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<p><b>Joint Policy:</b></p>	<p><b>Procurement/Contracts</b></p>	
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## **Amendments, Suspensions or Terminations**

### **Executive Summary**

This policy is jointly issued by the Office of the Comptroller (CTR) and the Operational Services Division (OSD) for contracts under the jurisdiction of each of these departments.

Effective contract management requires a Department to monitor Contractor performance and compliance. Significant changes in performance, funding or obligations must be memorialized, contemporaneously with the change, in a formal contract amendment. At least six months prior to the termination of a procurement Departments should review any remaining available options to renew or begin a new procurement process if the performance, program etc. will be ongoing.

The "*Standard Contract Form and Instructions* " or other prescribed amendment form for other contract types must be used to document all amendments to a Contract including exercising an option to renew, extending the period of performance, changing the scope of performance, changing costs, etc., in accordance with the solicitation. Amendments must be executed by authorized signatories of both the Department and Contractor contemporaneously with the need for the Amendment and prior to the Contractor incurring obligations based upon the Amendment. Departments must attach all relevant documentation to support the Amendment.

Unless otherwise provided by law, the following policy applies to state departments in all branches of government. In addition to the policies in this Chapter, departments are also responsible for the policies in [Contracts - State Finance Law and General Requirements](#), [Department Head Signature Authorization and Electronic Signatures for MMARS Transactions](#), [Quality Assurance and Internal Controls](#) which outline requirements for compliance with state finance law, and any other applicable [contract](#) and procurement policies issued by CTR, or OSD under the [Procurement Information Center \(PIC\)](#).

### **Considerations**

Contract amendments must be made with the same care and attention to detail as the original contract. Special consideration must be made to whether the amendment is allowable under the original procurement or contract, the timing of when an amendment is needed, and the formal documentation that will be needed for the amendment.

All state finance rules apply equally to amendments and an amendment that increases the obligation for the Commonwealth will be subject to appropriation of available funds and other funding rules. If an amendment changes the dates, amounts, or any information in the original MMARS encumbrance

transaction, a modifying transaction will also have to be done contemporaneously with the execution of the amendment and processed in MMARS. In all cases departments will be held to a standard of good faith and fair dealing with contractors when making amendments, suspensions or terminations.

In addition to the policies in this Chapter, Departments are also responsible for compliance with [State Finance Law and General Requirements](#) policy and any other applicable [Contracts Policies](#), including the use of [Interdepartmental Service Agreements](#), the [Vendor/Customer File and W-9s Policy](#), [the Accounts Payable Policies](#) and any other related policies issued by CTR applicable to the disbursement of state and federal funds, personnel and payroll, fringe and indirect charges, internal controls, reporting and recordkeeping.

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**Policy**

The Comptroller has broad authority to prescribe accounting rules and instructions for all state Departments and the appropriate use of the state accounting system. Pursuant to [G.L. c. 7A, § 7](#), [G.L. c. 7A, § 8](#), [G.L. c. 7A, § 9](#) and [G.L. c. 29, § 31](#), the Comptroller is required to implement a state accounting system (including a centralized payroll system) and issue instructions for the accounting practices to be used by all Departments for supplies, materials, assets, liabilities, equity, debt, encumbrances, expenditures, revenues, expenses and obligations of all Commonwealth funds and accounts, including payroll, unless specifically exempted by general or special law. The Comptroller has full authority to prescribe, regulate and make changes in the method of keeping and rendering accounts and is authorized to direct state Departments to implement changes in their systems to meet these statewide standards.

**The Operational Services Division (OSD) has broad authority to manage the acquisition of all goods, supplies, equipment and services, pursuant to M.G.L. Chapter 7, Section 4A(a), and to standardize forms and specifications, pursuant to M.G.L. Chapter 7, Section 22.**

**COMMBUYS.** Pursuant to [Executive Order 533](#); M.G.L. Chapter 7, Section 22; M.G.L. Chapter 30, Sections 51 and 52; 801 CMR 21.00, and the COMMBUYS Policy for Purchasing Organizations, all state agencies of the Executive Department and other entities governed by those provisions are required to use **COMMBUYS**, the only official procurement record system for the Commonwealth of Massachusetts' Executive Departments. COMMBUYS is an electronic market center that offers free internet-based access to all public procurement information posted here in order to promote transparency, increase competition, and achieve best value for Massachusetts taxpayers. See <https://www.mass.gov/learn-about-commbuys>.

If you have any questions about COMMBUYS, contact the Operational Services Division (OSD) [COMMBUYS Help Desk](#) or call during normal business hours (8AM – 5PM Monday – Friday) at 1-888-627-8283 or 617-720-3197.

**Purchase of Service:** Also, a notation of "*☞ For POS Only*" indicates that the text that follows pertains only to the "Purchase of Service" system and the procurement of human and social services.

### **Recommendations and Considerations for Terminating, Suspending or Amending Contracts**

The following are recommendations and considerations to review when considering amending, terminating or suspending a contract(s). These are by no means exhaustive. Departments should consult with their CFO and Legal Counsel prior to any formal action to amend, suspend or terminate a contract.

### **Establish Communication with Appropriate Staff**

Make proactive efforts to routinely communicate with fiscal, contract and program staff. CTR Internal Controls guidance recommends the participation of both the Legal Staff and the Chief Fiscal Officer as the key staff responsible for ensuring fiscal responsibility. Internal Department policies should encourage legal staff consultation prior to implementing any action to terminate, suspend, reduce or amend a contract, especial during time of fiscal constraints. Program and fiscal staff may not understand the limitations or implications of certain terminations, reductions, suspensions or amendments and legal staff should be included in discussions when these actions are anticipated. The following resources are also available to assist Departments with contract amendments, suspensions and terminations.

- The **Attorney General's Office (AGO)** should also be consulted regarding any anticipated termination, reduction, suspension or amendment which may involve a potential threat of litigation, or which is foreseen to involve a current or potential dispute or difficulty.
- The **Office of the Comptroller (Legal Bureau)** should be contacted whenever it is anticipated that a Department may be faced with insufficient funds for contract, payroll or other fiscal obligations. In addition to any notices of deficiency required to be made to ANF, and the House and Senate Committees on Ways and Means, the Comptroller must be contacted prior to any actions if the Department is considering termination of a lease or TELP due to lack of funding.
- The **Operational Services Division (OSD)** should be contacted whenever departments have questions related to whether an amendment falls within the scope of the RFR procurement under 801 CMR 21.00.
- The Massachusetts Office of **Information Technology (MassIT)** should be contacted whenever the amendment falls within the scope of an IT contract pursuant to Executive Order 549.

### **Carefully Consider the "Reasons" for Terminations, Suspensions or Amendments.**

If a termination or suspension is "for cause", the Department must be able to document the "for cause" events or actions supporting this type of termination, and that the performance requirements were clearly outlined in the contract and that the Contractor was, or will be provided with a reasonable opportunity to cure.

Without cause terminations should provide a reasonable notice of termination for the type of performance sought, or as specified in the contract. See [Termination without Cause](#) section below.

Terminations, suspensions or reductions due to the elimination or reduction of appropriation or allotments should be carefully reviewed in relation to the Department's published mission, priorities, other legal obligations and available funding. Departments should define critical business needs and priorities that are considered when contract modifications are necessary due to decreased or eliminated funding.

### **Carefully Review Termination, Suspension or Amendment Terms**

Termination, suspension and amendment language is contained in the Contract, which includes the contract boilerplate, language in the procurement document and any additional negotiated terms and conditions.

A Department's ability to amend, reduce, suspend or terminate a contract or modify contract performance is determined by the terms contained in the contract, the type of performance required, governing statutes and appropriation language. State and federal mandates to provide health and safety services to citizens, services to clients in residence, etc. may also limit a Department's ability to terminate or reduce certain contracts. Other contracts have performance that is not capable of being reduced or divided, which may also limit a Department's ability to reduce or terminate a contract.

It is recommended that contracts contain language informing Contractors that the contract creates no entitlement or guaranteed funding and is subject to completion and acceptance of performance by the Department. In addition, contract performance requirements are subject to the Department's needs that are based upon mandates, funding appropriation and allotments, which may change with changes in law, or budget and allotment reductions.

In the event the Department is faced with a budget reduction, elimination or substantial change in circumstances warranting a change in contract need or performance, the Department should make best efforts to negotiate an amendment to reduce performance, prior to having to terminate or suspend a contract. However, in some cases of severe budget cuts, allotment reductions, or agency funding eliminations, a Department will have no choice but to terminate, reduce or suspend existing contracts. To provide further protection, any contract which has performance which can be broken into phases, or is divisible and capable of being reduced should include language allowing the Department to require a reduction in performance and corresponding maximum obligation in the event of a budget or allotment reduction.

A contract termination is a permanent cancellation of the contract and should be used only in situations when the Department does not foresee continuing business with a Contractor.

A contract suspension is appropriate for multi-fiscal year contracts requiring a temporary halt to performance (for a period of days, weeks, months, on a certain date or upon completion of a specific amount of performance) with anticipated continued performance at a future date. A suspension is preferable to a termination if funding is anticipated to be made available at a later date because this places all the contract documentation into a "suspended" status or "on hold" and when funding becomes available, the contract documentation can be easily "reactivated" through a contract amendment, rather than a full contract execution with all contract attachments.

For contract suspensions, the notice of suspension should identify whether the amount of the reduction for the period of the suspension will be deducted from the overall maximum obligation of the Contract, or moved into subsequent fiscal years of the Contract.

### **Consider the "Costs" of Termination, Amendments or Reductions**

Unless otherwise specified in the Contract, the Department is responsible for compensating for reasonable performance requested, received and accepted until the contract termination or amendment date. Departments may not request or accept performance or otherwise incur obligations in excess of

Department appropriations and allotments (See M.G.L. c. 29, § 26 and § 27) or outside the scope of a contract.

Certain contracts can be easily terminated without additional costs, since the Department is purchasing services or commodities on an "as needed" basis. Other contracts may require compensation or liquidated damages for the Contractor for an early termination or reduction. Such contracts include those with an anticipated long term commitment, or which require the Contractor to make an up front commitment of time or funding, or to incur additional obligations in order to complete performance, such as renting space, hiring personnel, purchasing equipment or materials. Therefore, the Department needs to factor in these obligations when considering the associated "costs" of termination for the Contractor and the Commonwealth.

Some contracts may not be terminated without severe penalties. Please see TELP section below. Other contracts trigger substantial penalties if the Commonwealth terminates when there has been no breach by the Contractor. Therefore, departments should be careful both when negotiating potential penalties for early termination, and when making the determination to terminate a contract if penalty clauses have been negotiated. These obligations may not necessarily be waived if the Department's funding is reduced or even eliminated, but may remain outstanding liabilities against the Commonwealth that the Contractor may litigate to enforce.

### **Department's Actions Must be Fair and Demonstrate Good Faith and Fair Dealing - Notice of Termination, Suspension or Amendment**

Departments must demonstrate good faith and fair dealing when initiating any notice of termination, suspension or amendment. Departments must be able to demonstrate that there exists a good business justification or legal necessity that supports the contract change. Department actions that support its legislative mandate, support a good business justification or need, or are required out of legal necessity (such as a reduction required due to budget cuts) are generally given substantial deference provided the Department deals with affected contractors in good faith.

Notices of termination, suspension or amendments are usually in the form of a letter distributed to the Contractor(s). Notice of termination must be reasonable and in accordance with any notice provisions agreed to as part of the contract. If no notice period is specified in the contract a reasonable period for without cause termination or suspension is usually not less than 30 days, depending upon the complexity of the contract. Human and Social Service Contracts require a longer notice period. More complex procurements or contracts requiring a substantial upfront investment by a Contractor usually warrant a longer without cause notice period.

Any notice provided to a Contractor should be made by an authorized signatory of the Department head in consultation with the CFO and Department legal counsel.

Any notice shall be deemed delivered and received when submitted in writing in person or when delivered by any other appropriate method evidencing actual receipt by the Department or the Contractor. See contract for details. The *Standard Contract Form* allows email delivery to listed Contract Manager provided there is confirmation of actual receipt.

Most written notices of termination or suspension delivered to the Contractor should state:

1. the effective date and period of the notice,
2. the reasons for the termination or suspension, if applicable,
3. any alleged breach or failure to perform,
4. a reasonable period to cure any alleged breach or failure to perform, if applicable, and
5. Any instructions or restrictions concerning allowable activities, costs or expenditures by the Contractor during the notice period.

The content of the notice is usually prescribed in the Contract. For example, in the *Commonwealth Terms and Conditions* the following language appears:

*"Any written notice of termination or suspension delivered to the Contractor shall state the effective date and period of the notice, the reasons for the termination or suspension, if applicable, any alleged breach or failure to perform, a reasonable period to cure any alleged breach or failure to perform, if applicable, and any instructions or restrictions concerning allowable activities, costs or expenditures by the Contractor during the notice period."*

For all notices, Department must document a Contractor's actual receipt of notice. (Please see notice receipt requirements in Commonwealth Terms and Conditions, the [Procurement Information Center \(PIC\)](#), and *Standard Contract Form and Instructions*). Notice may be made orally, but written notice must be provided in the format authorized under the contract, provided that actual receipt is confirmed. For the purposes of time periods for notice, the time clock does not begin to tick until actual receipt of notice by the Contractor.

For Contracts using the *Standard Contract Form and Instructions*, the "Contract Manager" is the person to receive notices unless otherwise specified in the Contract:

*"Unless otherwise specified in the Contract, legal notice sent or received by the Contractor's Contract Manager (with confirmation of actual receipt) through the listed fax number(s) or electronic mail address will meet any requirements for written notice under the Contract"*.

For other types of Contracts (construction, leases, etc.) departments should carefully review the language for the person and form of receipt of notice that is required.

### **Contract Disputes**

In most cases, contract disputes or conflicts arise due to miscommunication, misunderstandings, or lack of accurate or timely information. Enhanced communication and careful monitoring of contract performance can usually resolve most disputes. Departments are encouraged to develop internal methods for resolving disputes.

Sometimes, contractors and Department staff develop close working relationships which encourage informal resolution outside the terms of the contract. Such resolutions, although efficient in the short term, create a dangerous precedent in the event of larger disputes or a serious breach in performance. Staff must understand that, irrespective of their professional working relationships with contractors, they have been entrusted with an independent fiduciary obligation to manage Commonwealth funds properly in accordance with the terms of the contract. This responsibility includes knowing the terms of the contract and providing prompt notice to the CFO, other appropriate Department staff and the Contractor whenever performance is disputed.

Failing to provide prompt and suitable notice may result in escalation of a bad situation, additional costs to the Department, and delays in performance. However, under Section 12, waivers in the Commonwealth Terms and Conditions, **"...forbearance or indulgence in any form or manner by a party shall not be construed as a waiver, nor in any way limit the legal or equitable remedies available to that party. No waiver by either party of any default or breach shall constitute a waiver of any subsequent default or breach."** Just because a Department accepts less than full or satisfactory performance at any point in the contract does not waive the Department's right to demand full or satisfactory performance during the remainder of the contract.

## **Litigation or Mediation**

Litigation has traditionally been the first line of attack when departments have been faced with a contract dispute which has reached an impasse. However, litigation is expensive for both the Commonwealth and a Contractor and may exceed the value of resolving the dispute. Departments may consider "mediation" as a less expensive, quicker and often less contentious way of resolving a contract dispute, and as a means of arriving at a creative solution not available in court.

Mediation uses a neutral third-party to work with the parties to develop a mutually agreeable solution to the dispute. Participation is voluntary and the results are binding by mutual agreement of the parties. ANF, CTR, OSD and the Attorney General's Office support the use of mediation as an alternative form of dispute resolution. Mediation supports procurement principles and balances the Commonwealth's interest in litigating important legal rights that affect the Commonwealth while preserving Commonwealth funds and providing a more effective and efficient alternative to court.

**Note: Mediation does not include arbitration. Arbitration may not be pursued or included in any contract as a method of dispute resolution.**

The [The Massachusetts Office of Public Collaboration.pdf](#) (MODR) has been designated as the lead agency for overseeing the use of mediation by state departments and other forms of alternative dispute resolution. MODR has established a contract that may be used by all state and private entities per MODR's enabling statute M.G.L. c. 75, s. 46. The contract offers qualified mediators with expertise in a wide range of substantive areas. Departments must contact MODR if they are considering mediation and may not separately procure these services. Private sector mediators under this contract have been selected and trained by MODR. Thus, the mediators are not employees of MODR or the Department and they act independently as impartial mediators on behalf of both the Department and the Contractor to reach a solution.

A Department and the Contractor who agree to pursue mediation are expected to share the costs of a mediation. For more information about mediation, dispute resolution systems design, facilitation and consensus-building, dispute resolution skills training, and other services offered by MODR, call (617) 287-4040.

## **The Office of the Attorney General (AGO)**

As the Commonwealth's litigator pursuant to M.G.L. c. 12, the Attorney General's Office (AGO) balances a variety of concerns that go beyond the scope of a particular dispute that may determine whether a contract dispute should be litigated or mediated. For example, some disputes may involve the development of legal precedents which have far reaching implications for other departments. The presence of such issues is not necessarily linked to the monetary size of the dispute. A small dollar dispute may involve issues with broad implications, while a large dollar dispute may not.

The AGO represents departments only in disputes involving litigation and will not represent a Department during a mediation or other administrative proceeding or hearing.

The AGO MUST be informed immediately whenever potential litigation may be involved or is threatened by a Contractor or bidder, whenever the Department believes that a dispute has reached an impasse that might be resolved through mediation or whenever a serious contract issue or public interest has been threatened warranting litigation. The AGO must review these disputes to determine whether the AGO can or will represent the Department and whether the matter should be litigated or mediated or otherwise resolved. Consequently, departments must obtain the approval of the AGO before agreeing to mediation or any contract dispute.

The cost of mediation should not be a deterrent to using this method of dispute resolution and opting for the AGO pursue litigation. Although mediation has an immediate cost at the time of the hearing, litigation

is not a cost-free method of contract dispute resolution. Although the Department will not be charged for legal services provided by the AGO the Department will usually be responsible for fees associated with expert witnesses, sheriffs' fees for service of process, deposition fees and the staff time and resources necessary to prepare and testify at depositions and trial if the litigation is not immediately resolved. Therefore, in the long run, mediation is usually more cost effective and less time consuming than litigation.

