risk-based audits conducted to the Governor, the appropriate standing committees of the Legislature, and the Joint Legislative Audit and Review Committee.

16.10.60
July 1, 2007

Audit and investigative findings

RCW 39.29.130 requires the State Auditor's Office (SAO) and the Attorney General's Office (ATG) to annually prepare an annual report of agency client service contract audit and investigative findings and enforcement actions with a status of agency resolution. The SAO and ATG submit the report to the OFM, the Governor and the Legislative policy and fiscal committees by November 30th of each year.

The audit findings referenced herein are those issued by the SAO and are not related to the risk-based audits conducted by OFM.

16.10.65
July 1, 2007

Expenditure coding for client service contracts

Subject NB "Payments to Providers for Direct Client Services is to be used for reporting expenditures against client service contracts.

The definition for this subobject is included in Subsection 75.70.20.

16.10.70
July 1, 2007

Standards of ethics and conduct

Chapter 42.52 RCW, "Ethics in Public Service," applies to all state employees in all branches of state government. State employees contracting on behalf of the state are to maintain strict ethical standards and take caution to avoid any real or apparent conflict of interest situations. State employees must also be aware of requirements and restrictions regarding contracting with current or former state employees. State employees should familiarize themselves with this statute prior to entering into contracts.



16.20 Client Service Contracts – Contract Award, Management, and Monitoring

16.20.05

July 1, 2007

Purpose of this policy

This policy serves as the basis for awarding, managing, and monitoring client service contracts.

16.20.10

July 1, 2007

Contract negotiations

Part of the process of awarding a client service contract under a competitive solicitation or a sole source process is to negotiate the specific contract terms. Any discussions, whether formal or informal, that are held with the apparent successful contractor to develop and finalize the contract are considered contract negotiations.

Under a competitive process, negotiations may be held with the apparent successful contractor if more favorable terms are desired than were submitted in the proposal or if the proposal is not sufficiently precise or direct.

Areas in the proposal that may be considered less than satisfactory include: time devoted to the project or phases of the project by the consultant, scheduling related to the items in the scope, pricing, billing terms, etc.

Negotiations should not substantially change the terms of the original proposal, but should eliminate any ambiguities in the contract and clarify the terms. If the terms offered by a contract are fair and equitable, award may be made without negotiations. Under a non-competitive or sole source award, price negotiations may be necessary if the contractor costs proposed seem higher than expected.

16.20.15

July 26, 2009

Formalizing client service contracts

16.20.15.a

Written Contract. All client service contracts, regardless of dollar amount, require a **written** document specifying the agreement between the agency and the contractor.

Required elements in a client service contract are:

- Identification of all parties to the contract;
- Scope of services that clearly describes the responsibilities and obligations of the parties;
- Maximum compensation, when applicable;
- Period of performance; including start and end dates or a statement, for example, that the end date is two years from the start date;
- Payment mechanism that describes the basis on which the contractor will be paid for services whether an hourly/daily/weekly/or monthly rate, by deliverable, completion of a project phase or milestone, achievement of a performance target or outcome, lump sum, etc.; and
- Signatures of all responsible parties.

Numerous other terms are often included in the contract documents to provide additional legal protection to the State.

Amendments to client service contracts must also be in writing.

A sample client service contract is provided on OFM's Additional Contract Resources website at:

<http://www.ofm.wa.gov/contracts/resources/default.asp>.

16.20.15.b

Contract Format. Agencies may choose a contract format appropriate to the services being acquired, provided that the required elements identified in Subsection 16.20.15.a are included. For example, an agency may wish to use a short-form contract or letter of agreement where the contract services are not complex or where the contract consideration is less than \$5,000.

16.20.15.c **Approval as to Form.** Approval as to form by the Office of the Attorney General (ATG) verifies the legality of the contract instrument, but does not necessarily imply concurrence in or approval of the content. It is a good business practice to have the agency's contract format or template reviewed "as to form" by the ATG prior to usage. As long as the ATG-approved contract format is used, it is not necessary that each contract executed by the agency be approved "as to form" by the ATG.

In addition to approval "as to form," it is advisable to have contracts reviewed by an Assistant Attorney General for "substance and content," whenever additional legal advice is needed prior to finalizing the document. Each agency may determine which contracts they submit to the ATG for review.

16.20.15.d **Available Funding.** Agencies shall not execute a client service contract or amendment that increases funding unless funding is available for the contract services prior to execution of the contract or amendment.

Agencies must identify the source and amount of funds to be used for the contract. If the contract is federally funded, state agency staff must ensure that the appropriate contract language regarding federal requirements is included in the contract. This would include suspension/debarment language, A-133 Single Audit language, and any other federal requirements appropriate for the fund source. Federal rules and regulations may also supersede State rules and regulations, and this should also be clear in the contract.

16.20.15.e **Health Insurance Portability and Accountability Act (HIPAA).** The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a federal law addressing several aspects of health insurance and the management of health care information. (Pub. L. 104-191, 110 Stat. 1936, 2054 and 110 Stat. at 2063) (HIPAA), and 45 CFR part 160 and part 164.

HIPAA contains requirements related to the confidentiality of protected health care information, electronic transmission of health care information, including billings, and the security of health care information. It also requires retention of records covered by the law for a six-year period of time.

Some client service contracts may require HIPAA language in order for the contracting agency to be in compliance with HIPAA. If the service provider is a physician or other medical care provider, they may seek insertion of HIPAA language into the contract so that they are in compliance with the federal law.

Client Service Contracts

These provisions generally relate to “business associate” arrangements, where one of the contracting parties is a business associate of a covered entity under HIPAA or where both parties are covered entities sharing protected information.

The decision about whether or not HIPAA compliance language or an addendum should be part of the contract is based on whether the parties fall under the HIPAA legal definition of a covered entity or business associate. The law provides exceptions for certain types or uses of information as well.

When the issue of inserting HIPAA language into a contract is raised, the following considerations apply:

- Is either or both of the contracting parties covered entities under HIPAA?
- Does the provided service include the sharing or disclosure of HIPAA protected health care information?
- Is the type of information created, stored, or disclosed in the scope of services protected information under HIPAA?
- Is either or both of the contracting parties business associates as defined under HIPAA?

If the answer to any of these questions is “yes”, please contact your agency HIPAA compliance officer, in-house counsel, or your Assistant Attorney General to determine whether HIPAA language needs to be part of the contract.

16.20.15.f

Hold Harmless and Indemnification. Hold harmless and indemnification provisions in client service contracts protect state agencies from assuming responsibility for the *contractor’s* acts and omissions. These provisions do not shield state agencies from responsibility for their own acts and omissions.

Under a **hold harmless** provision, the contractor releases the state agency from any responsibility for losses to a third party arising from the acts and/or omissions of the contractor or its officers, directors, partners, employees, and agents while the contractor is performing work under the contract. For example, if a client is injured in a contractor’s facility due to the carelessness of one of the contractor’s employees, the contractor cannot seek reimbursement from the agency for the amount the contractor has to pay to the client who suffered the loss.

An **indemnification** provision requires the contractor to reimburse the agency for losses incurred by the agency because of the contractor's acts or omissions in performing under the contract. An example is when a state agency is sued by a client who is seriously injured when he/she falls through a rotting front step at the contractor's place of business. If the client sues the state agency for those injuries, the contractor would have to pay costs for investigating, negotiating, defending, and settling the suit.

16.20.15.g

Personal Information. Contract records may occasionally contain personal information about citizens.

Privacy Notice: Safeguarding and disposition of personal information must be consistent with Executive Order 00-03 issued April 25, 2000, and chapter 42.56 RCW and other applicable statutes that protect personal information.

16.20.20
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Performance measures and outcomes

Contract managers are encouraged to consider whether performance measures and outcomes are applicable to their contract. The purpose of performance measures is to provide a standard or measure for performance of the contracted services. Performance measures may also be used to determine if, and when, the contractor has successfully completed performance, and when and how much the contractor should be paid.

Contract performance measures may:

- Define the standards for measuring contractor performance;
- Provide a means to monitor performance;
- Measure satisfaction with the contractor; or
- Provide data for program evaluation.

Good performance measures are:

- Clearly written;
- Easily understood by contractors, state agencies, and the general public;
- Focused on the performance expected from the contractor;

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- Well defined and consider both the quantitative (how much?) and qualitative (how well?) aspects of performance;
- Relevant, timely, verifiable and reportable; and
- Realistic in terms of available resources, funding and timelines, and recognize external factors beyond the control of the system.

Contract managers should check the funding source or statutory authority to determine whether any specific outcomes are mandated. They should also consider:

- How the agency will know the service has actually been provided to the client (other than accepting the contractor's word);
- How the agency will know the *quality* of the service has been provided and include a mechanism for measuring quality;
- What specific outcome the agency is looking for, such as enhanced job retention, reduced recidivism, or improved client health; and/or
- Whether payment is contingent on an event, product, or outcome and, if so, how the agency will ascertain that the contractor has satisfied the requirement. If payment points are not clear, consider the benefits of tying payment to an event, product or outcome.

16.20.25

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Performance-based contracts
16.20.25.a

Performance-based contracts have several **characteristics** that distinguish them from more traditional types of service contracting. Those characteristics:

- Emphasize results related to output, quality and outcomes rather than how the work is performed;
- Have an outcome orientation and clearly defined objectives and timeframes;
- Use measurable performance standards and quality assurance plans; and/or
- Provide performance incentives and tie payment to outcomes.

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Performance contracting may be used for a variety of types of services, but it is not applicable to or appropriate for all. Its use must be carefully considered since outcomes and performance standards need to be clearly identified in the contract, so that achievement of those outcomes and standards is apparent to all.

16.20.25.b

Performance-based contracts offer **benefits**. For example, they:

- Encourage and promote contractors to be innovative and to find cost effective ways to deliver services;
- Result in better prices and performance;
- Give contractors more flexibility in how to achieve results;
- Shift more risk to contractors so they are responsible for achieving the outcomes; and/or
- Provide incentives to improve contractor performance and tie compensation to achievement.

16.20.25.c

Potential issues associated with performance-based contracts include:

- Adequate management information systems may not be in place to correctly interpret data;
- Performance outcomes may be contingent on factors outside of the contractor's control;
- Contractors may have limited financial resources and capacity to assume risk;
- Contractors may provide reduced care to vulnerable clients to achieve an outcome or goal;
- Contractors fear a cash flow crisis and financial uncertainty; and/or
- Contractors may have under-developed financial information management systems.