Fiscal Staff should be instructed that they have an obligation to notify their General Counsel immediately whenever a potential contract dispute arises that may trigger the need for intervention, alternative dispute resolution, or that may potentially result in litigation. The Department General Counsel is the key contact with the AGO and should contact the Attorney General's Trial Division (617) 727-2200 for further assistance with approvals for mediation or to refer potential contract dispute litigation.

### **Breach of Contract**

A breach of contract is generally considered a "violation" of the contract terms and conditions or a "default" or "failure to perform." A breach is "material" if the Contractor violates a major requirement of the contract, e.g., transfer of performance to a subcontractor without Department prior approval, lapse in Worker's Compensation or other mandatory insurance, or the Contractor defaults on performance of a significant stated requirement of the contract, e.g., failure to deliver test packages on the day of the test as required, failure to submit mandatory programmatic or fiscal reports.

The contract language determines the basic parameters within which a Department may terminate or suspend contract performance or payments. This is where the time spent drafting the RFR can really assist a Department. If the contract terms and conditions of performance are clear, complete and detailed, then the Department will have an easier time determining when a breach or default has occurred.

Performance measurements are also helpful in determining breach or default. If a Department has clearly specified how performance will be judged and what the expected standard of performance is, the Contractor may be held to that standard. If no performance standards are identified, and no performance deadlines or thresholds are set, it is harder to argue that the Contractor breached or defaulted on the contract. Procuring departments are advised that oral agreements, oral amendments or conversations are almost always deemed unenforceable.

If performance is **in any way** substandard or incomplete and a Department believes there has been a full or partial breach, the Department contract manager is responsible for taking the following steps:

1. Immediately notify the CFO, Department legal counsel and/or other appropriate staff in accordance with internal protocol.
2. If a legal dispute or litigation is threatened, the Department is required to immediately notify the Office of the Attorney General (Government Bureau).
3. Document the breach (if not done already). The breach must be documented and verifiable. If a breach or incomplete performance cannot be documented or verified or if the Department fails to document or verify the breach, there is a weaker basis for forfeiting a retainage, suspending or terminating performance or the contract.
4. Documentation should be verified by more than one individual, preferably by the CFO, in consultation with legal counsel, to ensure that a claim of breach or incomplete performance is justified under the terms of the contract and reasonable. Sometimes, staff has performance expectations that are not memorialized in the contract terms and, therefore, the failure to meet these unwritten expectations cannot be used as a basis for forfeiture of a retainage, suspension or termination of contract performance.



5. Draft written notice of breach or notice of rejection of substandard or incomplete performance, specifically identifying the reason(s) for the rejection and what is necessary to cure the breach. The notice must be professional, impartial and must match the level of the breach. The notice should contain any time period for cure and the repercussions for failure to timely cure (i.e., suspension, termination, replacement).
6. Provide notice to the Contractor (see Contract terms for period of notice if specified).
7. If the breach is resolved, release the portion of periodic or final payments (and retainage if applicable) owed for the completed performance.

### **Contract Suspension and Termination - When and How To Suspend or Terminate a Contract**

When suspension or termination takes place prior to the expiration date specified in the contract, the party initiating the action must provide prior written notice to the other party. Given the seriousness of contract suspension or termination, the Department taking the action should take steps to obtain documentation ensuring proof of the basis for the termination or suspension and that the notice was delivered to the Contractor. Departments should include evidence of actual delivery of notice in the procurement/contract file.

Departments are strongly encouraged to review any anticipated suspension or termination actions with legal staff and their CFO prior to taking any action. Department legal staff may also contact the Attorney General's Office Trial Division if the planned termination or suspension involves potential litigation. This is especially important when a procuring Department wants to suspend or terminate a contract used by other departments (such as a Statewide Contract or Master Agreement used by multiple departments), since this action will have repercussions for more than just the procuring Department. Also, legal staff and OSD may be able to suggest other solutions, such as mediation or contract negotiation, which may resolve the issues and forestall termination or suspension.

Departments should be aware that procurement file contents are generally subject to public disclosure under the public records law, and if litigation results from the action to terminate or suspend, the procurement file contents may also be subject to legal discovery. Therefore, notes, memos and documents concerning suspension or termination should accurately reflect the facts and circumstances of the Department's actions.

There are three types of contract suspension or termination:

1. Immediate suspension or termination
2. Suspension or termination for cause
3. Termination or suspension without cause

Departments should refer to the applicable contract type to determine any specific standards for the timing and other procedural requirements regarding contract suspension or termination. It is important to note that there are specific differences between the two versions of the Commonwealth Terms and Conditions with regard to the basis for termination, required notice period and obligations upon termination. Furthermore, the rights of the parties as expressed in the applicable Terms and Conditions are not exclusive, but are in addition to any other rights and privileges the parties may have under operation of law or as otherwise negotiated as part of the contract. Therefore, it is vital to contact Department legal staff for assistance in this area.

### **Immediate Suspension or Termination**

A contract may be suspended or terminated immediately upon receipt of written notice in certain limited circumstances, including unforeseen emergencies that require immediate Department action or elimination or absence of funding.

### **Immediate Termination for Emergency**

A termination or suspension for an emergency is limited to a rare unforeseen public emergency that mandates immediate Department action to address an acute public health or safety incident. This circumstance may arise due to a death, assault or injury to a Commonwealth client or employee in connection with a Contractor's performance, or a public emergency (flood, fire, hurricane) having no connection with a Contractor's performance. Departments should try to notify any Contractor whose performance may be affected by an emergency. Depending upon the severity or duration of the emergency a Department may either temporarily suspend performance or payments or may terminate the contract upon prior written notice to the Contractor.

### **Immediate Termination for Lack of Funding or Appropriation**

Departments may not incur obligations in excess of appropriations AND allotments. Even if a Contract has an extended prior notice provision, in the event an appropriation OR allotments are eliminated or reduced Departments must take the appropriate actions to reduce contract obligations to match available appropriations and allotments, which may require immediate suspension or termination.

Although contract payments are "subject to appropriation" by the legislature and "allotment" by the Governor (M.G.L. c. 29, § 27) a Department may not escape contractual obligations through immediate contract termination (especially contracts for term leases, space leases, tax exempt lease purchase (TELP) or other long term commitments) unless the appropriation or allotment under the account funding the contract, or the specific language that authorizes the funding of that contract, is eliminated and the Department has no other available funds that could be unobligated or otherwise made available to pay for these obligations.

In the event of a statutory reduction of allotments pursuant to [M.G.L. c. 29, s. 9C](#), Executive Departments must take the appropriate steps to reduce obligations to ensure that expenditures do not exceed the spending limits set by ANF. Even with executed contracts with maximum obligations and line-item earmarks specifying "not less than \$\_\_\_\_\_" be expended" for a particular purpose or recipient, the Department does not have the authority to spend above the authorized spending limits and may be required to reduce contracts accordingly. See Appendix - [Policy Guidance For Contract Reductions In Response To M.G.L. C. 29, S. 9C Budget Reductions](#)).

Maintaining supporting documentation related to 9C reductions is critical. Please see section below entitled "Be Careful to Follow E-Discovery and Public Records Requirements."

### **TELPs and other mandatory payment commitments**

A Department may not terminate a lease or TELP contract for lack of funding without prior approval of the Comptroller to ensure that the termination is legally and fiscally appropriate and the termination will not negatively impact the Commonwealth's financial bond rating.

***A TELP may not be terminated unless the Department is being eliminated and all funding is terminated.***

A TELP financing company has already paid an equipment Contractor for the equipment being lease-purchased by the Department, and similar to any mortgage, the Department will remain liable for all payment to the Contractor unless there is a default for bankruptcy (Department is eliminated). Normally, the commonwealth is required to transfer the payment obligation to another Department or to seek appropriation of sufficient funds to close out this obligation. Similar to any default on a loan or mortgage, a default on a TELP has serious implications to the financial credit rating of the Commonwealth and must be avoided at all costs, including requiring a Department that is not being terminated to terminate other contracts and personnel to free up sufficient funds to make all TELP payments.

### **Reduction in Funding or Allotments**

For most contracts, if the available funding is eliminated or reduced for a contract, for any reason, the Contractor must be notified immediately in writing and the contract (or the underlying document under a statewide, OSD-designated statewide or multiple departmental contract) shall be deemed suspended and the Contractor shall not be entitled to compensation for any performance provided after the date of suspension. A Department does not have the authority to negotiate this with a Contractor nor may a Department accept continued performance pending additional funding. See [Appendix - Policy Guidance For Contract Reductions In Response To M.G.L. C. 29, S. 9C Budget Reductions](#)

When a Department is faced with a reduction in available funding or a reversion of funds, the Department's mandate is the primary priority, however, the Department must honor long term commitment (such as leases) if at all possible, or suffer the consequences of potentially severe termination penalties. If the available funding is not enough to cover all of the remaining contracts, the Department has three options:

1. Suspend a contract or portion of performance until available funding is received;
2. Amend a contract to reduce the amount of allowable performance; or
3. Terminate a contract with sufficient notice.

If a lack of available funding occurs, the Department has no authority to request or authorize continued contract performance or to compensate the Contractor for any performance provided during the period of the lapse in available funding. If available funding is pending, the Department must suspend contract performance until the available funding is in place, at which time contract performance may continue. If available funding is not pending or imminent, and the Department has no other legally available funding from any other sources, the Department must either continue the suspension or terminate the contract. In the event the Department receives available funding during the period of the original procurement, the Department and the Contractor may lift the suspension or execute a new contract for the remaining duration of the procurement.

If funding is not available for encumbrance and expenditures, if accounts are not reauthorized past the termination date (such as on June 30<sup>th</sup> for operating accounts, or at the end of a capital bond authorization) a Department may not authorize performance to begin or continue. The Department may not continue to incur obligations or continue to accept services from employees or contractors in these accounts (even if the employees or contractors want to volunteer to continue work). Contracts must be terminated or suspended, personnel must be terminated, or contracts and personnel transferred to other appropriate accounts legislatively authorized to fund these types of obligations and expenditures.

Departments **MUST** immediately notify contractors and must work with appropriate budget staff whenever available funding for a contract may be in jeopardy.

*\* For POS Only:* For contracts subject to the Commonwealth Terms and Conditions for Human and Social Services, when the following specific bases for immediate termination or suspension exist:

- the absence of appropriation, allotment, or availability to the Department to discharge its obligations under the contract in the fiscal year;
- a change in general or special law or regulation which prohibits or limits the Department's authorization to spend available funds for the purpose of the contract (such as M.G.L. c. 29, § 9C reductions);
- a party's default, breach or any intervening casualty which poses an immediate threat to the life, health or safety of a client;
- the indictment of the Contractor or one of its principals or officers for an offense or offenses related to the provisions of services;
- fraudulent activities on the part of the Contractor in its dealings with the Commonwealth; or the filing for bankruptcy by the Contractor.

For termination due to reduction in funding, dependent upon the reason for the reduction the Department will determine the appropriate action for termination, suspension, or amendment. If an appropriation is not re-authorized, is vetoed or otherwise reduced, a Department may not incur obligations that exceed appropriations. Whenever possible the Department should provide a minimum of 45 days notice unless the Department alternatively provides a conditional notice of termination with a proposed amendment to a Contract, subject to sufficient allotments.

Whenever an appropriation is reduced or discontinued, or under M.G.L. c. 29, 9C when revenues are insufficient to support appropriations, and a reduction in allotments are insufficient to support continued performance during a 45 day notice period, Departments must take appropriate suspension, amendment or termination actions to ensure that obligations are not incurred that exceed authorized appropriations, allotments or other available funding with as much prior notice as possible.

### **Suspension/Termination for Cause**

If the Contractor breaches any material term or condition of a contract, or fails to fulfill any material obligation required by a contract, a procuring Department may terminate or suspend a contract for cause by providing the Contractor with prior written notice.

Departments should only use suspension or termination for breach when the Department has clear **documented proof** of the breach or default. No action should be taken without consulting the Department CFO and legal counsel. If litigation might result, the Office of the Attorney General should also be consulted prior to any notice to the Contractor.

Some contracts may be utilized by more than one customer, and all known customers should be notified of the intent to cease doing business with a Contractor. Departments must be prepared to produce the level of documentation necessary to stand up in a court challenge, including documentation that the performance terms were clear and unambiguous and the breach was obvious. Additional documentation may include affidavits from Department personnel and documents that verify and support the allegations of breach or default supporting the suspension or termination. Suspension may be used to halt performance or to halt payments (reject or hold invoices with notice to the Contractor) until the Contractor corrects the breach or default.

The applicable contract language will determine the parameters within which a Department may terminate or suspend contract performance or payments for breach. As a result, a Department should make every effort to clearly describe its expectations in its procurement and other contract documents. If the contract terms and conditions of performance are clear, complete and detailed, it will be equally clear when a breach or default has occurred. Performance measurements are also helpful in determining breach or default. If a Department has clearly specified how performance will be judged and what the expected standard of performance will be, the Contractor should be held to that standard. Oral agreements, amendments or conversations do not carry the weight of the written agreement and therefore should be formalized through the use of written amendments if performance is to be judged against these standards.

*\* For POS Only:* A contract subject to the Commonwealth Terms and Conditions for Human and Social Services may also be terminated for cause, with a minimum of 45 calendar days notice, due to reduction of funds appropriated for contracts or when a statute or regulation which governs performance is changed, differently interpreted or adopted, thus significantly increasing the burden on either party in complying with the terms of the contract.

### **Termination without Cause**

Departments may terminate a contract "without cause" whenever deemed appropriate by the Department, upon prior notice to the Contractor. Termination without cause is also referred to as termination for convenience. Termination without cause enables a Department to terminate a contract without penalty, without giving a reason. This method enables the Department to terminate a Contractor without having to prove a breach, a lack of available funding, an emergency, change of circumstances or any other reason.

### **Amendments, Suspensions and Terminations**

Termination without cause is appropriate for contracts such as fee for service or product contracts, rate contracts, or other contracts in which performance is upon request and the units are severable. Cancellation of a contract may reduce the Contractor's potential profits, but in most circumstances, a Contractor has not committed resources to completion of performance since items have not been requested.

Departments are cautioned to consider the basis for termination without cause. A Department must be careful to avoid actions that could be found to constitute bad faith. Every contract has an implied covenant of good faith. Encouraging a Contractor to incur costs in order to meet contract performance and then terminating without cause might give rise to a claim of bad faith. Contracting for a specified number of units of a specialty product over the course of a fiscal year, which requires the Contractor to purchase materials and incur other obligations in order to meet the contract obligations, might trigger a claim of bad faith if a Department terminates without cause, unless the Department negotiates mutually acceptable terms for the termination.

The termination without cause option may also be deemed in bad faith and inappropriate in circumstances in which a Contractor is required to provide an end product, system, software, or report and can not receive compensation until performance is delivered and accepted, and the Department terminates without cause prior to the delivery and acceptance of the product. If the Contractor was performing in accordance with the contract performance requirements and there were no emergency or other funding implications to support a termination, the Department may be deemed to have unfairly terminated the contract. In this circumstance, the Department should compensate the Contractor for a reasonable amount of costs incurred in good faith to perform the contract.

When providing notice of termination without cause the Department should identify the period of notice (if not specified as part of the contract) and what allowable performance is anticipated and authorized during the notice period. The Department should negotiate final costs associated with the termination. Termination without cause will not relieve a Department from compensating the Contractor for performance provided and accepted by the Department and costs incurred in accordance with the terms of the contract up to the effective date of the termination, or as otherwise negotiated by the parties.

For most "off the shelf" product or "upon request" fee-for-service contracts, which have no guaranteed amounts of performance or units, 30 days prior notice of termination is standard. For other contracts involving projects or product development, or which require the Contractor to commit to provide services (such as maintenance contracts, leases and TELPs) notice periods should be negotiated to reflect the needs of the parties. Some parties may agree to have notice periods that equal "the remaining time of the contract" in effect negating this option as available and requiring termination only for cause or a loss of funding. Many leases and all TELPs limit without cause terminations, or subject terminations to substantial penalties.

*\* For POS Only:* Either party may terminate without cause with 60 days' notice (provided the Department is not under a M.G.L. c. 9C allotment reduction mandate which would require an earlier termination date to prevent spending above authorized allotments).

## **CONTRACT AMENDMENTS**

### **What can be amended?**

The scope of any amendment is limited by the language in the contract procurement and the contract itself. Further, the RFR or other procurement should clearly delineate the changes to the contract that would require formal amendments versus those which would be considered administrative in nature (not requiring a formal amendment).

Contracts governed by 801 CMR 21.00 may be negotiated at any time during the contract period based upon the terms of the RFR. The best value standard set forth in 801 CMR 21.07(1) allows the Department

and a selected bidder (or a Contractor) to negotiate a change in any element of contract performance or cost identified in the RFR or the bidder's response which results in lower costs, a more cost-effective or better value contract than was presented in the bidder's original selected response. Changes can be negotiated which result in overall increased costs, provided the overall result is the best value or a "better value" than was originally proposed. In summary, as long as the subject of negotiation results in a better value within the scope of the RFR than what was proposed by the bidder in the original selected response, it is negotiable.

The same best value standard applies to grants and interdepartmental services.

### **Changes to Informational Items or Accounting Information**

Informational changes are those that are not "[material](#)" contract terms and include changes in telephone numbers, email addresses, fax numbers, state accounting codes, or other references that may require a change in MMARS, but do not require a formal contract amendment. Changes are filed as part of the procurement/contract file. For example, the accounts from which a contract is funded are not a material term of a contract (unless the procurement exception legislative authorization or earmark for the contract is contained in the line-item or funding source) and may be changed by the Department during the term of the contract without notice to the Contractor or a formal contract amendment. As long as the contract is fully funded, and the object codes used match the material terms of the contract, a Department may redistribute funding sources, change accounts, object codes or other accounting information without a contract amendment form signed by the Contractor.

Please note that if the procurement exception or legislative earmark for the Contract is contained in the funding appropriation or other funding source, this funding source may not be changed administratively since the authorization for the Contract or procurement exception follows the funding source and this would be a material change to the Contract, and underlying procurement requirements.