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16.20.30

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Fiscal considerations and payment methods

16.20.30.a

Fiscal Principles. Fiscal principles that apply to client service contracts include, but are not limited to:

- State agencies must pay reasonable and fair prices for services.
- Payment to the contractor must be made according to the terms of the contract. A clear statement of work should directly correlate to the method of compensation in the contract.
- Contractors must have accounting methods and systems that are describable, auditable, and applicable to the circumstances. Contractors must comply with accounting measures and principles appropriate to the contractor's type of business and as identified in the contract.
- State agencies must use the accounting methods and systems published in this manual.
- Payments made under client service contracts must be applicable to the services provided and consistent with the rates and fees agreed upon.
- Payments made under client service contracts must be adequately documented and supported by appropriate accounting records maintained by both the state agency and the contractor.
- Payments should not be made for the same or similar services more than once (no duplicate payments to contractors).
- State agencies are to pay contractors for services in a timely manner (RCW 39.76.010). This is contingent upon the contractor completing work satisfactorily and submitting accurate and complete invoices.
- State agencies should track fund sources to ensure over-payments do not occur in any particular fund.
- State agencies should have a means to recover contract over-payments if discovered.

16.20.30.b

Financial Reporting. Financial reporting provisions may require a contractor to report on or allow access to their financial information at defined intervals during the contract or upon contract completion or termination. The purpose of financial reporting provisions is to aid in monitoring contractor performance and/or verify fiscal accountability, and to allow contract managers to make informed decisions about the contractor's ability to perform or meet contract requirements.

Key considerations for financial reporting provisions are to:

- Define the type of financial information and documentation required;
- Specify dates or intervals for reports, if any;
- Require access to contractor staff, records, and place of business, as appropriate; and
- Authorize monitoring of financial records.

16.20.30.c

Payment Methods. Contracts must describe the basis upon which the contractor will be paid for services, whether based on an hourly, daily, weekly or monthly rate, per deliverable cost, fixed fee, progress payments, achievement of a performance target or outcome, or other applicable method.

The method, or combination of methods, selected should best ensure delivery of quality services, encourage efficiencies and effectiveness of services, and provide the best value to state agencies. Clearly defining the payment terms will ensure both the contractor and agency have the same understanding about payment and will help mitigate confusion or potential project delays and disputes.

Another type of contract payment method is used with performance-based contracts. Performance-based contracts describe either what the contractor is expected to accomplish or what outcome the contractor is to achieve, but do not specify how the work will be completed. Therefore, contractors provide more strategic input into determining the best method and approach for the services in order to achieve the outcomes desired by the agency.

Performance-based contracts typically tie payments to outcomes or deliverables, not just the number of hours of service provided, but they do state a maximum compensation that may be earned.

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16.20.30.d **Payment Documentation.** The contract should define the documentation required to authorize payment and to assist the contractor in invoicing correctly so that the contract manager can expedite approval of the invoice for payment.

At a minimum, invoices submitted should include the contract number or other evidence of authorization to contract, date(s) services were provided, description of services provided or any goods received, and approval for payment.

The approval for payment can be documented by the initials of the approving staff and date on the contractor's invoice, or by an electronic approval process. For further information, refer to Subsection 85.32.30 of this manual.

16.20.30.e **Contract Overpayment.** If an overpayment to a contractor is discovered, the agency must take appropriate action. Contract managers should consult with their accounting or auditing staff, their internal legal staff, and/or with the Office of the Attorney General for guidance.

16.20.30.f **Federally Funded Contracts.** Contracts supported with federal funds, whether in whole or in part, are subject to federal requirements. Such requirements may be the result of federal statutory provisions, administrative regulations adopted by federal agencies, administrative guidelines distributed by federal agencies or contract award provisions.

There are basic federal rules that apply to virtually all expenditures of federal awards. Each federal agency and the U.S. Office of Management and Budget (OMB) publish these rules as listed below.

1. **Uniform administrative requirements:**

- a) State and local governments (including recognized Indian entities):
 - Grants Management Common Rule adopted by federal agency Code of Federal Regulation (CFR) (OMB Circular A-102).
- b) Institutions of higher education, hospitals, and nonprofit organizations:
 - Uniform Administrative Requirements adopted by federal agency CFR (OMB Circular A-110).
- c) For-profit organizations:
 - Administrative Requirements adopted by federal agency CFR.

2. **Cost principles requirements:**

- State and local governments (including recognized Indian entities) (OMB Circular A-87).
- Educational Institutions (OMB Circular A-21).
- Nonprofit Organization (OMB Circular A-122).

3. **Audit requirements** for all nonfederal entities:

- Audit common rule adopted by federal agency CFR.
- OMB Circular A-133, including Appendix B – Compliance Supplement.

Federal agency regulations including the CFR and OMB Circulars can be accessed on the Internet at: <http://www.gpoaccess.gov/cfr/index.html>, and <http://www.whitehouse.gov/OMB/circulars>.

The federal agency regulations and the OMB Circulars are routinely updated. Contract managers of contracts involving federal funds are encouraged to stay abreast of such changes by consulting with fiscal staff or other individuals that follow federal requirement amendments.

16.20.30.g

Sub-recipient or Vendor. When federal funds are involved, a determination should be made before a client service contract is written as to whether the contractor is a sub-recipient or vendor. The administrative and management requirements for each differ significantly. The correct designation ensures compliance with applicable federal regulations and determines whether an audit is required of the contractor.

A **sub-recipient** is a non-federal entity that expends federal funds received from a pass-through entity to carry out a federal program, but does not include an individual that is a beneficiary of such a program.

A **vendor** is a dealer, distributor, merchant or other seller providing goods or services that are required for the conduct of a federal program. Refer to Section 50.30 for further guidance about the sub-recipient/vendor determination and OMB Circular A-133 Audits of States, Local Governments, and Non-Profit Organizations, Subpart B-Audits, 210 Sub-recipient and vendor determinations.

Contracts should be clearly written to support the determination of sub-recipient or vendor status.

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A **sub-recipient** may:

- Determine who is eligible to receive federal assistance;
- Have its performance measured against whether the objectives of the federal program are met;
- Have responsibility for programmatic decision-making;
- Have responsibility for adherence to applicable federal program compliance requirements; and

Use federal funds to carry out an agency's program as compared to providing goods or services.

A **vendor**:

- Provides the goods or services within normal business operations;
- Provides similar goods or services to many different purchasers;
- Operates in a competitive environment;
- Provides goods or services that are ancillary to the operation of the federal program; and
- Is generally not subject to compliance requirements of the federal program.

In some instances, a contractor could be a sub-recipient for one state agency and a vendor for another. A contractor could also be a sub-recipient for one program within an agency, and a vendor for another program within the same agency.

16.20.30.h

Debarment/Suspension. The federal suspended/debarred list identifies contractors who cannot be given federally funded contracts. No federal contracts may be awarded to contractors on the federal suspended/debarred list.

16.20.35

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Liability insurance

16.20.35.a

Before contracting for client services, the agency should analyze the type of services required and evaluate the State's exposure to legal liability that may result from the contract. State agencies can be financially protected from those who seek legal recourse by requiring contractors to carry insurance. To protect the State's interests on contracts where insurance is appropriate, liability insurance requirements should be included in either the solicitation document as a condition of responsiveness or in the contract document.

Injury or damage to a third party including clients may result in legal liability to the State if it occurs as a result of a contractor's negligence. Liability insurance covers legal liability of an insured. If a contractor provides liability insurance coverage and names the State as an additional insured on the policy, the State will have insurance protection for many types of tort claims that arise out of the contractor's activities.

16.20.35.b

The OFM, Risk Management Division (RMD), recommends that agencies include insurance requirements in their contracts, whenever applicable. At a minimum, RMD suggests that contractors be required to purchase general liability/automobile liability and employer's liability insurance and comply with workers compensation laws. For more information on RMD's suggested insurance specifications, refer to *Contracts: Transferring and Financing Risk*. This manual is available in hard copy through RMD or on OFM's RMD website at: <http://www.ofm.wa.gov/rmd/default.asp>.

If you have further questions, you may contact RMD at (360) 902-7301. Contract managers should contact internal agency staff, who may be knowledgeable about insurance requirements, before contacting RMD.

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Industrial insurance

16.20.40.a

When a state agency enters into a client service contract, the contractor's employees should be covered by industrial insurance also called workman's compensation. This protects the State's interest if either the contractor or someone employed by the contractor is injured while performing work under the contract.

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With few exceptions, Title 51 RCW, Washington State's industrial insurance law, requires that all persons performing work under contract in Washington State be covered by industrial insurance. Contractors are required to provide industrial insurance coverage either through the Department of Labor and Industries (L&I) or as self-insured employers certified by L&I. Agencies can verify a contractor's compliance by contacting L&I, Field Audit Compliance, in Olympia at (360) 902-4752 or 902-4750, or by sending an e-mail to: verifystatecontracts@lni.wa.gov.

Employments excluded from mandatory coverage are listed in RCW 51.12.020 and include sole proprietors, partners, corporate officers, and others.

16.20.40.b

Under RCW 51.12.050, the contracting agency is responsible for ensuring that the prime contractor and any subcontractors have industrial insurance coverage or the agency may be liable for unpaid industrial insurance premiums. As appropriate, agencies should incorporate into their client service contracts a provision stating that the contractor agrees to comply with the industrial insurance requirements of Title 51 RCW and to cover its employees with industrial insurance.

16.20.45

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Risk assessment approach to contracting

16.20.45.a

Risk Assessment Approach. The risk-assessment approach to contracting is intended to assist contract managers in analyzing the contract services and contractor's qualifications in order to better focus their oversight efforts on higher risk contracts. A risk assessment evaluates risk factors to determine how much monitoring and/or auditing should be done to protect the agency's interests.

The risk assessment may be conducted informally or formally depending on the dollar value of the contract, complexity of the services, experience of the contractor, etc. An informal risk assessment is the analysis conducted by the contract manager to make effective contracting decisions and is not required to be in writing. A formal risk assessment is conducted in writing and documents the types of activities and factors considered. The contract manager may not know the answers to all these types of questions and may need to seek further information from the contractor, from others in the agency, from other state agencies with oversight (such as current licensure), etc.

Sample risk assessment checklists are provided on OFM's Additional Contract Resources website at:

<http://www.ofm.wa.gov/contracts/resources/default.asp>.