Please note also that object codes must accurately match the type of expenditure being made. Changes in object codes should be made only to correct mistakes and may not be used when funding becomes unavailable in one subsidiary and the Department is moving expenditures due to lack of funding in the correct subsidiary. Intentionally misclassifying expenditures may be considered a state finance law violation under [M.G.L. c. 29, § 66](#).

### **Material Contract Changes - When is Amendment Form Required?**

Contracts may need to be modified during the contract term. An amendment must be executed whenever there is a significant or "material" change to the terms of a contract that is negotiated and executed by both parties. The unilateral modification of significant terms of the contract by either party can result in breach or default of the contract; therefore it is important for both the Department and the Contractor to review their contracts on a regular basis to ensure the terms remain current.

If circumstances produce the need to amend the terms of the contract to prevent default or breach, such as passage of a new law that affects either party's ability to perform as anticipated, and the parties cannot agree to amended terms, then the contract should be terminated.

Although day-to-day contract correspondence and communications may be made electronically (email or fax) any changes in performance, funding, obligations or changes in the terms of a contract (including grants, subsidies, ISAs, etc.) must be memorialized, contemporaneously with the need for the change, in a formal contract amendment. **Electronic signatures for contracts and amendments are not authorized.** Therefore, Departments may negotiate an amendment electronically, but must finalize the amendment in the same manner as the contract with written (wet) signatures by authorized signatories of the Department and Contractor.

A *Standard Contract Amendment Form* must be executed and filed in addition to any required or optional attachments whenever there is a "material" change to the performance requirements listed under the

Contract, the performance expectations of the Department or the performance obligations of the Contractor. See [Process for Documenting Amendments](#).

For example, changes in dates of performance; the type, number, cost or rates of goods or services; the requirements for performance (adding, deleting or altering), reporting requirements (content, timing or recipients); budget line items (deletions, additions or changes) are usually considered a material change from what was contained in the original Contract (or as previously amended) and should be formally amended. In many Contracts, performance and costs are fixed and any change would be a "material" change in the contract.

Adjustments to budget line items or performance may not be a "[material](#)" change depending upon how the Contract and Procurement was structured and if the Contract contains language that "minor" adjustments can be made without a formal Amendment provided both parties confirm the changes in writing. For example, some Contracts have performance requirements that change based upon volume of use or need and will need flexibility throughout the Contract. Other Contracts purchase "availability" of services, maintenance, beds, hours or goods, which may or may not be fully utilized during a fiscal year and may be adjusted to allow utilization of other listed budget items.

### **Process for Documenting Amendments**

When a "[material](#)" contract change is made, an amendment is made using the *Standard Contract Form and Instructions* (or other appropriate amendment form for ISAs, construction, leases, etc.), attaching the details of the amendment (date change, change in scope, costs, etc.). The amendment is sent to the Contractor for signature and must be executed by both parties contemporaneously with the need for the Amendment and prior to the Contractor incurring any obligations based upon the Amendment.

In the majority of cases, amendments are mutually agreed to by the parties. Amendments requesting increased performance (as authorized by the procurement or contract) are fairly routine and do not meet resistance by Contractors unless a Contractor is unable (or unwilling) to increase the requested additional performance.

Departments should pay special attention to ensure that amendments are timely negotiated to have contract coverage for all Commonwealth projects and programs. This is especially important when a Department is faced with budget or allotments cuts. Departments may be faced with having to terminate, suspend or amend contracts to reduce maximum obligations or the scope of anticipated performance. Suspensions and terminations are completed by providing prior notice under the terms of the Contract and closing out current contract obligations.

When Departments seek to implement contract reductions, some Contractors may refuse to agree to a contract amendment reducing the contract performance or the maximum obligation of a contract. In these instances, a notice of termination or suspension, usually in the form of a letter distributed to the Contractor, is necessary. A Department has the option to provide a notice of contract amendment outlining a contract reduction which also contains language for a notice of termination or suspension if the Contractor refuses to negotiate or agree to the contract reduction.

The notice may contain language authorizing performance up to a specified time limit or not to exceed a set dollar limit above which the Department will no longer accept or pay for performance. Since contract increases and decreases must be mutually agreed, a one-way contract amendment reducing a contract may not be done. If a Contractor refuses to negotiate a contract amendment, the contract will terminate or be suspended by operation of law unless earlier terminated or suspended by the Department. Departments anticipating any delays in obtaining an amendment prior to the termination date the Contract may use the thirty day extension as part of their notice of amendment. See [Thirty-day extension](#).

Departments are also required to reflect any amendment having a fiscal impact (increase, decrease, change in funding source, change in performance dates, rates, etc.) in the state accounting system (MMARS) using the appropriate transaction modification form.

Some amendments will affect fiscal information with no underlying contract changes and will not have a contract amendment form. For example, Rate Contracts, which do not have maximum obligations are required to be encumbered based upon the anticipated obligations to be incurred. Departments may increase or decrease the total encumbrance obligations without any underlying contract change provided all contracts under the encumbrance will be fully funded for any obligations incurred. The accounts from which a contract is funded are not a material term of a contract (unless the procurement exception legislative authorization or earmark for the contract is contained in the line-item or funding source) and may be changed by the Department during the term of the contract without notice to the Contractor or a formal contract amendment. For these changes, the Department enters and processes the change in MMARS. If the change is outside the Department's transaction processing delegation limit, the Department must submit the doc id of the MMARS transaction on a Comptroller Transmittal Form indicating the type of change required.

The Department and Contractor may agree in advance, as part of the procurement or Contract what items of performance or cost can have "minor" adjustments, and how these minor adjustments will be documented. This documentation must be in writing and must be included as part of the Contract/Procurement file if an Amendment is not used. Emails of agreed changes must be printed and stored as part of the Contract File since emails are not an acceptable format for public records and for Quality Assurance and Audit purposes. All key information related to a Contract must be attached to the record copy of the Contract. When in doubt as to whether a change is material, Departments should execute a Standard Contract Form and Instructions.

#### **State finance law applies to amendments.**

State finance rules apply equally to amendments. Any amendment that increases the financial obligation for the Commonwealth will be subject to appropriation of available funds and other funding rules. If an amendment changes the dates, amounts, or any information in the original MMARS transaction, a modifying transaction will also have to be done contemporaneously with the execution of the amendment and processed in MMARS. See policy "[State Finance Law and General Contract Requirements](#)".

Performance under an amendment is subject to the same funding rules as any obligation or expenditure. Departments must do everything legally allowed to manage within current appropriations. Departments must immediately notify CTR, ANF and the House and Senate Ways and Means Committees of the estimated amount of any anticipated deficiency in any appropriation. See [M.G.L. c. 29, § 9E](#).

If funding is not available for encumbrances and expenditures under an amendment, if accounts are not reauthorized past the termination date (such as on June 30<sup>th</sup> for operating accounts or at the end of a capital bond authorization), a Department may not authorize performance to begin or continue under an amendment. ***The Department may not continue to incur obligations or continue to accept services from employees or contractors in these accounts (even if the employees or contractors want to volunteer to continue to work).*** Contracts must be terminated or suspended, personnel must be terminated, or contracts and personnel transferred to other appropriate accounts legislatively authorized to fund these types of obligations and expenditures.

Expenditures for obligations under an amendment may not be made against other accounts to "front" funds during this time period and such expenditures may not be retroactively transferred (Expenditure Correction - EX) to these accounts should the accounts be re-authorized, or a new account(s) established. The Comptroller may not make a journal entry (expenditure correction) between accounts if the account ultimately to be charged had insufficient funds at the time the amount was expended from the other account, unless prior written notice is sent to HOU and SEN Ways and Means. See [M.G.L. c. 7a, § 3](#). This



means that expenditures made to another current account because a supplemental budget has not yet passed, or ISA funding has not been set up, cannot later be charged to the new accounts or reauthorized accounts when the supplemental budget passes because there were insufficient funds in the account from which the charges were to be made, without prior written notice to the House and Senate Committees on Ways and Means.

If performance is partially but not fully completed by the close of the fiscal year (by June 30<sup>th</sup>) and the performance is severable and capable of being paid for in subsets, all performance capable of being accepted should be compensated using current fiscal year funds. For appropriated funds in non-continuing accounts, the resolution of final contract payments must be completed no later than August 15<sup>th</sup> for performance delivered by June 30<sup>th</sup> in any fiscal year in order to enable retainage payments to be released by the end of the accounts payable period on August 31<sup>st</sup>.

[Pursuant to M.G.L. c. 29 § 13](#) payments must be made within the accounts payable period or the amounts appropriated for final payment and retainage will lapse (revert) unless the Department obtains a PAC – prior appropriation continued. If a PAC is not obtained, the amounts for final payments or retainage will have to be paid as prior year deficiencies (PYD) which will be charged back to the next fiscal year's funds.

Any remaining performance made in a subsequent fiscal year must be paid using that subsequent fiscal year's funds, including retainage payouts connected to this performance. A Department may pursue legislation as part of the GAA or a supplemental budget that enables a PAC (prior appropriation continued) which is the ability to use prior year funds for the services completed in the subsequent fiscal year.

## **TYPES OF AMENDMENTS**

### **Negotiating Prompt Pay Discounts and EFT During Amendment.**

If the Contractor has not offered prompt payment discounts or is not enrolled in Electronics Funds Transfer (EFT) (either because it was not required in the procurement or it was deemed inappropriate at the time) contract renewal provides an excellent opportunity for departments to encourage contractors to offer prompt payment discounts and to take advantage of this cost saving payment method offered by EFT. EFT is the Commonwealth standard for all contract payments. Please see [Commonwealth Bill Paying Policy](#). If the Contractor does not yet receive payments electronically, the Contractor should complete the [Authorization for EFT Payments Form](#).

Departments should extend an offer to renew the contract at least thirty days (and preferably earlier) prior to the scheduled end date of the contract using the Standard Contract Amendment Form or other prescribed form.

### **Contractor Legal Name or Legal Address Change Only**

If a Contractor changes its legal name or address (or both) but does not materially change its organizational structure, financial condition, procurement or contract obligations, the Department may continue the underlying contract(s) without amendment, an interim contract, or a new procurement.

For example, a Contractor wants a new image and decides to change its name, a contract partnership adds a new partner, or an individual gets married or divorced and changes his/her legal name. In addition, a Contractor may change its business location or where its tax reporting information should be sent.

Procedurally, the Contractor must notify any Department with which it has contracts of its legal name change, with documentation supporting the change. One Department will be responsible for updating the Vendor/Customer file with the new information.

- When the Legal Name changes, the Contractor is required to sign a new Commonwealth of Massachusetts [W-9 Form](#) and applicable "[Commonwealth Terms and Conditions](#)" to reflect the

legal name change (and Legal Address if both are changing. If just the Legal Address is changing, only a new W-9 Form is required. The T&C and W-9s are filed along with a Vendor/Customer Modification (VCM) with the Office of the Comptroller, Accounts Payable Bureau.

- Underlying contract transactions and payments are not affected; however, it is good business practice to identify the new legal name on all contract and payment transactions.

**Note:** Departments must also update the [COMMBUYS](#) Contract record to reflect the most current information and any MMARS records to ensure that the encumbrances and payments reflect the correct Legal name of the Contractor.

### **Changes to Informational Items or Accounting Information**

Informational changes that are not material contract terms, such as state accounting codes, funding accounts or other references may require a change in MMARS if necessary, but do not require a formal contract amendment. Changes are filed as part of the procurement/contract file. For example, the accounts from which a contract is funded are not a material term of a contract and may be changed by the department during the term of the contract without notice to the Contractor or a formal contract amendment. As long as the contract is fully funded and matches the material terms of the contract, a department may redistribute funds, change accounts, object codes or other accounting information without a contract amendment form.

### **Amendment to Contract Dollars**

Amendments to Contract dollars are in most cases considered a "[material](#)" contract change requiring a formal Amendment. The scope and language of the original contract, RFR, procurement, grant application process or other authorization will determine whether a Department and a Contractor will be able to negotiate amendments to contract dollars or duration. A contract must specify a definite period or duration of the contract that cannot be open-ended or ambiguous. If the RFR or other procurement states, for example, "*two years initial duration plus two additional options to renew not to exceed one year each,*" the resulting contract will be limited to a maximum of four years.

Normally contracts are limited to the maximum obligation and duration specified in the contract and procurement. For example:

If the RFR (or other procurement) and a Contractor's response proposed a maximum project all-inclusive cost for a completed project and there have been no material changes made by the procuring Department, a dollar increase for the identified project is NOT allowable. Contractors must perform based upon what they promised. If it costs the Contractor more than planned, this is the risk that was assumed by the Contractor. Extensions of time to complete performance are allowable, but there may be no additional costs in such circumstances.

Increases above the maximum obligation or maximum duration identified in the original RFR (including options to renew) may be allowable with certain restrictions. For example:

If the RFR (or other procurement) and a Contractor's response proposed a maximum project all-inclusive cost for a completed project and if the requested increase in cost is due to a change made by the Department to the original project, through no fault of the Contractor, and the change is within the scope of the original RFR (or other procurement) or the Contractor's response, an increase in maximum obligation is authorized to address the required change and the contract may be extended beyond the maximum termination date stated in the RFR (the end of the initial duration and all options to renew) for the minimum period necessary to complete performance of the project.

If the maximum obligation or maximum number of units or services specified in the RFR (or other procurement) is clearly specified as being an "estimate" and bidders were clearly notified in the RFR (or other procurement) that these were negotiable during the contract period, the amendment is allowed at

the procuring Department's option, but the contract duration may not be amended to extend beyond the maximum duration specified in the RFR.

If a maximum obligation was identified in the RFR (or other procurement) only to identify current needs and bidders were clearly informed in the RFR (or other procurement) that additional performance might be requested if additional funding became available, or if required by the Department, and the required performance is within the scope of the original RFR (or other procurement) or the Contractor's response, the maximum obligation may be increased based upon the needs of the Department, but the contract duration may not be amended to extend beyond the maximum duration specified in the RFR.

If a maximum obligation was identified in the RFR (or other procurement) only to identify current needs and bidders were asked to provide responses with all available commodities and services and cost structures based both upon current needs and additional purchases, or a "market basket" or "catalog" approach, the maximum obligation or a change to the listing of "market basket" and/or "catalog" may be increased or decreased based upon the needs of the Department, but the contract duration may not be amended to extend beyond the maximum duration date specified in the RFR.

If the RFR and contracts **do not** specify a maximum obligation or **do not** specify a number of units, then specifying items or performance to be delivered and base compensation for the number of units requested by the Department does not require a formal amendment but such requests must be made by written notification to the Contractor (fax, mail or electronic mail) and confirmation of actual receipt of notice.

801 CMR 21.00 Contracts - Contract Expansion. The RFR Required Specifications, incorporated by reference into all *Standard Contract Form and Instructions* for 801 CMR 21.00 contracts, even if the terms were not included in the RFR, contains the following contract expansion language:

*If additional funds become available during the contract duration period, the Department reserves the right to increase the maximum obligation to some or all contracts executed as a result of this RFR or to execute contracts with contractors not funded in the initial selection process, subject to available funding, satisfactory contract performance and service or commodity need.*

This language allows negotiations to enable the efficient use of additional funds without the necessity to amend the RFR or conduct a new procurement.

### **Amendments to Contract Performance**

From time to time, departments may want or need to modify the terms of performance. Departments may negotiate changes to the original performance measures, reporting requirements or payment methodologies tied to performance at any time during the contract duration as long as the changes are consistent with the specifications of the original RFR. The need to amend the performance terms may result from changes in available appropriation, in the type of customers, consumers or clients needing services or other factors that are beyond the control of the Department or the Contractor. If there is no change to the contract fiscal terms, no MMARS encumbrance modification transaction is required. A *Standard Contract Form and Instructions* must be executed and filed in addition to any required or optional attachments whenever there is a "material" change to the performance requirements listed under the Contract or the performance expectations of the Department.

### **Amendment to Contract Duration**

While 801 CMR 21.00, 815 CMR 2.00, 815 CMR 6.00 and most procurement rules do not prescribe any set limits for procurement duration, the dates of the total anticipated duration (including options to renew) specified in the RFR, grant application or other authorization will determine the allowable duration for a contract.

An increase or extension to the duration of a contract beyond the maximum period identified in an RFR or other authorizations are allowable only to:

1. Enable a Contractor to complete performance (time only extension). No additional or new performance or additional dollars are allowable under this option. This option is only available to finish a contract not to extend continued performance out over a longer period of time with continuing payments; or
2. enable a Department to implement an authorized "Interim Contract" under 801 CMR 21.00 or under a Level II or I Department's procurement policies and procedures (see [Contract Exceptions](#) in the [Procurement Information Center](#)), or an Interim Grant under 815 CMR 2.00 (See [State Grants and Federal Subgrants Policy](#)). An Interim Contract or Grant is used solely to provide a temporary extension to complete a new procurement process.

3.

Amendments to Contract duration are considered a "[material](#)" Contract change.

**Close out of Fiscal Year Obligations.**

A Contractor or vendor's failure to submit an acceptable invoice for performance made and accepted by the Department in time for payment of the performance is not sufficient reason for an encumbrance extension through APEN.

In rare circumstances, a vendor may fail to submit an invoice for goods and services (performance) that have been delivered prior to June 30, 20\_\_ and have been accepted by the Department as contract compliant. It is presumed that as part of fiscal year closing activities the Department has internally verified receipt and acceptance and the value of the performance delivered on or before June 30, 20\_\_ in accordance with the contract terms, in preparation for verifying invoices once received. Departments should make every effort to notify vendors of outstanding invoices and the value of the performance provided by the vendor that has been verified by the Department.

If it appears that a Department may not receive invoices by August 15th and the Department can verify receipt of goods and services by June 30<sup>th</sup> of that year, and the contract value of the performance in accordance with contract terms, the Department should fax a written notice to the vendor(s) with the following language:

*"In order to ensure that funds appropriated and encumbered in fiscal year 20\_\_ for the performance delivered does not revert at the end of the accounts payable period on August 31, 20\_\_, thereby becoming unavailable for expenditure, you must submit final invoices no later than August 15th confirming outstanding obligations for performance delivered on or before June 30, 20\_\_. If you fail to respond, a payment in the amount of \$[amount certified by Department] will be scheduled for payment on August\_\_ which represents full satisfaction of any and all outstanding amounts owed."*

Final payments allow the Department to close out the contract without reverting funds that have been properly encumbered for a contract and are available for expenditure. If amounts are disputed, then the Department should make a partial payment at the level certified by the Department and identify any remaining amounts in the encumbrance for the extended accounts payable process approved by the Executive Office for Administration and Finance. Additional contested amounts, which cannot be paid prior to September 15th through the extended accounts payable process, would default to the prior year deficiency process for non-continuing accounts.

**Exercising Options to Renew**

Procurements and other authorizations may allow for options to renew. Although options to renew are made at the discretion of a Department, the exercise of an option(s) to renew is considered a Contract amendment which will not be effective until documented by the execution of an amendment by the Department and Contractor on or before the termination date of the Contract. A Department may exercise more than one option to renew at a time, if multiple options are still available under the procurement. For example, a procurement with three, one-year options to renew may exercise all three options at once and execute a multi-year contract for the three year period.

If a Contract is scheduled to terminate prior to using the time left under a procurement, grant application, other procurement process (such as a contract employee posting) or other authorization (such as a budget line-item earmark for the Contractor) any remaining time or options to renew that are still available may be used by the Department provided the Amendment:

- will not extend the contract duration beyond the maximum period authorized in the RFR, grant application, other procurement (such as a contract employee posting) or authorization (such as a budget line-item earmark for the contractor)Contractor);
- is executed under the same terms and conditions as stated in the original procurement and contract. However, a Department and Contractor may negotiate any of the details of performance which were identified in the contract, the RFR, grant application, other procurement or the Contractor's original response;
- is supported by sufficient appropriations or other legally available funds; and
- is exercised through a formal amendment by the Contractor and the Department. Departments should ensure that any amendment is included in the procurement/contract file with the original record copy of the Contract.

The procurement period or any remaining time available under another authorization remains the same, even if the contract terminates and performance stops for a period of time. The Department and Contractor may agree to continue performance at a later date within the authorized procurement period, but any lapse in time between the original Contract termination date and the execution of an amendment or the date of confirmed receipt of a notice of extension will be lost and may not be added on to the end of the original procurement period.

For example: A Contract has an initial total duration of 7/1/05-6/30/08 with a two (2) one year options to renew, for a total duration of 6/30/10. If the contract terminates on 6/30/08 and is not renewed until 10/01/08, the period of the lapse (6/30/08-10/1/08) is lost and may not be added back to the end of the procurement period which will remain 6/30/10.

Failure to execute a Contract Amendment to exercise the option to renew by the scheduled contract termination date will result in termination of the contract by operation of law (unless the contract is extended using a [Thirty day Extension](#) to allow time to complete the amendment).

Once a contract terminates, new performance must stop and a contract may not be "revived" retroactively back to the termination date.

### **Extending Contracts – Limited Thirty Day Contract Extension**

If a Department has a reasonable concern that the Department or a Contractor will be unable to complete an Amendment to timely renew a contract, or to extend the termination date and performance, the Department may provide written notice to the Contractor allowing for a temporary contract extension ***not to exceed thirty (30) days***, in order to allow continued performance (subject to appropriation or availability of non-appropriated funds). This limited option to extend the contract and prevent a lapse in performance, solely to enable completion of the amendment negotiation and execution process.

The extension will be under the same terms and conditions as the original contract and is limited to the scope and costs outlined in the notice. If an Amendment is not executed within the 30-day extension period, the contract will terminate unless an additional notice of extension is sent by the Department and confirmed by the Contractor prior to the termination date. Departments may not use multiple extensions except in extraordinary circumstances, such as contract negotiation difficulties.

This option is not designed to be used as a routine method of delaying the amendment process for failure to timely manage contracts, or to replace the amendment process, but to prevent a lapse in performance if an inadvertent and good faith delays occurs and subject to the following restrictions:

- **Confirmation of Notice.** Notice of contract extension must be sent "in writing" by an authorized signatory of the Department by mail, fax or email or other method identified in the contract. Advance oral notice may be given provided the Department follows-up with the notice "in writing". **The notice will not be effective until the date the Contractor confirms receipt of this notice.**
- **Amendment Effective Date.** When the Amendment is signed, the Effective Start Date will be interpreted to be the latest date it is signed by authorized signatories of the Department and the Contractor. The date listed in the Effective Start Date should not be entered as a date earlier than the latest signature dates (unless the Department is including performance to be covered under a [Settlement and Release](#) process for performance improperly performed or accepted during a lapse between the termination date and a confirmation of up to a 30-day extension, or execution of an Amendment).
- **Not for "new" Contracts.** A contract extension may not be used to authorize the start of a new contract that does not already exist.
- **Must be supported by sufficient funding.** A contract extension may not be used to continue performance under a contract when an amendment cannot be done because funding is not available (such as a pending ISA, supplemental appropriation or other funding source). If funding is not available to support performance, continued performance may not be requested or accepted by the Department. The contract will remain "suspended" until funding is available and a contract Amendment can be executed.
- **Must be allowable under procurement authorization.** A contract extension may not be used to extend a contract beyond the maximum period authorized in the RFR, grant application, other procurement (such as a contract employee posting) or authorization (such as a budget line-item earmark for the Contractor), unless the extension notifies the Contractor that the Department is also authorizing an Interim Contract to complete a new procurement or grant process. (See Procurement Exceptions in the [Procurement Information Center](#)), or an Interim Grant under 815 CMR 2.00 (See [State Grants and Federal Subgrants Policy](#)). An Interim Contract or Grant is used solely to provide a temporary extension to complete a new procurement process.
- **Notice and Confirmation Receipt filed with Record Copy.** A copy of the written notice of Contract Extension AND proof of the Contractor's **confirmation of receipt** must be attached to the original or record copy of the Contract being extended. Confirmation of receipt may be evidenced by a fax from the Contractor's Contract Manager listed in the Contract or by an authorized signatory listed in the Contractor Authorized Signatory listing. Emails sent from the Contractor's Contract Manager or authorized signatory must be additionally verified by the Department, and printed for the Contract file. Verbal confirmation may be made with the Contractor, but the Extension is not effective until **written confirmation from the Contractor** is received by the Department.
- **MMARS must Match Extension.** The Department is responsible for ensuring that the MMARS encumbrance supporting the contract matches the time extension and has sufficient funds encumbered to support payment for performance (and to take advantage of existing prompt pay discounts). The encumbrance must match the dates of extension and may not be used to retroactively allow payments back to the termination date if the extension was confirmed after the termination date. Any performance improperly provided by the Contractor or improperly accepted by the Department after the termination date and prior to the confirmation of extension may not be paid under the extension and must be resolved through the [Settlement and Release](#) process under the Amendment or a separate Settlement and Release document.

Please note that the number of times a Department requires this temporary extension will be subject to quality assurance review and audit.

### **Sample Extension Language**

The following are two samples of language that could be included for notice to a Contractor of a potential contract extension. Departments may routinely include this language when starting the amendment process, but will be required to justify circumstances in which the language is triggered and this temporary extension is required.

#### **NOTICE OF EXTENSION SENT WITH AMENDMENT DOCUMENT:**

*Your contract with the Department expires on \_\_\_\_\_. If the contract is not properly amended on or before this date the contract will terminate. Performance is not authorized to continue under this contract during any lapse between the termination date of this contract and execution of an amendment. Therefore, in order to ensure continued performance and compensation, please review and have the amendment executed by an authorized signatory and return the amendment no later than \_\_\_\_\_ to allow the Department sufficient time for signature prior to the contract termination date. Any negotiations and completion of details of performance must be completed prior to this date.*

*If for any reason you foresee any delay in submitting the executed amendment by this date please contact us immediately. To avoid a lapse in performance due to an inadvertent delay in completion of this amendment, this notice shall serve as the Department's authorization that the contract shall be extended for a limited period not to exceed thirty days past the termination date under the same terms and conditions [or according to the attached terms] for an amount not to exceed \$\_\_\_\_\_ (for the extension period) during which time the amendment must be completed. This extension shall be void if the Department receives a written objection or notice of suspension or termination from the Contractor prior to the date of termination or if sufficient funds are not appropriated or otherwise made available to fund this performance. This notice is not effective until you confirm receipt, so please provide confirmation of receipt. Please note that email confirmation or fax confirmation will be deemed sufficient confirmation if sent to the email address or fax number listed in the Contract.*

#### **EMERGENCY NOTICE OF EXTENSION:**

*Your contract with the Department expires on \_\_\_\_\_. If the contract is not properly amended on or before this date the contract will terminate. Performance is not authorized to continue under this contract during any lapse between the termination date of this contract and execution of an amendment. Please be advised that to avoid a lapse in performance due to an inadvertent delay in completion of the amendment process, this notice shall serve as the Department's authorization that the contract shall be extended for a limited period not to exceed thirty days past the termination date under the same terms and conditions [or according to the attached terms] for an amount not to exceed \$\_\_\_\_\_ (for the extension period) during which time the amendment must be completed. This extension shall be void if the Department receives a written objection or notice of suspension or termination from the Contractor prior to the date of termination or if sufficient funds are not appropriated or otherwise made available to fund this performance. This notice is*

*not effective until you confirm receipt, so please provide confirmation of receipt. Please note that email confirmation or fax confirmation will be deemed sufficient confirmation if sent to the email address or fax number listed in the Contract.*

Please note that a 30-day extension is a "contract document" extension and is not an Interim Contract (which extends a "procurement" at the end of a procurement period for a contract or grant in order to complete a new procurement or grant process). The Interim Contract allows the procurement and contract extension at the end of a procurement period. The 30-day extension is solely for a contract extension when the underlying procurement authority already exists.

EXAMPLE:

- Contract termination date is 6/30/15. There are sufficient funds appropriated for FY'16 and time remaining on the procurement to support a contract renewal until 6/30/16. The Department is negotiating terms with the Contractor and is concerned that the Amendment will not be signed by both parties on or before 6/30/15. The Department sends the Contractor a notice of extension through 7/31/15 which is confirmed prior to 6/30/15. This allows the MMARS encumbrance to be modified to add 7/1/15-7/31/15 for performance during this time while the Amendment process is completed.
- - If the Amendment is signed on or before 7/31/15, the contract continues and the MMARS encumbrance can be modified to add the remaining amount of the renewal through 6/30/16.
  - If the Amendment cannot be signed on or before 7/31/15, the Department should send and have a second notice of extension confirmed on or before 7/31/15.
  - If the Amendment is signed on 8/15/15 and an extension was **not** made on or before 7/31/15, the period of the lapse (8/1/15-8/15/15) would be required to be resolved through the [Settlement and Release](#) process as part of the Standard Contract Form or a separate Settlement and Release document.

**Performance outside scope of Contract/Amendment – Settlements and Prior Year Deficiencies**

A Department (or any other Commonwealth representative) is not authorized to request that performance begin or continue, or that any obligation be incurred by a Contractor (for which compensation is to be sought under a Contract) **PRIOR** to the legal contract effective start date of that Contract or Amendment, or **AFTER** the termination date of that Contract.

Contractors are not authorized to deliver performance for which compensation is sought under a contract or amendment (even if requested by the Department or any other Commonwealth representative) prior to the contract effective start date of that contract or after the termination date of that contract. Any oral or written representations, commitments or assurances made by the Department or any other Commonwealth representative are not binding and a Department may not back-date a contract or amendment in order to cover the delivery of performance prior to the contract effective date.

The Commonwealth has no legal obligation to compensate a Contractor for performance that is not requested and is intentionally delivered by the Contractor outside the scope of a Contract. However, a Department may not accept performance outside the scope of a contract and then refuse compensation, since this type of action could be considered bad faith. Therefore, if the performance is accepted by the Department, accrued to the benefit of either the Department, the Commonwealth or customers/clients, and the Department deems that performance is compensable, the department and the Department and the Contractor may negotiate the reasonable value for the delivered and accepted performance under a Settlement. Since the delivery and acceptance of performance without a valid Contract in place is the fault of both the Department and the Contractor, the Settlement and Release is used to document the details of the circumstances, the negotiated compensation and the release language which ensures that



the Contractor can not come back at a later date seeking additional funds related to the same performance.

There are three types of contract Settlements:

1. **Contract Performance Completed Without a Contract**
2. **Performance prior to the Effective Start Date of a Contract or Amendment.**
3. **Disputed Performance or Compensation under a current or expired contract.**

1. **Performance made Without a Contract.**

On the rare occasion that performance is authorized, completed and accepted without a Contract (when a Contract document was required), the [Settlement and Release Form](#) serves as the “contract” documentation to enable compensation for this performance. If funds are available to make payment under the object code for this type of expenditure, the payments should be made under the object code that would have been used if a Contract had been properly obtained. If funds are not available to make payment for the performance, the Department has a more serious state finance law issue and must submit the Settlement and Release and all supporting documentation to the CTR Legal Office for review and determination of the appropriate funding source for payment. CTR may require payment from another departmental funding source, a prior year deficiency (if the obligation arose in a prior fiscal year) or other appropriate funding source.

2. **Performance prior to the Effective Date of a Contract or Amendment.**

Departments may not authorize new or continued performance prior to the “Contract Effective Date” which is the latest date for signature by the Contractor and Department, and other required approvals prior to performance. **If a Contractor improperly incurs obligations (provides performance) for which compensation will be invoiced prior to the Effective Date, and the performance is accepted by the Department, these obligations must be resolved through a Settlement process.**

This improper performance may occur:

- a. prior to the timely execution of a Contract (the parties began performance prior to the contract effective start date), or
- b. during a lapse in time between the termination date of a Contract and a renewal amendment (the parties failed to timely sign a contract amendment) or
- c. during a lapse in time between the termination date of a Contract and the Contractor’s confirmation of a notice to extend for 30 days.

The Department has two options to resolve the settlement:

1. **Execute Settlement and Release Form.** Execute a [Settlement and Release Form](#) for the performance provided outside the scope of the contract or amendment, or
2. **Include Performance as part of Contract or Amendment.** Include the performance in a Settlement that will be incorporated by reference into the Standard Contract Form. The Department will be required to:
  - a. Identify this performance (as part of an initial or amended contract) by the date this performance was started in the “Anticipated Start Date” of the Standard Contract Form and Instructions. This will identify when the start of performance related to the Contract or Amendment actually occurred, even though the Contract/Amendment is executed after this date.

- b. Check off option #3 under "Anticipated Start Date" of the Standard Contract Form that indicates that the performance is part of a Settlement.

Departments must also:

- a. Attach the performance and costs of the settlement performance unless the performance is already identified as part of the Scope of Services and Budget attachments.
- b. Include in the Contract file, a justification or the reasoning for the improper performance, for Quality Assurance or Audit purposes.
- c. Include the amounts covered by the Settlement obligations within the same encumbrance transaction (MMARS Doc ID) as the Contract or Amendment so that all obligations and payments for the Contract are together. The Department has the option of identifying the Settlement payments on a separate line of the encumbrance but this is not necessary. The encumbrance must reflect the total amount of obligations for the Contract including the Settlement amounts.

#### EXAMPLE OF CONTRACT SETTLEMENT:

Contract termination date is 6/30/20\_\_ . There are sufficient funds appropriated for the upcoming fiscal year and time remaining on the procurement to support a contract renewal until the following 6/30/20\_\_ . The Department and Contractor failed to use a temporary extension and did not execute a timely amendment on or before 7/1/20\_\_ . The Amendment was signed as of 7/16/20\_\_ . Therefore, the "effective date" of the Amendment is 7/16/20\_\_ .

If obligations are incurred by the Contractor during the period of the lapse (7/1/20\_\_7/16/20\_\_ ) for which compensation will be sought (invoiced) this performance would be required to be resolved through a Settlement and cannot be automatically rolled into the Amendment. The Department has two options:

1. **Execute a separate [Settlement and Release Form](#)** for the performance during the lapse (7/1/20\_\_-7/16/20\_\_ ) and attach to the original contract; OR

2. **Include the performance as part of the Standard Contract Amendment**, as follows:

The Department would enter "July 1, 20\_\_" or the actual date the performance obligations occurred after 6/30/20\_\_ ) under "Anticipated Start Date" of the Standard Contract Form and Instructions.

The Department would also check the box indicating that the obligations incurred prior to the 7/16/\_\_ effective date is included under a Settlement, as follows:

3. were incurred as of **July 1, 20\_\_** , a date **PRIOR** to the Effective Date below, and the parties agree that payments for any obligations incurred prior to the Effective Date are authorized to be made either as settlement payments or as authorized reimbursement payments, and that the details and circumstances of all obligations under this Contract are attached and incorporated into this Contract. Acceptance of payments forever releases the Commonwealth from further claims related to these obligations. By completing the Amendment to include the performance during the lapse, the Department is able to enter the MMARS encumbrance to include both the performance during the lapse and the performance under the properly executed Amendment.

For either option above, the Department would be required to attach the performance and costs of the performance *unless* already identified as part of the Scope of Services and Budget attachments. In addition, a justification or the reasoning for the improper performance and need for the settlement must be included in the Contract file for Quality Assurance and Audit purposes.

Please note that if **no performance occurred or was anticipated to occur until on or after** the effective date of the Amendment (7/16/20\_\_), the Department would not have any performance included as part of a Settlement and the Department would check of the box indicating that no performance was

made prior to the effective date, and choose an effective date upon signature of both parties, or a date in the future after the signature of both parties, as follows:

\_\_ 1. may be incurred as of the Effective Date (latest signature date below) and **no** obligations have been incurred **prior** to the Effective Date.

\_\_ 2. may be incurred as of \_\_\_\_, 20\_\_, a date **LATER** than the Effective Date below and **no** obligations have been incurred **prior** to the Effective Date.

Since the dates entered in MMARS must match the paperwork, the MMARS encumbrance would only reflect the effective dates of the Amendment (7/16/20\_\_-6/30/20\_\_) since no performance occurred until on or after the effective date of the Amendment. The supporting documentation or MMARS records should then indicate that the Department has no obligation to make payments for invoices or obligations prior to the effective date.