16.20.45.b

Risk Assessment Categories. Risk factors can be broken into two broad categories: 1) risks associated with services and 2) risks associated with contractors.

1. **Risks associated with the services.** Examples of factors that may be considered in assessing risk include the following:
 - **Program history** – Is it a new or long established program or service? Have any significant changes occurred?
 - **Total funding** – Does this contract represent a significant portion of the total program funding?
 - **Complexity** – Are program requirements simple or complex?
 - **Client health and safety** – How vulnerable are the clients that the program serves?
 - **Responsibility for key decisions** – Does the state agency, federal government or the contractor make decisions about eligibility and amount or type of service to be provided to a client? For federal funds, is the contractor a vendor or sub-recipient?
 - **Federal risk assessment** – Has the U.S. General Accounting Office and U.S. Office of Management and Budget identified the program as being high risk?
 - **Payment method** – What type of payment method is used (e.g., cost reimbursement, fee for service, fixed fee, performance-based, etc.)? What experience does the state agency have with the method?
 - **Procurement method** – Are contracts awarded on a competitive basis, which includes detailed evaluations of the service proposal, costs, and contractor qualifications or are they awarded on a sole source or non-competitive basis?
 - **Monitoring methods** – Are the existing methods of monitoring effective for this program? Do these monitoring methods effectively mitigate the other types of possible risks?

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- **Client choice** – Is the client choosing the contractor, as required by some federal programs?
2. **Risks associated with contractors:** Examples of factors that may be considered in assessing risk include:
- **Funding that the contractor receives from the agency** – Is the amount of funding from the agency small or large? Does the contractor have many or few contracts with the State?
 - **Multiple funding sources** – Is the contractor receiving funding from several sources for similar services? Are multiple funding sources involved and to what extent?
 - **Collaboration** – Has the contractor promoted collaboration on service delivery and contract expectations between itself and all of its funding partners?
 - **Length of time in business** – Has the contractor been in business for several years or is it a start-up client service provider?
 - **Experience and past performance** – Does the contractor have contracts for similar services with other governmental entities? How extensive is the contractor's experience providing this type of service for the State? What is their performance history?
 - **Accreditation/licensure** – Are contractors subject to accreditation or licensure requirements?
 - **Financial health and practices** – Is the contractor's financial condition good? Does the contractor demonstrate sound financial practices? Is the contractor's financial record keeping system adequate for the number and complexity of funding sources being managed? Is the contractor's cost allocation methodology equitable?
 - **Current and prior audit experience** – Has the contractor had weaknesses in internal control over federal or state programs?
 - **Oversight exercised by funding agencies** – Have there been monitoring or other reviews by other funding agencies that could indicate the degree of risk? Is the contractor proposing to operate under a waiver from customary program and financial management requirements?

- **Board of directors** – If the contractor is a nonprofit organization, does the board take an active role in directing the organization, establishing management policies and procedures, and monitoring the organization's financial and programmatic performance? Is the board comprised of individuals who are unrelated? Do employees or ex-employees of the organization serve as board members?
- **Subcontracting** – Does the contractor subcontract key activities? Does the contractor have an effective monitoring function to oversee subcontractors?
- **Organizational changes** – Has there been frequent turnover of key contractor management, senior accounting staff or key program personnel? Has the contractor started any new services within the last twelve months? Has the contractor experienced a recent rapid growth or downsizing? Has the contractor experienced reorganization within the last twelve months? Has the contractor changed major subcontractors recently?
- **Management structure** – Is the organization centralized or decentralized? How much control does the organization have over decentralized functions?
- **Legal actions** – Have any lawsuits been filed against the contractor within the last 12 months?
- **Defaulted contracts** – Has the contractor defaulted on any of its contracts within the past five years? If so, what were the circumstances?

Based on the results of the risk assessment, contract managers may decide whether it is advisable to contract for the services. If so, the contract manager will decide which contractor to select, and the scope, frequency, and methods of monitoring and/or auditing to use to ensure sufficient oversight, given the risks involved. Risk assessment results may also be used to devise more stringent controls and tighter contract language, when appropriate, to adequately monitor and/or audit the use of public funds.

It is also important to note that contract risk is dynamic. Therefore, the risk assessment should be updated periodically to provide a current record of risk factors associated with the contract.

Risk assessments, linked to a monitoring plan, should be documented. Contract managers may choose how to document this. Several examples of risk assessment tools can be found on OFM's Additional Contract Resources website at: <http://www.ofm.wa.gov/contracts/resources/default.asp>.

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16.20.45.c **Transferring Risk.** Risk management strategies include transferring risk to the contractor, minimizing or mitigating the risk, eliminating the risk, or sharing the risk with the contractor. Contract managers may:

- Add clauses to the contract to address specific risk factors;
- Require contractors to provide proof of insurance;
- Develop and implement effective monitoring plans and contractor reporting requirements;
- Link payments to deliverables/performance measures; and/or
- Consider payment bonds or liquidated damages clauses.

16.20.50
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Contract management principles

Contract managers must be mindful of the following:

- In almost all instances, written contracts must be signed by both parties before work can begin under the contract.
- Written contract amendments must be signed prior to the contract expiration date (end date) whenever there is a change to the scope of work, period of performance, or maximum dollar amount (or other financial terms) of the contracts.
- When signing a contractor's contract form, provide appropriate review of the contract to ensure adequate protection for the State is included in the contract.
- Services should be performed to the satisfaction of the contract manager before payment is approved.
- Coordination among state agency staff is important to ensure the same client services to the same client are reimbursed only once.
- All work must be completed within the contract period of performance, including deliverables.