The use of Settlements is a corrective action that should be used rarely and should not be a standard solution to a Department's failure to timely execute contracts or contract amendments. Departments may be cited for overuse of the settlement process during Quality Assurance visits or audits

### **3. Disputed Performance or Compensation under a current or expired contract.**

- Contract disputes that are settled during the period of the contract may use the options outlined in #2 above "**Performance prior to the Effective Start Date of a Contract or Amendment**" to document the Settlement.
- Any claim settled after the term of the Contract should be resolved using the [Settlement and Release Form](#), or if the claim was resolved after the commencement of litigation, following the process for Settlements and Judgments under 815 CMR 5.00 with prior approval from the CTR Legal Office.

#### **Payments of Settlements.**

Payments of Settlements follow the same process as other contract payments.

- If performance was delivered on or before June 30<sup>th</sup> of the fiscal year in which the Contract was executed, this performance must be paid from fiscal year funds for the fiscal year ending on that June 30<sup>th</sup>.
- If there were no funds available at the end of the fiscal year to cover payment, or payment is delayed beyond the close of the accounts payable period on August 31<sup>st</sup> (for a non-continuing account), the compensation would be treated as a Prior Year Deficiency (PYD). The payment would be made by the Office of the Comptroller and charged back to the current fiscal year appropriation(s) of the Department.
- Settlements within the contract period and available funding for performance compensation must be paid using available contract funding under the same object code for performance under the Contract.
- Settlements within the contract period and available funding for non-performance costs such as attorneys fees, penalties or interest must be approved prior to payment by the CTR Legal Office, since these are not performance payments and require different object codes and may require a different funding source for payment.
- If the Settlement resolution was outside the scope of the contract, which is after the contract period and the authorization for the contract funding (due to litigation or protracted settlement negotiations) the CTR Legal Office would determine the appropriate source for the payment.

Please also see Policy Chapters for **Accounts Payable**, including **Commonwealth Bill Paying Policy**.

## **MMARS Transactions Must Match Extensions and Amendments**

Current state finance law policy requires MMARS to match the underlying contract or supporting documents, including extensions and amendments. What appears in the MMARS system will be considered the "official record" or "record copy" of fiscal activities and will supersede paper or other formats of the same information. Departments must remember that MMARS is an accounting system, used to accurately record and report on fiscal activities.

Although MMARS is an effective management tool, departments cannot rely solely on the MMARS system to manage fiscal responsibility and decisions. MMARS will not always prevent mistakes or incorrect entries. Some transactions will pass all the system tests (edits) and be processed to "Final" status even though the expenditure, underlying procedures, procurement process, or contract documentation is legally deficient.

Therefore, just because Department staff are capable of processing a transaction to "Final" status in MMARS will not be interpreted to mean that the transaction, or underlying documentation are automatically legal, appropriate or in compliance with applicable laws, regulations, policies or procedures. Compliance responsibility remains at all times with the Department employees who process transactions to "Final" status. Since MMARS will track the UAID of the Department employee who approves transactions, quality assurance reviews will identify not only the transactions that will be reviewed, but also the security identification (UAID) of the employee who approved the transactions.

Departments must be especially careful when modifying MMARS transactions (such as encumbrances) to support contract extensions and amendments, specifically effective dates. It is improper for Departments to enter a modification to a MMARS transaction to reflect start and end dates that are not supported by the underlying contract documentation. When Contracts are audited, review will include whether the dates listed in MMARS are accurate and are supported by the contract, amendment or settlement.

Therefore, staff should not routinely enter July 1, 20\_\_ in MMARS as the start date of an encumbrance, even if the Contract Effective Start Date states July 1, 20\_\_, unless the "Effective date" of the underlying Contract or Amendment (date of completed execution) was on or before that date, or unless they have included performance between the listed start date and the execution date as part of a settlement.

## **Personal Information And Privacy Concerns**

Personal or confidential information must be carefully protected due to severe penalties for release. See [M.G.L. c. 66A](#), [M.G.L. c. 93H](#), [Executive Order 504](#), [PCI Compliance](#) (for Department accepting credit cards or electronic checks for payments. See also, ITD [Enterprise Information Security Standards: Data Classification](#) and [Privacy & Security](#) policies.

It is important to provide payees with remittance information that will facilitate proper payment application to their receivables. When negotiating a contract establish a mutually agreeable data structure to communicate goods delivered or services rendered. Since certain MMARS fields are a matter of public record, MMARS doc IDs (encumbrances, payments, etc.), vendor invoice numbers, contract numbers, check descriptions, and any comment fields *MUST NOT contain personal information (such as individual's names, SSN numbers, bank account numbers, date of birth, addresses etc.) or other information that could jeopardize privacy or facilitate identity theft.*

MMARS doc IDs and key comment fields may be printed on checks, sent electronically as part of remittance advice, and will appear on VendorWeb (and may be viewed related to public records requests), therefore care must be taken that individual personal information is not used.

Security Access to electronic databases or other files containing personal information should be monitored to ensure access is required for job completion.

## **Be Careful To Follow E-Discovery And Public Record Requirements**

Departments are obligated to demonstrate good faith and fair dealing in all contract actions, therefore, justifications for business decisions should be documented to support rationale for decisions.

Courts usually give deference to Department decisions that are made in good faith and with good business justification and that are properly documented. Failure to document decisions will work against a Department in a challenge, audit or litigation.

All discussions must be formally documented with responses back to contractor (BE CAREFUL OF WHAT IS PUT IN EMAILS). All emails, communications and policy documents or decisions (paper or electronic) contract activity are public records under [M.G.L. c. 66](#) and [M.G.L. c. 4, s. 7, ss. Twenty-sixth](#).

The content a public record will determine retention and most contract records must be retained for 6 years following the last payment on any contract. (See [SEC Public Records Bulletins](#) and website on [Public Records](#).) See also [SEC Bulletin on Electronic Mail](#):

*All email created or received by an employee of a government unit is a public record. In Massachusetts, the term "public record" is broadly defined to include all documentary materials or data created or received by any officer or employee of any governmental unit, regardless of physical form or characteristics. G. L. c. 4, § 7(26). Email is, therefore, a public record and it is subject to the requirements of the Public Records Law. G. L. c. 66.*

*Email must be managed as a part of the office's records holdings. Email messages are subject to the same records management principles as all other records of the office. Records retention schedules issued by the Supervisor of Public Records (for local governments) and by the Records Conservation Board (for state government offices) must be implemented for email as well as for analogous paper records.*

Staff should be reminded that email is **not an informal communication tool** and that they need to be careful about what is communicated through email. Since emails are discoverable in the event of litigation or an audit EMAILS RELATED TO CONTRACT ACTIONS SHOULD NOT BE DELETED FOR ANY REASON. Staff should be instructed to either print emails or move Contract related emails to a central directory or separate ".pst" folder or any other method that will ensure accessibility and retrieval during the requisite retention period. See ITD [Enterprise Electronic Messaging Communications Security Policy](#) and [SEC Bulletin on Electronic Mail](#).

In addition, under recent E-Discovery rules, in the event Emails are deleted (even unintentionally) the Department may be considered to have acted in bad faith. willfully or even negligently hiding emails and could be charged with paying for a forensic records management expert to attempt to retrieve the deleted emails, or may be subject to penalties and fines (even for ordinary negligence).

Failure to have a records management policy for emails, not complying with public records rules or not following the organization's internal records management policy (which includes the failure to ensure that employees are properly trained and that the rules are followed) have subjected organizations to penalties and losing cases. These costs would be severe for a department. Therefore, departments must ensure that Contract documentation is stored properly in accordance with public record and records management policies.

## **State Finance Policy Quality Assurance and Audit Review of Effective Dates and Obligations.**

In addition to ensuring the availability of sufficient funding, and any procurement or other approvals that are required for a particular expenditure, Departments are required to have contracts in place for certain obligations, prior to incurring an obligation for which compensation will be made.

- Departments must enter the Start date in a Contract that **accurately reflects when performance obligations are incurred** for which compensation will be sought (invoiced) under the Contract/Amendment.

- The date entered under “**Anticipated Contract/Amendment Start Date**” listed in the *Standard Contract Form and Instructions* should be the **same or later** than the “Effective Date” which is the latest date for signature by the Contractor and Department, and other required approvals prior to performance, UNLESS the Department is including performance prior to the Effective Date under a Settlement. See [Performance prior to the Effective Date of a Contract or Amendment](#).

Current state finance law and policy requires MMARS to match the underlying contract or supporting documents, including extensions and amendments. What appears in the MMARS system will be considered the “official record” or “record copy” of fiscal activities and will supersede paper or other formats of the same information.

Please note that anytime a Contract or Amendment has a listed Start Date that is earlier than the Contract effective date (which is the latest date for signature by the Contractor and Department, and other required approvals prior to performance) the Contract will be considered to “potentially” include performance improperly made prior to the Contract effective date and may be subject to Quality Assurance or audit findings.

- If the MMARS transaction supporting the Contract identifies a start date prior to Effective Date any payments for performance made prior to the Effective Date will be considered Settlements and the Department may be cited for a Quality Assurance or audit finding.
- If the MMARS transaction supporting the Contract/Amendment reflects the Contract Effective Date (execution/approval), rather than the earlier Start date listed in the Contract, the encumbrance will be interpreted to support the effective date and that no performance was made prior to the Effective Date (execution/approval), (unless other documentation identifies that performance was made prior to the effective date and the Department merely deferred payments to after the effective dates.)

Please note also that the object codes must accurately match the type of expenditure being made. Changes in object codes should be made only to correct mistakes and may not be used when funding becomes unavailable in one subsidiary and the Department is moving expenditures due to lack of funding in the correct subsidiary. Intentionally misclassifying expenditures may be considered a state finance law violation under [M.G.L. c. 29, § 66](#).

### **Process for Documenting Amendments**

Contract amendments are made using the *Standard Contract Form and Instructions* (or other appropriate amendment form for ISAs, construction, leases, etc.), attaching the details of the amendment (date change, change in scope, costs, etc.). The amendment is sent to the Contractor for signature and must be executed by both parties contemporaneously with the need for the Amendment but in no event later than the termination date in the Contract.

In the majority of cases, amendments are mutually agreed to by the parties. Amendments requesting increased performance (as authorized by the procurement or contract) are fairly routine and do not meet resistance by Contractors unless a Contractor is unable (or unwilling) to increase the requested additional performance.

Departments should pay special attention to ensure that amendments are timely negotiated to have contract coverage for all Commonwealth projects and programs. This is especially important when a department is faced with budget or allotments cuts. Departments may be faced with having to terminate, suspend or amend contracts to reduce maximum obligations or the scope of anticipated performance. Suspensions and terminations are completed by providing prior notice under the terms of the Contract and closing out current contract obligations.

However, when departments seek to implement contract reductions some Contractors may refuse to agree to a contract amendment reducing the contract performance or the maximum obligation of a

contract. In these instances, a notice of termination or suspension, usually in the form of a letter distributed by the Contractor, is necessary. A department has the option to provide a notice of contract amendment outlining a contract reduction which also contains language for a notice of termination or suspension if the contractor refuses to negotiate or agree to the contract reduction.

The notice may contain language authorizing performance up to a specified time limit or not to exceed a set dollar limit above which the Department will no longer accept or pay for performance. Since contract increases and decreases must be mutually agreed, a one-way contract amendment reducing a contract may not be done. If a contractor refuses to negotiate a contract amendment the contract will terminate or be suspended by operation of law unless earlier terminated or suspended by the department. Departments anticipating any delays in obtaining and amendment prior to the termination date the Contract may use the thirty day extension as part of their notice of amendment. See [Thirty-day extension](#).

Departments are also required to reflect any amendment having a fiscal impact (increase, decrease, change in funding source, change in performance dates, rates etc.) in the state accounting system (MMARS) using the appropriate transaction modification form.

Some amendments will affect fiscal information with no underlying contract changes and will not have a contract amendment form. For example, Rate Contract increases and decreases in total obligations which can be done without any underlying contract change and appropriation account changes (switching, adding or deleting accounts) with no underlying contract change. For these changes, the department enters and processes the change in MMARS. If the change is outside the department's transaction processing delegation limit the department must submit the doc id of the MMARS transaction on a Comptroller Transmittal Form indicating the type of change required.

### **Guidelines On Material Changes In A Contractor's Identity**

A change in the Contractor's Tax Identification Number (TIN) usually signals a material change in the Contractor's identity such as a merger, acquisition, consolidation or other organizational restructuring. When this occurs, the procuring Department (or Procurement Management Team (PMT) for 801 CMR 21.00 contracts) must determine the impact on its contracts. OSD makes the determination for statewide contracts. The Department must require, review and place in the procurement/contract file a clear and detailed statement of the material change sufficient to enable the Department to decide, in its best interests, whether it will permit the assignment of the contract to the successor entity, award the remaining performance to the next best value bidder (or grantee), conduct a new procurement or take any other action permitted under the relevant procurement regulations, policies and procedures.

Decisions to continue contracts after a Contractor has materially changed its identity are made by departments on a contract-by-contract basis. Since the analysis may be different for each contract, one Department is not bound by another Department's decision.

A material change in Contractor identity occurs whenever the legal name, organizational structure, Tax Identification Number (TIN), Vendor Code or other change occurs in a Contractor from what was presented in the Contractor's response to a procurement. However, certain changes, such as a legal name change, are insignificant to the underlying contract(s) and should merely be recorded to keep the procurement file up-to-date. Other changes are considered material and may affect not only the underlying contract(s) but also the integrity of the original procurement.

This policy outlines some of the most common material changes to a Contractor's identity and provides basic guidance to departments. Departments are strongly encouraged to seek the advice of their legal counsel whenever these circumstances arise. In addition, a *Change in Contractor Identify Form* is available for documenting information in such circumstances.

### **Material Change In Contractor Identity: Merger, Buyout Or Consolidation**

A merger, buyout or consolidation is a **structural change** to a Contractor in which the assets and liabilities of one or more organizations (one being the Contractor) are combined into a single successor entity. Both mergers and consolidations are governed by state statutes, which require a formal filing with the Secretary of the Commonwealth and that certain conditions are met. One important provision to note, under M.G.L. c.156B, s.80 and c.180, s.10A, is that the new entity assumes all of the obligations and responsibilities of the prior entity. Other forms of a material change in the Contractor (whether or not a new Taxpayer Identification Number results) are described at the end of this document.

**Merger or Buyout.** One or more organizations merge into another, or one organization buys another, and one becomes the surviving organization. For example, Organization A merges into, or is bought out by, Organization B and the surviving entity is Organization B, with A no longer existing as a separate legal entity.

In that case, if the Department's current Contractor is Organization B, the merger or buyout will not change the underlying contract documentation. The Department should verify, however, that the merger or buyout by the Contractor will not result in any changes to the performance responsibilities of the Contractor under the current contract(s).

If, however, the Department's current Contractor is Organization A, which is merged into, or is bought out by, Organization B, this presents a **substantial structural change** in the Contractor which does affect the underlying contract(s) and procurement, and may trigger the "assignment" or "termination" clauses of the applicable Commonwealth Terms and Conditions.

**Consolidation.** Two or more organizations combine ("consolidate") into a new or resulting corporation (A + B = C, with both A and B no longer existing as separate legal entities). If the Department's current Contractor is either Organization A or B which are consolidated into a new Organization C, this presents a **substantial structural change** in the Contractor which does affect the underlying contract(s) and procurement, and may trigger the "assignment" or "termination" clauses of the applicable Commonwealth Terms and Conditions.

### **Contract Options with a Material Change in Contractor Identity**

If the *Commonwealth Terms and Conditions* applies to the contract, this contract contains provisions on termination and contract assignment which assert the Commonwealth's control over whom it does business with. While a Contractor may freely make whatever organizational or structural changes it wishes, if it involves a material change to its identity (as noted by a change in Taxpayer Identification Number) then its existing contracts may terminate. **Further, a Contractor may not unilaterally assign, or delegate its responsibilities or duties under a contract to another entity. The procuring Department has the sole authority to determine what to do with the remaining contract performance in all such instances.**

When faced with a material change in Contractor identity, a Department must determine what is in the best interests of the Department, what actions are appropriate to prevent a lapse in any necessary services or a project, the most cost-effective actions given available resources and funding, and what actions will maintain the integrity of the original procurement.

Executive departments should invoke the procurement principles stated in 801 CMR 21.01(1) to evaluate the proposed or actual business change of the Contractor for goods and services contracts. The procuring Department or PMT should develop, review and place in the procurement file a clear and detailed statement of the material change sufficient to enable the Department to decide, in its best interests, whether it will continue the underlying contract(s) or undertake any other action.

Departments have the following options when faced with a material change in Contractor identity:



1. Continue the contract through assignment to the successor entity, upon review and justification as outlined further in this document;
2. Award a short-term interim contract to the intended successor entity on a competitive procurement exception basis (in order to permit adequate time for a review and/or re-procurement and potential transition to a new Contractor);
3. Award the remaining contract performance as an interim contract to another Contractor (the next best value bidder from the original procurement, or another eligible grantee) on a procurement exception basis, if justified;
4. Consolidate the contract into another existing contract (if scope is arguably within the scope of the original procurement);
5. Allow the contract to lapse or terminate the contract;
6. Suspend or terminate the current contract and re-procure the contract; or
7. Take any other permitted contracting or procurement action that supports common-sense procurement decision making and fiscal responsibility based upon the circumstances.

### **Contract Assignment**

A contract assignment refers to an assignment of the remaining contract performance to a successor Contractor or to another Department. **A Department should approve the assignment of the remaining contract obligations, duties or responsibilities under a procurement to another entity only in certain circumstances.** These are usually limited to circumstances in which a Contractor's identity changes (through a merger, buyout, consolidation or other underlying business relationship) resulting in the formation of a new successor entity and the Department has determined that the assignment of the remaining performance is essential. In addition, departments may freely assign a contract to another Commonwealth Department.

When a Contractor is planning a merger or other significant organizational transformation, it is important that the relevant state departments be informed as early as possible; at least 60 days advance notice of the potential change is desirable. If the Contractor holds contracts with multiple procuring departments, each procuring Department will then undertake a review and may grant approval of a contract assignment, including the establishment of conditions, if appropriate, or may take any other contract management action it deems advisable under the specific circumstances. A decision that one procuring Department makes does not apply to any other procuring Department who may hold contracts with the same Contractor.

### **Evaluating the Impact of a Material Change in Contractor Identity**

The primary responsibility of Department staff is to protect the interests of the Commonwealth and of the interests of consumers being served under any contract. As with most procurement decisions, Department staff are free to use their judgment in determining the scope of review, the relative importance of various factors and how to gather necessary or desirable information, prior to making any contracting decisions. The Department is responsible for maintaining documentation of its review process and all other relevant information in the procurement file.

In considering whether or not to permit a contract assignment when there is a material change in Contractor identity, a Department should conduct and document a thorough review of the potential impact. Factors to consider include:

### **Critical Services or Continuity of Program or Project**

This is probably the paramount consideration when faced with a material change in Contractor identity. In certain circumstances, such as a critical need to prevent a lapse in services for certain types of long-term service projects, mandated client services, clients in residence, etc., it may be

prudent to permit these contracts to be assigned to a successor organization, rather than terminating and re-awarding these contracts to another Contractor.

For most commodity contracts, and many service contracts, where clients or a program are not involved, a requested contract assignment to a successor entity should be carefully scrutinized. Since the successor entity may not be one of the original bidders (or grant applicants), this entity has no automatic right to the remaining contract performance, absent extreme or special circumstances that warrant a contract assignment. Instead, departments should consider whether the assignment is appropriate or an interim contract with other bidders under the original procurement, or current eligible grantees.

### **Original Procurement Requirements**

The successor entity must meet the same requirements as the Contractor under the original procurement. Some of these requirements include basic qualifications under an RFR, years of experience, M/WBE status or subcontracts, consumer-controlled or non-profit organization status (which might affect its competitive ranking or eligibility for a contract award) and internal contract management capacity.

Absent special circumstances, a resulting successor entity that does not meet or exceed the same material requirements as the Contractor under the original procurement should not be awarded a contract performance assignment.

### **Qualifications of Successor Entity**

The assignment of the remaining contract performance under a procurement should not be made to a successor entity unless the level of quality of performance will be maintained or increased. Departments should consider the new entity's service delivery philosophy, financial stability, capacity to service the contract, new and existing staff resources and qualifications, program plan and other factors to ensure the successor entity offers the equivalent or a better value than the current Contractor.

An assignment is only appropriate if the new Contractor's key personnel, financial stability, staff resources and qualifications are equal to or better than the current Contractor. If the financial stability, capability to perform and the core individuals responsible for performance are the same, it is easier to argue that an assignment is appropriate. If not, the Department must be able to defend that the assignment is more appropriate than the award of an interim contract to the next ranked best value bidder or a new procurement.

This consideration is especially important if the Contractor was selected specifically for its expertise which is not easily replaced. See also [M.G.L. c. 106](#), § 2-210.

### **Price or Cost Implications**

In order to maintain the integrity of the original procurement, assignment of the remaining contract performance under a procurement or grant award process should not be made unless the cost or price implications of the assignment do not materially increase or change. The successor entity should be assuming the contractual responsibilities outlined in the current Contractor's RFR response at the same costs and prices as negotiated under the original contract.

However, the Department and the successor entity (new Contractor) may negotiate any costs or prices as authorized under the original RFR, grant application, other solicitation and the resulting contract. Other factors to consider are economies of scale factors, blending rates, special costs, etc.

### **Non-Profit Status**

Additional considerations arise when the original Contractor was a non-profit. If an organization's non-profit status is affected by a material change in Contractor identity, there are legal, policy and administrative factors that departments should consider. Many federal funding sources used are

### **Amendments, Suspensions and Terminations**

limited to non-profit or governmental recipients; thus, departments should review any funding source restrictions (e.g., in the Catalog of Federal Domestic Assistance) in such circumstances. Often times there are public and community implications that departments should be aware of as well.

### **Assumption of Liabilities**

Will the successor entity assume all the obligations and liabilities of the prior Contractor under prior year contracts within the current contract cycle of the contract to be assigned? While this is required in mergers and consolidations (see M.G.L. c. 156B, § 80 and M.G.L. c 180, § 10A for relevant legal requirements in Massachusetts), in other situations, such as a contractual affiliation, the Department should assure itself that all outstanding or potential obligations and liabilities will be covered. Pursuant to [M.G.L. c. 106](#), § 2-210, "*No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.*"

*\* For POS Only:* For human and social service contracts, the successor entity should be aware of Commonwealth audit and audit resolution policies and understand that it may be liable in future years for findings of audits to be conducted of prior year activities.

### **Reasonable Risk of Insecurity**

Pursuant to [M.G.L. c. 106](#), § 2-210 the Department may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (successor entity). See also [M.G.L. c. 106](#), § 2-609.

### **Administrative Process for a Material Change in Contractor Identity**

In cases involving a material change in Contractor identity that may affect more than one Department (such as a Statewide Contract), the affected departments may identify a principal procuring Department or another agreed upon state agency to assume responsibility for coordinating and facilitating communication among other affected departments. This communication is key to ensure that there is no disruption of payments to the current or new entity if an assignment occurs.

It is important to note, however, that the decision on whether or not to assign or terminate a contract may vary within and among departments, depending on the program specific elements of the contract review as well as other administrative factors. A Department should explain to the current Contractor and successor entity that any changes will apply solely to the Department (unless a statewide contract or other multi-Department Master Agreement (MA) is being modified) and that the same process will need to be repeated with each state Department with which the Contractor does business.

Departments must also identify and plan the appropriate administrative steps necessary if the review indicates a contract assignment is desirable. Probably the most critical issue facing departments affected by material changes in Contractor identity is the need to prevent any disruption of client services or service projects or programs that are in progress.

To insure the timely authorization to assign performance, departments must coordinate the end date of performance and funding for the current Contractor with the start date and remaining performance and funding for the successor or new Contractor. Departments will need to allow sufficient time to gather and process information in order to determine the legal form of Contractor change in identity and the corresponding administrative requirements, including tax status and board governance requirements.

Detailed discussions should be held with the current Contractor as soon as possible to determine accurate and complete obligation levels for the contract(s) up to the date when contract performance will be assumed by the successor entity. These discussions must identify all services or service units which have been delivered and any outstanding or supplemental units expected to occur within the time frame determined. It is especially important to identify and review all payment invoices not yet submitted, or submitted and not yet paid and to identify and resolve any service delivery or reimbursement problems.

As a special note, for all cost reimbursement contracts, the current Contractor needs to assure that all incurred costs up to the planned transfer date have been identified and included in the final obligation amount. Once contract dates and funding levels for the current and successor contractors have been agreed upon, the Department should prepare a *Change in Contractor Identity Form*, which serves to document the details associated with the change in Contractor for the underlying contract including all outstanding payments due the current Contractor and the remaining performance authorized for transfer to the new Contractor.

Oversight departments do not usually play an active role in the review process, however, CTR, OSD and the relevant secretariats are available for consultation as needed. CTR and OSD can provide guidance on how a planned Contractor change in identity might affect the underlying original procurement or contracts. In addition, OSD and CTR can issue regulatory interpretations for the contracts within each Department's respective jurisdiction. The secretariat may make policy determinations for cross-agency program/funding implications and determine principal procuring Department or lead coordinator, if necessary.

*\* For POS Only:* Examples of OSD regulatory interpretations include the UFR filing determination and whether related parties result from the change, etc.

### **Required Documentation for Material Change in Contractor Identity**

A material change in Contractor identity, such as with most mergers, buyouts and consolidations resulting in a new successor entity, also involve a legal structural change and a new **Tax Identification Number**. Therefore, along with identifying contract specific information to assign contract performance to the successor entity, several documents are required. There may be instances where the successor Contractor is technically not "new" but rather is an existing Contractor with a contract for the same type of service, into which the Department may decide to incorporate the performance assignment.

The successor Contractor must complete and execute, as appropriate:

1. A [MA-W9](#) Request for Taxpayer Identification Number and Certification (Massachusetts Substitute MA-W9 Form); if not listed as vendor in the MMARS Vendor Customer file.
2. the [Commonwealth Terms and Conditions Form](#) or [Commonwealth Terms and Conditions for Human and Social Services](#) for the successor entity (new Contractor), or other appropriate contract document;
3. a *Change in Contractor Identify Form* to document any remaining performance and payments to the current Contractor and the balance of performance and anticipated amounts to be expended by the new Contractor. The *Contractor Change in Identity Form* documents the new Contractor's commitment to assume all outstanding obligations and responsibilities under the current contract. This process replaces the need to do an Amendment with the current contract to close-out the current contract, and a new *Standard Contract Form and Instructions* with the successor entity. All assignment information for the current and successor entities are retained in the same place;
4. any **required attachments** that were required under the original RFR (such as *Contractor Authorized Signatory Listing, Affirmative Action Commitment Statement, Affirmative Market Program (AMP) Plan, Mandatory Consultant Contractor Submission Form*, and any other attachments required by the Department) and,
5. *For POS Only:* Written Disclosure of Current and Anticipated Related Parties pursuant to 808 CMR 1.04.

The Department must also update the Vendor/Customer Table with a Vendor/Customer Modification (VCM) in MMARS and submit the new *W-9* and the relevant *Commonwealth Terms and Conditions* (if applicable) to the Office of the Comptroller, Accounts Payable Bureau. Underlying contract documents and payments are not affected, however, it is good business practice to identify the new legal name on all contract and payment transactions.

The remaining contract documentation and MMARS transactions would be processed in accordance with standard contract processing and filing procedures.

### **Other Types of Contractor Changes**

For information purposes only, this summary describes common Contractor business arrangements, from the least to the most integrated form of organizational combination/restructuring (except for merger and consolidation, which was described earlier). It is also important to note that these terms are sometimes used to mean something different than the legal concepts underlying the terms as presented here. Therefore departments should work closely with their legal departments when these situations present themselves.

These examples do not necessarily formally trigger the "assignment" clause, but may have an impact upon services which could justify a departmental review of the contract(s) anyway and follow-up monitoring or other action as needed. If serious concerns arise, the contract may be terminated with an appropriate notice period in accordance with the applicable *Commonwealth Terms and Conditions*.

**Management Agreement** - One party provides management services to another, as spelled out in a contractual agreement. The nature and scope of these agreements can vary greatly. This may or may not involve a delegation of some contract related responsibility which would be impacted by the assignment clause.

\* *For POS Only:* Also, reimbursement restrictions (see 808 CMR 1.00) and potential related party disclosure may apply.

**Joint Venture** - A limited purpose undertaking by two or more parties. The venture may be set up through a contractual agreement (functioning as a partnership), or more formally by establishing a separate corporation, either for-profit or not-for-profit, to undertake the activity or to provide support. In a contractual joint venture, one Contractor must act as the lead agency in terms of being a party to a Commonwealth contract (because the Commonwealth generally does not enter into multi-party contracts) and then subcontract with its venture partners. If a separate corporation is established and is intended to be the Contractor, then it is treated like any other new Contractor.

**Contractual Affiliation** - Similar to a joint venture, but the undertaking is broader in scope in terms of services involved. The participating parties may jointly develop programs, combine resources or lend assistance. One example of a contractual affiliation is the formation of a network, through the establishment of a new organization in which each affiliating Contractor is a member. In this case the new "network" corporation enters into service contracts on behalf of the network, and subcontracts with its member contractors.

\* *For POS Only:* Related party disclosure requirements will likely be triggered. From an accounting perspective the affiliated parties may be determined to be consolidated entities, which must then file audited financial statements accordingly. Should the Department wish to permit a contract assignment to the network corporation, OSD recommends that the Department condition its approval, and resulting contract, on all entities assuming responsibility for prior year obligations. In this way, should prior year audit or other issues arise, there will be access to resources to satisfy prior year obligations whether or not the prior entity continues to directly hold Commonwealth contracts.

**Corporate Affiliation or Acquisition** - An action whereby one entity takes control of another (i.e., a parent/subsidiary relationship is established). In a not-for-profit this occurs through by-law changes so that the controlling organization appoints the directors of the subsidiary organization, which remains intact as a separate corporation.

\* *For POS Only:* In the above affiliation or acquisition, certain administrative requirements are triggered such as notification of changes to the Board of the acquired organization and related

party disclosures. The Department may wish to review the circumstances to determine whether the best interests of the Commonwealth and the consumers will still be served by the new arrangement.

**Asset Purchase/Acquisition** - A purchase of assets is a contractual arrangement where one organization purchases some or all of the assets, and possibly some or all of the liabilities, of another. The seller organization either ceases to exist or "dissolves" (a not-for-profit must petition the court for dissolution) or it is transformed into another kind of entity. In the latter case, the seller is no longer a service Contractor - since it has nothing left to provide services with. In Massachusetts, if the seller is a public charity it must provide 30 days prior written notice to the Attorney General's Public Charities Division before disposing of all or substantially all of its assets, if a material change in the nature of the activities conducted by the charity will result.

The 801 CMR 21.00 contracts performed by the Contractor (seller) are not "assets" that can be purchased by another organization. The Department must determine how and by whom the services should now be delivered. Should a Department determine that it is in the Commonwealth's best interests to assign a contract in these circumstances, it should condition approval on the new entity assuming prior year obligations.

### **Assignment of Payments**

Pursuant to [M.G.L. c. 106](#), § 9-318, a Contractor may freely assign payments under a contract to a third party. The third party receiving payment is called an assignee. An assignee is not considered a "Contractor" and may not have a separate vendor code established for an assigned payment. All contract payments are due and owing to the Contractor and the assignee has no legal right to make any claims to the Department under the contract. The assignment of payments merely re-directs payments that have been lawfully earned and paid to the Contractor to another address. All reports of payments and tax reporting are recorded for the Contractor.

### ***A Department MAY NOT establish a new vendor code or obtain a W-9 form or a Commonwealth Terms and Conditions from the assignee.***

1. The Department must receive documentation from an authorized signatory of the Contractor that the Contractor agrees to assign payments to a third party assigned under a particular contract(s).
2. The Department then submits to the Comptroller's Payee, Payments and Tax Reporting Unit a Vendor/Customer Modification Form (VCM) for the Contractor with a MA-W9 to add an additional "payment address" (remittance address) with "Attn." or "c/o" or "payable to" and the assignee's name and payment address.
3. **The Contractor's Legal Name, TIN and Legal Address MAY NOT be changed.** The Department must also submit EFT (Electronic Fund Transfer) documentation (required for all payees unless a one-time payment or a hardship accepting EFT) as applicable to enable payments to the assignee electronically.
4. Payments are then made using the vendor code with this additional payment address. A Department MAY NOT change the Contractor's legal address to the address of the third party since the legal address is necessary for tax reporting purposes and the third party assignee should not get the Contractor's tax forms.

The assignment of payments will be made on a contract-by-contract, and Department-by-Department basis and will not be made on a statewide basis for all payments due a Contractor (unless approved by both OSD and CTR for a Statewide Contract). In the event a payment is inadvertently issued to the Contractor, the Department will have no obligation to "chase" the payment. The Contractor will be legally

obligated to forward that payment to the assignee. The assignee has no rights against the Department under any assignment agreement or under any contract.

### **Internal Controls**

CTR publishes Internal Control guidelines in consultation with the State Auditor's Office. All Departments are required to file an Internal Control Plan and review and update this plan to ensure fiscal responsibility and accountability. [See G.L. c. 7A, § 9A](#). Departments should be evaluating the risks related to managing contracts and amendments and developing internal controls to mitigate these risks and ensure compliance with the directives in this Policy. See [Internal Control Guide](#). Departments will be audited based upon this policy and their Internal Control Plan.

### **Quality Assurance**

The Office of the Comptroller will interpret this policy and take any actions necessary to carry out the purposes of state finance law, including issuing additional policies, procedures and forms for department use. The Office of the Comptroller may review any amendments issued by a department to ensure compliance with Comptroller policies and procedures and other requirements of law, and compliance will be a consideration when determining the award, modification or termination of a department's transaction delegation.

### **Violation of State Finance Law**

Any Department Head or designee ***who knowingly violates state finance, or authorizes or directs another officer or employee to violate any provision*** of G.L. c. 29, or any rule or regulation promulgated there under, or any other provision of law relating to the incurring of liability or expenditure of public funds law shall be punished by fine of \$1,000 or imprisonment for one year, or both. See [G.L. c. 29, § 66](#).

### **Records Management**

In accordance with 815 CMR 10.00 the Department is the record keeper of the official record copy of the contract documents and the contract/procurement file. MMARS is the official record of the encumbrance and payment transactions and will supersede any paper copies of the same information. The contract/procurement file must contain, or refer to the location of, all documentation related to a procurement and resulting contract(s). Amendments for options to renew must be filed with the record copy of the contract. A Department is responsible for retaining and archiving contract records in accordance with the disposal schedules issued by the Secretary of State Records Conservation Board. [SEC Statewide Records Retention Schedule](#). See Policy "State Finance Law and General Contract Requirements" for additional information on Procurement/Contract File content requirements.

Public records must be retained in accordance with records retention requirements and remain capable of being printed (without modification) with all necessary information (date, quantity, price etc) for the duration of the records retention period and for audit purposes. (6 years from last payment on contract for contract and grant related invoices). All documents must be carefully labeled or otherwise marked to ensure that the supporting documentation and MMARS Doc ID can be identified and matched. Email is not a satisfactory electronic storage mechanism for electronic records. Email header information and dates are not always retained depending on how the emails are stored and archived, and there is a greater risk that these emails will be inadvertently deleted during storage maintenance purges.