16.20.55

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Managing and monitoring contracts

16.20.55.a

Proactively Manage and Monitor. Once the contract is fully executed by all parties, agency staff must proactively manage and monitor the contract to ensure the quality and quantity of services are received. Effective management and monitoring of client service contracts are keys to successful contracting results.

16.20.55.b

Managing the Contract. Contract management includes any activity related to contracting for client services, including the decision to contract, contractor screening, contractor selection, contract preparation, contract monitoring, auditing, and post-contract follow up.

While the contractor has responsibility to perform under the terms of the contract, the state agency has responsibility for reasonable and necessary monitoring of the contractor's performance to ensure compliance with the contract provisions.

Many contracts name a contract manager who serves as the primary point of communication between the agency and the contractor and who provides the principal contract management and monitoring function. More than one individual can be named as having responsibility for various aspects of the contract.

The chief objective of the contract manager, however, is to ensure that the contractor fulfills all contractual obligations in a quality manner within budget and schedule. To accomplish this task, the contract manager should be completely knowledgeable of the terms of the contract and maintain requisite controls throughout.

16.20.55.c

Monitoring the Contract. Monitoring means any planned, ongoing or periodic activity that measures and ensures contractor compliance with the terms and conditions of the contract. The level of monitoring should be based on a risk assessment of the services provided and the contractor's ability to deliver those services. Every communication with a contractor is an opportunity to monitor activity.

The **purpose of monitoring** is to ensure the contractor is:

- Complying with the terms and conditions of the contract and applicable laws and regulations;

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- Adhering to the project schedule and making appropriate progress toward the expected results and outcomes;
- Providing the quality of services expected;
- Ensuring the health and safety of clients; and
- Identifying and resolving potential problems and providing constructive, timely feedback.

Effective contract monitoring can assist in identifying and reducing fiscal or program risks early in the process, thus protecting public funds.

Monitoring activities may include, but are not limited to, the following:

- **Periodic contractor reporting.** Contractors submit progress reports or other appropriate data or deliverables to report on services being provided, adherence to the contract, and degree of progress being made. Substandard performance can also be determined.
- **On-site reviews and observations.** Contract managers may conduct on-site reviews, interview contractor staff to ascertain their understanding of program goals, interview clients about services received, review key systems and service documentation, review client case records, review personnel records to ensure staff have appropriate credentials, review fiscal records, and observe operations whenever possible. The results of these reviews should be documented in writing and compared with contract requirements.
- **Invoice reviews.** Contract managers compare billings/invoices with contract terms to ensure the costs being charged are accurate, consistent with the contract requirements, and within the compensation limits set by the contract. Verifying that funds are tracked by fund source will help prevent over-payments by fund.
- **Audit report reviews.** Contract managers review any required audit reports and audit work papers and ensure the contractor takes appropriate and timely corrective action, if required.
- **Client surveys.** Contract managers, or the contractors, may survey clients concerning contract service delivery and quality. Contract managers should require the contractor to resolve client complaints. Contractors should keep records of both the complaint and method of resolution.

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- **Other periodic contact with contractor.** Meetings and other periodic contact with the contractor to review progress facilitates continuous dialog and mitigates problems.

Documentation of monitoring activities must be maintained by the agency to verify that monitoring has been conducted. Contract files should include, for example, copies of letters and e-mail, meeting notes, and record of key phone conversations as evidence that conscientious monitoring has occurred during the contract. This is especially important where there are issues with the contractor's performance.

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Executing amendments to existing client service contracts

As work progresses, it may be necessary to make changes to the contract to enhance or improve the deliverables or services. Any written alteration to an existing contract is called a contract amendment. Amendments are executed by all parties to document the changes being agreed upon.

16.20.60.a

Principle Terms Amended. The principle areas of contract changes that require amendments are:

- **Scope of work.** This may include adding, modifying or deleting tasks, services or deliverables, or revising specifications. Changes must be within the scope of the original contract.
- **Cost.** If the total amount of the contract is increased, a contract amendment is required. If the contract amount is decreased, it is advisable to execute an amendment to clarify the scope of work and dollar amount being decreased.
- **Period of performance.** An extension to the end date of the contract is the most common change to the period of performance.

16.20.60.b

Within the Scope of Work. Changes to contracts may be awarded as amendments, rather than as new contracts, if the changes are **within** the general scope of work of the original contract. Work that would be considered within the general scope of the original contract is that which would be fairly and reasonably within the contemplation and intent of the parties when the contract was awarded. If the amendment provides for services that are essentially the same as those in the original contract, the amendment would likely be within the general scope of the contract.

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Changes that are within the scope of work, but which represent **substantial** changes in the quantity, duration, cost, or nature of the work may not be appropriate for contract amendments and may need to be addressed in a new procurement or new contract. When the agency includes in its solicitation document the option to extend the contract for additional periods or to add subsequent phases, such amendments, though they may represent substantial changes, are appropriate. They were specified in advance of contract award and all firms who competed were made aware of these potential additions to the contract.