## **Information Sources**

### Related Policy:

- [Key State Finance Law Compliance Appointments and Responsibilities](#)
- [Department Head Signature Authorization and Electronic Signature for MMARS Transactions](#)
- [Contracts Policies](#)
- [Accounts Payable Policies](#)
- [Records Management Policies](#)
- OSD [Procurement Information Center \(PIC\)](#)

### Legal Authority:

- [Expenditure Classification Handbook](#);
- [M.G.L. c. 7A](#) (Office of the Comptroller); [M.G.L. c. 29](#) (State Finance Law);
- [M.G.L. c. 110G](#) (Uniform Electronic Transactions Act); [M.G.L. c. 30, § 65](#) (Legal Services);
- [M.G.L. c. 29, § 29D](#) (Debt Collection); [M.G.L. c. 29, § 29E](#) (Revenue Maximization);
- [M.G.L. c. 30, § 27](#) (Revenue Receipt); [M.G.L. c. 10, § 17B](#) (Revenue Receipt); Massachusetts Constitution [Article LXIII Section 1](#) (Revenue Receipt);
- [M.G.L. c. 7, § 22](#) (OSD – Commodities); [M.G.L. c. 30, § 51](#); (OSD – Services) [M.G.L. c. 30, §. 52](#); (OSD – Services)
- [M.G.L. c. 29, §. 29A](#) (Consultants) (Level III – Executive only);
- [M.G.L. c. 29, §. 29B](#) (Human/Social Services) (Level III - Executive only)
- [M.G.L. c. 15A](#) and [M.G.L. c. 73](#) (state and community colleges);
- [M.G.L. c. 75](#) (UMASS); General or special laws governing expenditures;
- [Massachusetts Executive Orders](#) (Level III – Executive Only);
- [Administrative Bulletins](#)(Level III – Executive Only);
- [Comptroller regulations](#) (815 CMR 2.00 10.00);
- [M.G.L. c. 29, § 66](#) (State Finance Law Violations)
- [COMMBUYS](#)
- [801 CMR 21.00](#)
- [808 CMR 1.00](#)
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### Attachments:

- Appendix - [Policy Guidance For Contract Reductions In Response To M.G.L. C. 29, S. 9c Budget Reductions](#)

### Links:

- [MMARS transaction Records Management/Authorized Signature Form](#)
- [Employment Status Form](#) (must be completed for all Individual Contractors)
- [Attorney General Review Form for Attorneys Providing Legal Services](#)
- [Attorney General Policy for Prior Review of Attorneys](#)
- [Commonwealth Terms and Conditions for Human and Social Services](#) (Level III - Executive Only)
- [Purchase Order for Commodities and/or Services](#)
- [Change in Contractor Identify Form](#) (Change in business structure or contract assignment)
- [Interdepartmental Service Agreement Form](#)
- [Subsidy Agreement](#)
- For Standard Contracts for Construction (See Policy Chapters on Vertical and Horizontal Construction Contracts under construction)
- For Standard Contracts for Real Property Leasing (See Policy Chapter on Real Property Leasing Contracts – under construction)
- [Contractor Authorized Signatory Listing Form](#)
- [Electronic Funds Transfer \(EFT\) form](#)
- [Form W-9 \(Massachusetts Substitute W-9 Form\)](#) (if not listed as vendor in the MMARS Vendor Customer file)
- [MMARS transaction Authorization/Records Management Form](#)
- [Consultant Contractor Mandatory Submission Form](#)



**REVISIONS**

**November 19, 2014** – Updated guidance for M.G.L. c. 29, s. 9C budget allotment reductions and general updates to contract form names. Links and policy.

**December 5, 2012** – Updated guidance for M.G.L. c. 29, s. 9C budget allotment reductions.

**October 20, 2008** – Updated guidance for M.G.L. c. 29, s. 9C budget allotment reductions.

**April 30, 2007** – Updated to add clarifications to contract extensions, amendments and settlements. Add guidance for M.G.L. c. 29, s. 9C budget allotment reductions.

**November 1, 2006** – Removed language referencing Knowledge Center and updated relevant links to Mass.gov/osc portal site.

**November 1, 2005** – Updates to reflect joint issuance of policy with OSD concurrent with launch of Procurement Information Center (PIC).

**Appendix**  
**POLICY GUIDANCE FOR CONTRACT REDUCTIONS IN**  
**RESPONSE TO M.G.L. c. 29, s. 9C BUDGET REDUCTIONS**

The following guidance is provided to assist Departments with the process of reducing contract related obligations and expenditures in response to M.G.L. c. 29, s. 9C budget reductions. Appropriations subject to M.G.L. c. 29, s. 9C allotment reductions include appropriations to state agencies under the control of the governor or a secretary, but not including the courts, the office of the governor, or the office of the lieutenant governor..." [M.G.L. c. 29, s. 9B](#).

**ROLE OF CTR IN M.G.L. c. 29, s. 9C CONTRACT REDUCTIONS**

The Supreme Judicial Court (SJC) has recognized the unique role of the Comptroller (CTR) to reflect [M.G.L. c. 29, s. 9C](#) reduction decisions in the state accounting system (MMARS). Decision-making authority resides with the Governor, the Secretary for Administration and Finance (ANF) and Department Heads.

- CTR implements Department decisions (encumbrances, payments etc.) that are entered and approved by Departments in the state accounting and payroll systems as the official record, *subject to appropriation and allotments*.
- ANF implements allotment reductions (spending limits) in the state accounting system to support 9C cuts

Although not the authority on section 9C, as part of our customer service to departments, CTR provides guidance to enable departments to efficiently "implement" 9C related department decisions, including contract and payroll reductions, in compliance with state finance law, and to reduce the risk of unnecessary litigation.

To this end, CTR consults with the Executive Office of Administration and Finance, the Office of the Attorney General, the Office of the Treasurer, the Human Resources Division, the Operational Services Division and other agencies to identify key areas of risk and to solicit recommendations to assist affected agencies.

**LEGAL BACKGROUND FOR M.G.L. C. 29, S. 9C ALLOTMENT REDUCTIONS**

The SJC has stated that "*The Governor is the 'supreme executive magistrate' of the Commonwealth. Part II, c. 2, s 1, art. 1, of the Constitution of the Commonwealth.*"

*"The nature of such an office requires that the Governor have authority to use discretion in applying the energies of the executive branch and the resources of the Commonwealth, as such resources are made available by the Legislature, to achieve the purposes or objectives of the laws." See Opinion of the Justices, 375 Mass. 827, 833, 376 N.E.2d 1217, 1221 (1978).*

When there are sufficient revenues to support appropriations the Legislature determines objectives.

*"...it is for the Legislature, and not the executive branch, to determine finally which social objectives or programs are worthy of pursuit. It is not within the Governor's official competence to decide that the objectives of any validly enacted law are unwise and, therefore, that no effort will be made to accomplish such objectives. To the contrary, the Governor is bound to apply his full energy and resources, in the exercise*

of his best judgment and ability, to ensure that the intended goals of legislation are effectuated." Id. at 833-834.

In addition, "The constitutional separation of powers and responsibilities, therefore, contemplates that the Governor be allowed some discretion to exercise his judgment not to spend money in a wasteful fashion, provided that he has determined reasonably that such a decision will not compromise the achievement of underlying legislative purposes and goals." Opinion of the Justices, 375 at 836.

However, the SJC has also ruled that under M.G.L. c. 29, s. 9C, when the Commonwealth is faced with insufficient revenues to support appropriations ANF's reduction of allotments (payments) is MANDATED, and the reduction of earmarks (in full or in part) is constitutional and proper. See New England Div. of American Cancer Soc. v. Commissioner of Admin., 437 Mass. 172, 184-185, 769 N.E.2d 1248, 1257 (2002).

**QUESTION: Can any earmark be reduced in whole or in part to comply with 9C allotment reductions?**

**ANSWER: Yes.**

The SJC has ruled that allotments may be cut, including earmarks in whole or in part (since these are seen as limits to expenditures) **provided the underlying goals of the appropriations are met.**

Examples of line-items that may be targeted for 9C reductions:

- Fully earmarked (entire line-item is divided into specified earmarks)
- Partially earmarked (line-item has one or more specified earmarks)
- Contains earmarks requiring "not less than \$\_\_\_\_" to be spent on a particular program, for a specified recipient, etc.
- Contains language requiring the department to maintain the same level of performance (for example vouchers) as in the previous fiscal year.

Departments need to demonstrate that underlying goals are met with the 9C decisions made. In the SJC decision, many of the earmarks that were considered to be authorized to be reduced contained "not less than \$\_\_\_\_\_" language. See New England Div. of American Cancer Soc. v. Commissioner of Admin., 437 Mass. at 184-185, 769 N.E.2d at 1257.

The SJC also confirmed that there was no requirement to make reductions on a pro rata basis or with uniform allotment reductions.

*"We reject the plaintiffs' summary argument that we should limit the Governor's authority under G.L. c. 29, § 9C, to make only "pro rata reductions across all line item appropriations to be paid out of a particular fund," or, alternatively, across all expenditures subject to allotment under § 9B. A requirement that a budget shortfall must be addressed with uniform allotment reductions is noticeably absent from the statute and, in our opinion, could produce arbitrary results. Id., See also, Opinion of the Justices, 375 Mass. 827, 836, 376 N.E.2d 1217 (1978).*

Rather, the SJC acknowledged that the Executive Branch had the expertise to make these decisions in a manner that fulfills the goals of the appropriations. Id.

*"It is an expression of the Legislature's recognition that the executive branch has the "detailed and contemporaneous knowledge regarding spending decisions" to enable necessary reductions to be made on an expedited basis, and the Legislature's confidence that they will be made in a manner that will not compromise the achievement of*

*underlying legislative purposes and goals. See Opinion of the Justices, 375 Mass. at 836, 376 N.E.2d 1217.”*

The SJC stated that:

*“the General Court in the exercise of its legislative power of appropriation has a broad scope for determining whether it will prescribe in detail the particular purposes for which money appropriated shall be expended or, on the other hand, it will permit executive or administrative officers or boards to exercise judgment and discretion within a wide field in the expenditure of money appropriated for a given object to accomplish the general purposes of the appropriation.” See Opinion of the Justices, 302 Mass. at 615, 19 N.E.2d at 815.*

## **ALLOTMENT REDUCTIONS ACT AS REDUCTION IN EXPENDITURE OR SPENDING AUTHORITY**

In order to incur an obligation and make a payment (expenditure) a department must have BOTH:

1. an *appropriation* (legislative authority to spend for a particular purpose) and
2. an *allotment* to support the expenditure (sufficient revenues to support the payment)

Pursuant to M.G.L. c. , s. 9B, the Governor divides annual appropriations into *periodic allotments* which represent the total amount of money that the state agency may spend during the allotment periods.

*“In this way, it is generally expected that an appropriation will be expended proportionately over the course of a fiscal year.” Brookline v. The Governor, 407 Mass. 377,381, 553 N.E.2d 1277 (1990).*

Appropriations are divided into periodic *allotments* or installments of available cash (often 1/12 of the appropriation) to manage a reasonable cash flow for expenditures based upon tax collections during the fiscal year. Departments are required to manage “obligations incurred” within the limits of an appropriation (obligation ceiling) and the amounts expended (payments) within the limits of the periodic allotments.

When tax revenues are projected to fall short of the amounts necessary to support appropriations, *ANF is mandated to direct M.G.L. c. 9C “allotment” reductions (spending limits) to prevent “expenditures” (payments) above the projected revenues.*

Allotment reductions also operate to reduce a department’s authority to obligate funds up to the levels identified in an appropriation so that obligations may not be incurred in excess of the 9C spending limits until sufficient revenues are received/projected to support the full appropriation.

Therefore, in a 9C situation, just because a Department has an appropriation or line-item, or a contract is executed with a maximum obligation *does not guarantee or authorize* the Department or the Contractor to incur obligations up to those limits. M.G.L. c. 29, s. 9C spending limits *act as a reduction in spending authority*, which in turn reduces the “authority” for the Department to incur obligations in excess of imposed spending limits.

Departments notified of 9C reductions must take the necessary steps to reduce projected obligations and expenditures to match the spending limits established by ANF. Departments are notified in advance of potential 9C reductions and identify spending plan adjustments to operate within spending limits (which may impact operational expenses, capital expenses, contracts and personnel).

When making 9C reduction decisions, there is a careful balance between:

- the Executive’s discretion for where the 9C reductions will be made,
- the implied covenant in all contracts of good faith and fair dealing, and

- the necessity to fulfill the “underlying goals of the appropriation” being reduced

## **CONTRACT REDUCTION PLAN RECOMMENDATIONS**

Please review the following guidance and related policies *prior* to taking any actions.

Contracts include service contracts, grants, subsidies, Interdepartmental Service Agreements and Interdepartmental Chargebacks. All contract reduction actions must be made in accordance with the terms of the Contract and the Office of the Comptroller [Contract Policies](#), including but not limited to: [“Amendments, Suspensions or Terminations”](#) and [“State Finance Law and General Requirements”](#).

### **Department and Secretariat Wide Communication**

The biggest problems and most costly mistakes (both in time and funds) are often made as a result of inadvertent mistake due to the failure to communicate with line staff or involve staff in the 9C reduction process. Management needs to treat the current budget environment as an emergency situation and implement the same strategy and controls that would be implemented in an emergency.

Management decisions related to contracting can not be made in a vacuum without discussion with operational or program staff. Cuts proposed may have unintended consequences or create more costly issues because management does not know either details or implementation issues. Line staff may have alternatives or suggestions that would make reductions more efficient or less painful. Departments need to discuss worst case scenarios with staff to identify potential pitfalls or impacts.

Failure to communicate may also put line staff in the position of dealing with situations for which they are caught off guard or are not equipped to handle (press inquiries, irate or desperate contractors, program or service delivery failures, customer panic or complaints). Departments facing staff cuts are experiencing various degrees of uncertainty, panic and anger among staff, which is potentially disruptive if not managed carefully.

### **IDENTIFY DEPARTMENT PRIORITIES AND GOALS IN A 9C ACTION PLAN**

- Based upon the Department’s Internal Control Plan and Department’s risk assessment, create a department plan of priorities and goals that will be applied to determine whether a contract will be reduced or eliminated (this plan will be critical in the event of litigation). Make sure to apply the plan consistently and document decisions (also critical to demonstrate good faith and fair dealing if decisions are challenged).
- Create an action plan for how staff will implement priorities and goals so staff knows the focus of the Department and their own job focus.
- Confirm key contacts or a centralized process for press releases, contractor or customer complaints or panicked inquiries, and public information requests. We have found that public records requests then to escalate during times of fiscal constraint.
- Contractors always have the ability to terminate the contract for cause, so departments should also be prepared for this occurrence. *What is the back up plan for all current contracts?*
- Confirm **Department Head Authorized Signatories** recorded in MMARS who can approve obligations and payments in accordance with the 9C plan. Departments who currently have multiple authorized signatories must coordinate any obligations to ensure that obligations will not exceed established spending limits.
  - Ensure that Authorized Signatories are recorded through Department Head Authorized signatory flags in the state accounting system (MMARS). All Department Head Authorized Signatories (anyone who signs or approves any obligation on behalf of the Department Head) must have a MMARS UAID with an Authorized Signatory flag even if they never plan to log in to

## IDENTIFY ALL CURRENT AND OUTSTANDING OBLIGATIONS

It is critical that CFOS communicate with ALL staff to identify ALL current, outstanding and potential obligations in the current and future fiscal years.

**Departments must identify all costs and POTENTIAL expenditures that might be triggered during the contract period at a later date, or if there is a contract change. Especially important are all obligations that have been incurred to date and that must be paid. Current obligations that have been incurred and have triggered a legal obligation to pay can not be reduced; therefore, 9C reductions can be made solely from funds where obligations have not been incurred.**

Failure to communicate with staff results in management or line staff potentially incurring obligations or "discovering" obligations requiring payment that exceed spending limits.

- Be careful about "incidental purchases" which include purchases of goods and services at the amount authorized under [M.G.L.c. 7, § 22](#). Make sure all obligations from any one in the Department/Secretariat are accounted for on the 9C spending plan PRIOR to being incurred.
- Be careful to identify essential operating costs, such as ensuring funding for software licenses to support operations and associated maintenance and upgrades, or any mandated security requirements such as ensuring up to date virus software and other security protocols for [PCI compliance](#) if the Department accepts credit cards for payments.
- Determine if Department has unused individual software licenses that can be terminated without affecting operations.

All current and potential obligations should be recorded in the state accounting system (MMARS) in an encumbrance or pre-encumbrance so that all obligations can be tracked and monitored carefully by fiscal staff.

***If Department obligations exceed spending limits, the Department can not seek a deficiency budget or a Prior Year Deficiency (PYD) but will be required to make additional cuts in operational costs, contracts or personnel to accommodate the spending limits.***

Determine the date that the contract performance and budget reductions must be effective (amended, terminated or suspended) to ensure that obligations will not be incurred that will exceed authorized spending limits. These dates will be used as part of the Notice of Amendment, Suspension, or Termination sent to Contractors.

Maximum Encumbrance amounts and performance limits must be determined for Rate Contracts, even though Rate Contracts do not have a maximum obligation and Master Agreement encumbrances may cover multiple Rate Contracts.

Staff using Rate Contracts must be informed that performance above a specified number of units or above a specified dollar amount will not be authorized. It is recommended that Rate Contractors are also notified of any limits in obligations to ensure that obligations are not incurred above authorized spending limits. In the event the Department has negotiated a Purchase Order (PO) or Statement of Work (SOW) under a Rate Contract, the Department must take the appropriate action to suspend, amend or terminate the PO or SOW accordingly if a reduction is necessary. Departments must ensure that performance above these amounts is not inadvertently accepted by staff, thus potentially incurring an unfunded obligation in violation of state finance law.

## FOLLOW INTERNAL CONTROLS

### Amendments, Suspensions and Terminations

All the normal rules apply, even in a 9C situation.

Biggest and costliest mistakes occur when Departments take short cuts and fail to follow their own Internal Control Plans. Budget reductions are key time when Internal Controls protect Department and prevent future audit findings.

Coordinate 9C Action Plan with Internal Control Plan. Departments may want to develop Internal Control Plan chapter which incorporates action plan for implementation of 9C reductions.

Primary risk is failing to document 9C decisions and ensuring that supporting documentation is located or referenced in each contract file. A centralized 9C file is sufficient PROVIDED each contract file references the centralized file for 9C documentation. (Notice on file cabinet is not enough).

Careful documentation and cross referencing (especially the location of electronic files and emails) is critical for audit, litigation and E-Discovery purposes.

Ensure that 9C plan and internal controls are communicated to ALL staff, including regional offices.