Changes that are outside the general scope of the contract are **not** appropriate to award through contract amendment. Such changes would have the effect of making the work performed substantially different from the work the parties bargained for at the time the original contract was awarded.

If a contract has expired, it is generally not appropriate to amend it; rather it is more appropriate to award a new contract.

16.20.60.c

Amendment is in the Best Interest of the State. The agency must determine that a proposed amendment is in the best interest of the State, considering such factors as service continuity for clients, time savings, cost effectiveness, and the learning curve for a new contractor.

When adding funding to a contract, agencies should generally include in the amendment both the dollar amount of the additional funding and the revised contract maximum (the amendment amount added to the current contract maximum). In addition, agencies should consider specifying what additional services are being provided under the amendment and include any new deliverable dates resulting from the additional dollars being authorized.

16.20.60.d

New Contract Option. If an amendment is not **clearly** determined to be the best choice, the agency must execute a new contract. A new contract is generally appropriate where there is a substantial change in the scope of work, duration, nature of work, or cost, or where there is a logical break in service.

16.20.65

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Corrective action

Contract problems must be addressed as soon as they are discovered to prevent them from becoming recurring or serious. Corrective action is suggested when direct negotiation and other less formal means have failed. Corrective action means action initiated by the agency and taken by the contractor that corrects identified deficiencies, produces recommended improvements, or demonstrates that deficiencies or findings are either invalid or do not warrant action.

Contract problems that warrant corrective action include:

- Failure to ensure client health or safety;
- Monitoring or audit findings;
- Poor quality of key deliverables;
- Inferior quality of services;
- Failure to perform all or part of the contract;
- Ongoing late performance;
- Inadequate, unclear, or excessive billing; and
- Late submission of reports on a recurring basis.

A first step in corrective action would typically be to communicate in writing to the contractor describing where performance is deficient. Corrective action activities should be coordinated with the agency's management, in-house counsel, and/or Assistant Attorney General, as applicable, to avoid waiving any rights that might be available to the State.

All corrective action initiated by the agency must be documented in writing. If the corrective action is successful in resolving problems, the contractor should be notified in writing that resolution has been achieved and the documentation retained in the contract file.

If corrective action is unsuccessful at first, state agency staff may continue to work with the contractor until deficiencies are resolved, or they may proceed with a dispute process or take other appropriate courses of action.

16.20.70

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Contract disputes

A contract dispute is typically the result of a serious difference of opinion between the agency and contractor about contract terms, conditions, or performance. The contract disputes process generally follows a corrective action process that has reached an impasse. The contract should contain a disputes clause setting forth the process to be followed. Invoking the disputes clause is an option available to either party, but is not required. If the dispute process is elected, the process must be followed as described in the contract.

Disputes provisions may take different approaches. One approach is for the disputing party to submit a written statement of the issues to the other party at a higher level within the organization. If that does not resolve the issue(s), a neutral third party can be appointed to review the position of both parties and submit a written decision. Another approach is to convene a dispute panel with each party to the contract appointing one member and a mutually agreed upon third panel member being appointed with the majority prevailing. Other appropriate disputes approaches may also be utilized, as agreed upon.

Dispute activities should be coordinated with the agency's Assistant Attorney General. Unless otherwise directed by the Office of the Attorney General, dispute processes are to precede any court action.

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Contract remedies and sanctions

After efforts to resolve issues through either or both the corrective action and/or dispute processes have failed, a contractor who is deemed to be noncompliant with the terms and conditions of the contract may be determined to be subject to remedies or sanctions, such as:

- Withholding payment;
- Collection of liquidated damages per the contract terms;
- Federal debarment or suspension of the right to contract with an agency or agencies, if federal funds are involved;
- Suspension of the contract; or
- Termination of the contract.

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16.20.80

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Contract termination

Contracts may be terminated prior to the completion date of the contract either for convenience of the parties or for cause as provided under the contract terms.

16.20.80.a

Termination for Convenience. The termination for convenience clause is intended to handle changed conditions under the contract, particularly when the expectations of the parties have been subjected to substantial change.

Termination for lack of funding, referenced under the "Savings" clause of the model contract, is processed as a "Termination for Convenience." It is intended to handle the situation when funding from federal, state or other sources is no longer available to the agency or not allocated for the purpose of meeting the agency's contractual obligation.

The Attorney General's Office may be contacted when an agency is considering invoking the termination for convenience clause.

16.20.80.b

Termination for Default. To terminate a contract based upon the contractor's default, the agency asserting default must demonstrate that the contractor has not performed according to the contract. This step follows the validated corrective action and/or disputes processes. By invoking the termination for default clause, the agency is generally in a position to claim damages due to the other party's breach of the contract. Again, either the agency's in-house legal counsel or Assistant Attorney General should be consulted whenever an agency is considering invoking this clause.

16.20.85

July 1, 2007

Review and implement contractor's final product

16.20.85.a

When the contract is almost complete, contract managers are responsible to:

- Assess whether all services have been provided and contract objectives and outcomes met;
- Determine the agency's next steps based on the contractor's work;
- Ensure contractor has accounted for any state property or equipment used for the contract, has turned in building access cards, etc.; and
- Ensure all invoices are received and authorize final payment, when appropriate, to the contractor.

16.20.85.b

Final Written Report. As part of completing contract work under the terms of the contract, the contractor may be required to submit a final written report. Not all contracts will require such a report, but when they do, the final written product should address, at a minimum, the following areas as appropriate to the type of service provided:

- Statement of the services provided and clients served;
- Benefits or results to be realized by clients; recommendations for further improvements, if any; and/or
- Other matters that should receive management emphasis or attention.

Generally, the final report is submitted before final payment is made to the contractor.

16.20.90

July 1, 2007

Evaluate contractor's performance

Upon contract completion, the agency contract manager may want to prepare a contractor evaluation. This evaluation will be useful if agency management wants an analysis of contractor performance and if other agencies inquire about the contractor.

The evaluation may address the following:

- Timely completion of work;
- Quality of work performed;
- Quantity of work;
- Professional manner and conduct;
- Client satisfaction;
- Working relationship with agency staff; and/or
- Quality of project management.

Contract managers should share with other state agency staff information gained from administering the contract so that those responsible for future contracts can gain from these experiences.

16.20.95 Documenting the contract file

July 1, 2007

Agencies are required to maintain adequate documentation regarding the contract and services provided by the contractor. Agencies may maintain contract documentation in more than one location as well as by multiple media. Contract payment documentation may be maintained in the fiscal office, while the contract manager may maintain a monitoring file in his/her location and the contract office may maintain the procurement files. The information may be available in electronic or hard copy format.

16.20.95.a **Documentation.** Documentation in the contract file, at a minimum, must include the executed contract and all attachments and exhibits incorporated into the contract.

Monitoring activities conducted under the contract such as meeting minutes, copies of reports submitted, fund tracking records, etc., are all examples of the types of documentation that may be part of a contract file and must be maintained somewhere in the agency.

16.20.95.b **Records Retention.** Records retention of client service contracts must follow the requirements published by the Office of the Secretary of State in the General Records Retention Schedule for Agencies of Washington State Government at: <http://www.secstate.wa.gov/archives/ga.aspx>.

16.20.98 Auditing contracts

July 1, 2007

16.20.98.a **Auditing.** Auditing is broadly defined as the independent examination of an entity's records or actions in order to evaluate compliance with financial, legal, contractual, or policy requirements.

Several types of audits are performed, including:

- **State Audits** – As with all expenditures made by agencies, client service contract expenditures are subject to audit by the State Auditor's Office.
- **Federal Audits** – When agencies award federally funded client service contracts, the agency needs to determine whether the contract constituted a sub-recipient or vendor relationship with the contractor. If the contract constituted a sub-recipient relationship, an OMB Circular A-133 audit may be required.

16
Client Service Contracts

If the contract established a vendor relationship, in general, vendor contracts will not be covered by an OMB Circular A-133 audit. Determining whether a contractor is a vendor of the agency or an agency's sub-recipient can be difficult. Guidance is available in Subsection 50.30.60, and at: www.whitehouse.gov/omb/circulars/a133/a133.html.

Audits initiated by the agency or contractor: State agencies should use a risk assessment to consider whether an audit of the contractor is needed. When an audit is deemed appropriate and necessary, the expectations for the audit scope, methodology, and due date should be included in the written contract.

An audit can be designed to accomplish one or more of the following:

- Provide reasonable assurance as to the accuracy of financial information reported by or obtained from the contractor;
- Assess the financial condition of a contractor;
- Assess the internal control system of a contractor;
- Assess the performance of a contractor; and
- Assess compliance with applicable laws and contract regulations.

While an audit can be an effective monitoring tool, it carries a cost. Therefore, care should be exercised in calling for audits. Regardless of whether an audit is performed, the agency still must monitor its contracts to ensure it receives the services for which it paid.

16.20.98.b

Audit Resolution. State agencies should evaluate appropriate resolution to the audits where findings and/or questioned costs have been identified. If federal funds are involved, OMB Circular A-133 Section 315 requires follow up and corrective action on all federal findings.

Normally, if a finding exists in a published audit report, whether issued by Federal auditors (Office of Inspector General), an independent audit firm, the State Auditor's Office, or a state agency's internal audit staff, resolution of audit findings is warranted.

16.20.98.c

Questioned Costs. Questioned costs are normally those costs identified as the result of an audit that may have inappropriately been paid to the contractor. The agency should investigate further and determine whether costs should be recovered.

Methods for recovering questioned costs may include:

- Billing the contractor;
- Adjusting future payments until the questioned costs have been recovered; and/or
- Deducting the questioned costs from the final payment.

There may also be good reasons not to pursue recovery of the questioned costs, such as when the costs to recover a small dollar amount are more than the over-payment. Sufficient reasons, generally based on Assistant Attorney General guidance, should be documented when exercising the option not to pursue recovery.

Contracts using federal funds may require different processes, as prescribed by the federal government.

16.20.98.d

Performance Audits. In 2005, Initiative 900 gave the State Auditor's Office authority to conduct performance audits of state and local governments. The State Auditor developed the following definition of a performance audit:

An objective and systematic assessment of the performance and management of an entity, program, activity, or function in order to:

- Provide information to improve performance and operations;
- Facilitate decision-making by parties with responsibility to oversee or initiate corrective action; and
- Improve accountability to the public.

Performance audits conducted will cover broad areas but will include those of the greatest public interest, matters that affect all agencies, and other identified recurring challenges.