### **PRIOR REVIEW OF ANY 9C PLAN BY CFO AND LEGAL COUNSEL**

- CFO and Agency Counsel should coordinate and be involved with
  - Review of Contract reduction plan and justification that Plan supports:
    - Good faith business needs (the implied covenant in all contracts of good faith and fair dealing); and
    - Fulfillment of the “underlying goals of the appropriation.”
    - Current obligations, anticipated obligations, and potential penalties for reductions have been identified and funding is available to support obligations.
  - Work with staff to identify ALL outstanding, current and potential obligations to ensure that all obligations are known and accounted for as part of 9C Plan (e.g., incidental purchases, “open orders”, rate contracts, travel for contractors, TELPs, leases and other costs that are triggered later in fiscal year that may not be on anyone’s radar screen).
  - Coordinate review of internal budgets to ensure that all budgets and spending are approved as part of 9C Plan.
  - Review of notice letters to ensure language is complete and accurate.
  - Support to verify actual receipt of notice and follow-up support if necessary.
  - Support to ensure Internal Controls and contract policies are adhered to.
  - Difficult potential or actual interactions with contractors should be coordinated with the Department’s legal counsel and CFO who may be able to provide negotiation assistance and prevent escalating problems or potential litigation.
  - Support if litigation is threatened. Threats of litigation must be brought immediately to the attention of the Department’s legal counsel, and from there immediately to the Office of the Attorney General (AGO).
  - Support to ensure 9C changes are adequately documented for records management, audit and litigation purposes
  - Ensure electronic records (such as 9C related emails and spreadsheets or databases) are referenced and accessible for required public records retention period
- No actions should be taken by fiscal staff (including verbal communications with contractors) to change performance under any contract until the Chief Fiscal Officer (CFO) and the Department’s legal counsel have reviewed and approved a plan for making the required reductions. All obligations should be pre-

approved as part of the 9C Plan to ensure that sufficient funding is available for all obligations and appropriate adjustments are made to live within the 9C spending limits.

- Special attention must be made to evaluate the risk of reducing contracts that have long term obligations such as leases and TELPs that have severe penalties for early termination.
- Staff should be instructed **not** to have verbal conversations with contractors regarding contract termination, suspension, or amendments without someone else also witnessing the call and notes of the conversation documented to ensure that contractors do not detrimentally rely on verbal communications which may lead to potential litigation.
- Contracts must be reviewed to ensure that notice of suspension or termination are known, what performance has been completed to date, outstanding payments that must be made and whether contracts have performance requirements that are capable of being reduced in whole or in part.
- Departments must consider the costs of reducing or terminating contracts (such as delay penalties) to ensure that these associated costs will be sufficiently funded.
- Departments will need to document that the 9C reduction decisions were made in good faith and were fair based upon the Departments 9C Reduction Plan. Note that the reductions do not have to be equal across programs or Contractors.
- Contractors always have the ability to terminate the contract for cause, so departments should also be prepared for this occurrence. What is the backup plan if a Contractor terminates?

### **PREPARE STAFF FOR 9C ACTIONS AND REACTIONS**

- Prepare receptionists and Help Desks for upset contractors and where to send inquiries or provide approved "scripts" with key information that staff can use to explain the 9C situation with "accurate facts". Direct staff to document questions or complaints and confer with key contacts internally **first** before providing information. Keep scripts updated as information is adjusted. Provide escalation hierarchy of staff for inquiries that need special handling.
- Failure to communicate with staff increases the state of panic, rumors and misinformation that are already spreading with contractors and customers/clients. Try to manage the panic, both internally with staff and with contractors by working closely with staff, providing accurate information and demonstrating sensitivity and leadership.
- Staff needs special handling, sensitivity and empathy during difficult transitions to support employee productivity and successful department goals. A Department is only as strong as its weakest link, so don't forget to care for all the "links" during the commotion of making 9C decisions. A little TLC and motivational support go a long way.
- Ensure that staff is responsive and don't "ignore" calls or emails because they don't know how to respond or don't want to respond (bearer of bad news). Provide staff that can support these inquiries.
- If staff reductions will occur, determine how this will impact the effective management of contracts, programs and payments. Have a transition or back up person assigned for each contract PRIOR to the staff changes. Make sure re-assignment of duties complies with collective bargaining agreement to avoid unnecessary grievances

### **BE CAREFUL TO FOLLOW E-DISCOVERY and PUBLIC RECORD REQUIREMENTS**

Departments are obligated to demonstrate good faith and fair dealing in all contract actions, therefore, justifications for business decisions related to 9C contract reductions should be documented to support rationale for decisions.



Courts usually give deference to Department decisions that are made in good faith and with good business justification and that are properly documented. Failure to document decisions will work against a Department in a challenge, audit or litigation.

All discussions must be formally documented with responses back to contractor (BE CAREFUL OF WHAT IS PUT IN EMAILS). All emails, communications and policy documents or decisions (paper or electronic) related to 9C activity are public records under [M.G.L. c. 66](#) and [M.G.L. c. 4, s. 7, ss. Twenty-sixth](#).

The content a public record will determine retention and most contract records must be retained for 6 years following the last payment on any contract. **DO NOT DESTROY 9C related documents.** (See [SEC Public Records Bulletins](#) and website on [Public Records](#).) See also [SEC Bulletin on Electronic Mail](#):

*All email created or received by an employee of a government unit is a public record. In Massachusetts, the term "public record" is broadly defined to include all documentary materials or data created or received by any officer or employee of any governmental unit, regardless of physical form or characteristics. G. L. c. 4, § 7(26). Email is, therefore, a public record and it is subject to the requirements of the Public Records Law. G. L. c. 66.*

*Email must be managed as a part of the office's records holdings. Email messages are subject to the same records management principles as all other records of the office. Records retention schedules issued by the Supervisor of Public Records (for local governments) and by the Records Conservation Board (for state government offices) must be implemented for email as well as for analogous paper records.*

Staff should be reminded that email is **not an informal communication tool** and that they need to be careful about what is communicated through email. Since emails are discoverable in the event of litigation or an audit EMAILS RELATED TO 9C ACTIONS SHOULD NOT BE DELETED FOR ANY REASON. Staff should be instructed to either print emails or move 9C related emails to a central directory or separate ".pst" folder or any other method that will ensure accessibility and retrieval during the requisite retention period. See ITD [Enterprise Electronic Messaging Communications Security Policy](#) and [SEC Bulletin on Electronic Mail](#).

In addition, under recent E-Discovery rules, in the event Emails are deleted (even unintentionally) the Department may be considered to have acted in bad faith, willfully or even negligently hiding emails and could be charged with paying for a forensic records management expert to attempt to retrieve the deleted emails, or may be subject to penalties and fines (even for ordinary negligence).

Failure to have a records management policy for emails, not complying with public records rules or not following the organization's internal records management policy (which includes the failure to ensure that employees are properly trained and that the rules are followed) have subjected organizations to penalties and losing cases. These costs would be severe for a department. Therefore, departments must ensure that 9C documentation is stored properly in accordance with public record and records management policies.

## **PERSONAL INFORMATION AND PRIVACY CONCERNS.**

Personal or confidential information must be carefully protected due to severe penalties for release. See [M.G.L. c. 66A](#), [M.G.L. c. 93H](#), [Executive Order 504](#), [PCI Compliance](#) (for Department accepting credit cards or electronic checks for payments). See also, ITD [Enterprise Information Security Standards: Data Classification](#) and [Privacy & Security](#) policies. Therefore, it is recommended that Department consider privacy requirements as part of the 9C Plan preparation.

Since certain MMARS fields are a matter of public record, MMARS doc IDs (encumbrances, payments, etc.), vendor invoice numbers, contract numbers, check descriptions, and any comment fields **MUST NOT contain personal information (such as individual's names, SSN numbers, bank account numbers, date of birth, addresses etc.) or other information that could jeopardize privacy or facilitate identity theft.**

MMARS doc IDs and key comment fields may be printed on checks, sent electronically as part of remittance advice, and will appear on VendorWeb (and may be viewed related to public records requests), therefore care must be taken that individual personal information is not used.

Security Access to electronic databases or other files containing personal information should be monitored to ensure access is required for job completion.

### **WHAT ABOUT OBLIGATIONS THAT HAVE ALREADY BEEN INCURRED?**

Pursuant to [M.G.L. c. 7A, s 3](#), in order for the Comptroller to allow a payment the Department must provide a certification that, "*articles have been furnished, services rendered and obligations incurred ...by the person authorized to incur such obligation.*" You must determine whether a legal obligation has been incurred. See [Bill Payment Policy](#) for additional guidance.

If there is a legal obligation to make payment, then these payments must be made under the Contract and 9C reductions can be made only for the remainder of The Contract (if any) or other Contracts.

### **WHEN IS AN OBLIGATION INCURRED?**

- **Goods** – payment obligation is triggered when goods are delivered. Some goods can be returned, subject to return policies, with the exception of specialty orders made to spec for the Department.
- **Services** – Payment obligation is triggered when:
  - Fee for services are performed, OR
  - For performance-based obligations, when the milestone triggering a payment obligation is delivered (when a contractor not paid for any performance until milestone achieved); OR
  - When the contractor has provided possession or committed (reserved) access to goods or services on behalf of the department for a period of time, such as rentals, leases, TELPs, on-call service or maintenance, subscriptions and hotel reservations.
- **Grants** – *Financial assistance is not considered a service for the Department*). Payment obligation is triggered when:
  - A grantee incurs costs intended to be paid under the grant, OR
  - The date a grant payment is due if grant is not performance based,
  - The date a milestone fulfilled for performance based grants (no payment obligation if milestone not met).

Since grants are financial assistance, many grantees rely on grants in order to operate their businesses and should be provided with as much prior notice as possible if a grant is being eliminated or reduced.

### **SOME CONTRACTS SHOULD NOT BE REDUCED OR TERMINATED**

Special attention must be made to identify contracts that have long term obligations that cannot be terminated unless the DEPARTMENT AND ALL APPROPRIATIONS AND LEGALLY AVAILABLE FUNDS ARE TERMINATED (also known as "fiscal elimination" or "failure of appropriation").

- TELPS (tax exempt lease purchase)
- Certain leases
- Projects in progress where a substantial investment has been made by the Commonwealth or contractor and termination or reduction would result in severe penalties for early termination or the payments to cover current performance would equal or exceed current fiscal year obligations.

It may not be enough that a line-item or an earmark is reduced if the type of contract or terms trigger severe penalties for reduction, suspension or termination. Normally the Commonwealth can terminate for "lack of funding" only if the Department is abolished or all funding is terminated. Provided however that:

- TELP payments are loan payments that are repaying the Contractor (financer) for paying for the equipment in full at the time the TELP was done. Therefore, a default on a TELP will not be authorized and a Department/Secretariat would be required to cut other expenditures prior to a TELP, or seek a legislative appropriation to cover the TELP in the event an agency is abolished and liabilities are not transferred or assumed by another Department/Secretariat.
- Even if a department is eliminated and a line-item cut or eliminated, if the responsibilities or liabilities are "transferred" to another department/secretariat, these liabilities become the responsibility of the successor department/secretariat and can not be terminated.
- If a Department's budget is cut, rather than eliminated, if a Department has a "choice" of which contracts to cut, or the choice between staff or operational cuts and contracts, a "fiscal failure" will not be available to terminate these contracts without penalty. Lease clauses with "failure of appropriation" mean all funds. If you have a choice to cut a lease or another expenditure (including staff) it would not be considered a failure of appropriation.
- Even if a line item is cut or eliminated and an office within a department/secretariat is closed, liabilities remain the responsibility of the department/secretariat if there are any legally available funds to support these long term obligations.

Please note that the goal of 9C reductions is to realize cost savings, not to increase costs, liabilities or damages. For certain contracts, like TELPS, Departments would be required to layoff staff and terminate other contracts before terminating a TELP, EVEN IF THE EQUIPMENT THAT HAS BEEN TELPed IS NO LONGER IN USE.

## LEASES

Departments should not be purchasing or acquiring equipment under a lease-purchase agreement other than through an authorized TELP. (See [Acquisition Policy](#).) Therefore, leases are considered a "temporary use" of equipment or space. Whenever possible, attempts should be made to re-deploy space or transfer a lease of equipment to another Department that may have funding, prior to terminating or reducing a lease.

Even if a space under lease has been vacated or equipment is no longer in use, the leases can not be unilaterally terminated with payments stopped. Some leases have penalties for early termination, even if space is vacated or equipment is returned to the vendor.

Leases are priced, with interest to cover the vendor's anticipated profit based upon full payments for the duration of the lease, loss of use of the space and equipment if returned to the vendor, and any loss in income for the duration of re-letting space or re-deploying equipment (some of which can not be re-deployed).

Certain projects already in process, such as large IT implementations, or construction contracts in progress, should not be reduced or terminated without consulting with ANF and ITD or DCP/DCAM to ensure that the Commonwealth won't be subject to liability, penalties or damages if the project is delayed or stopped.

In some cases delay and penalty costs could exceed the value of the project, defeating the goal of the 9C reductions. Departments must consider the costs of reducing or terminating contracts (such as delay penalties) to ensure that these associated costs will be sufficiently funded.

## AVAILABLE OPTIONS FOR CONTRACT REDUCTIONS:

### Amendments, Suspensions and Terminations

Departments have three approaches to handle contract reductions:

1. Suspension
2. Amendment
3. Termination

**WHICH OPTION IS APPROPRIATE?**

<b>REDUCTION OPTION</b>	<b>WHAT OPTION DOES</b>	<b>APPROPRIATE WHEN:</b>	<b>DOCUMENTATION</b>
Suspension	Temporary halt to performance	Department may lift suspension if spending limits lifted.	Notice of Suspension
Amendment	Permanent Change to Contract	Department does not plan to amend to reactivate amendment amount if spending limits lifted. Change is permanent.	Standard Contract Amendment executed by both Contractor and Department
Termination	Permanent Cancellation	Department does not plan to continue Contract even if spending limits lifted.	Notice of Termination

**SUSPENSIONS (TEMPORARY HALT TO PERFORMANCE – NO CONTRACT AMENDMENT NEEDED)**

Provides a written Notice to a Contractor that all or part of contract performance will be suspended (put on hold) for a period of time or for a specific level of funding or performance during the current fiscal year, which allows for the necessary MMARS encumbrance reductions but keeps the Contract intact in case additional funding is authorized during the fiscal year. (NO CONTRACT AMENDMENT REQUIRED)

A contract suspension is appropriate for single or multi-fiscal year contracts requiring a temporary halt to performance (for a period of days, weeks, months, on a certain date or upon completion of a specific amount of performance) with anticipated continued performance at a future date. Appropriate when Department would continue performance or contract with Contractor if funding levels are restored

**Benefits of Suspension vs. Amendment or Termination:**

- More palatable for Contractors, since the perception is the suspension is temporary if spending limits lifted
- Less likely to prompt litigation or challenge
- Formal Contract Amendment not required - only Letter of Notice with terms for suspension
- Letter of Notice of Suspension much easier for staff to implement than trying to obtain an executed Amendment
- Easier to reactivate Contract if allotment restrictions are lifted with Letter of Notice of Contract reactivation.
- Acts as a permanent amendment or termination (with no further paperwork) in the event allotment limits are not lifted for the rest of the fiscal year or the period of the suspension.

- A contract amendment does not need to be done for a suspension. Suspensions are the most efficient for departments to implement when time is of the essence since a contract amendment does not have to be executed by the Contractor and Department. A suspension accomplishes the same effect with a partial or full suspension (reduction) of performance.

### **Partial or Full Suspension of Performance as of a Specific Date**

Full or partial performance suspensions may be made solely to the current fiscal year with no changes to out-years. A suspension can also be made as of a certain date or period of time (i.e., effective December 31, 20\_\_ – June 30, 20\_\_). For example, "All performance must cease as of November \_\_, 20\_\_ until further notice."

Some Departments do not want to halt all performance as of a certain date, but would rather reduce the amount of performance and limit obligations to a maximum amount of dollars or units during the remaining period of the fiscal year, or for the duration of the Contract. Therefore, the Notice would state that, "The Contractor is not authorized to incur obligations in excess of \$\_\_\_\_\_ dollars" or "no greater than \_\_\_\_\_ units which may not exceed \$\_\_\_\_\_dollars", or "no greater than the attached scope of performance and budget."

NOTE: The dates of performance SHOULD NOT be changed in MMARS even if no performance will be made and no payments made. MMARS must reflect the total dates of the contract even dates in which not performance is made, therefore, suspensions put the contract on hold rather than modify the dates. Also, the contract dates should remain in tact in case the spending limits are lifted and the Department wants to revive the Contract performance.

### **WRITTEN NOTICE OF SUSPENSION**

The Notice of Contract Suspension should identify:

- The effective date of Suspension or the date of the Contract performance reduction (for example, immediately or within a specified number of days from the date of the Notice, or as of a certain date) and the period of the suspension (such as "until further notice", "for the current fiscal year" or "the period of the Contract").
- Instructions or restrictions concerning allowable activities (performance), costs or allowable obligations that can be made during the period of the suspension. Please note that the purpose of the suspension is not to change the end dates of a contract, but merely halt performance. The Contract stays intact so that the Contract can be reactivated in the event spending limits are lifted. Therefore, the dates of performance are not changed in MMARS only the level of funding.
- For example, the Notice would state that, "The Contractor is not authorized to incur obligations in excess of \$\_\_\_\_\_ dollars" or "no greater than \_\_\_\_\_ units which may not exceed \$\_\_\_\_\_dollars", or "no greater than the attached scope of performance and budget."
- The specific limit on expenditures by amount is necessary to enable contract encumbrance reductions to ensure encumbrances do not exceed the spending limits imposed by ANF. It is helpful to identify both the amount of the reduction (by fiscal year) and the total amount available for expenditure (by fiscal year) as part of the Notice of Suspension.
- For **Maximum Obligation Contracts or Rate Contracts with underlying Purchase Orders (PO) or Statements of Work (SOW)** the Notice of Suspension should include:
  - The specific amount of the reduction for each contract or for Rate Contracts, the reduction in the underlying PO or SOW; and
  - The new total Maximum Obligation for the total duration of the contract or for Rate Contracts, the new total Maximum Obligation for the underlying PO or SOW.

- **Rate Contracts.** Although most Rate Contracts depend upon the Department “requesting” performance before an obligation is incurred, for Rate Contracts with no existing engagement or underlying POs or SOWs, a Notice of Contract Suspension is recommended to provide advance notice that the Department intends to decrease or halt anticipated performance and puts the Contractor on notice of the maximum allowable expenditures than can be requested and paid for under the Contract for the period of the suspension or that the Contract will not be used “until further notice”. Notice is important to ensure that performance is not made in excess of this authorization inadvertently by a regional office or Department staff.
- Although optional, it is recommended that the Department attach or send an adjusted *scope of performance and budget* or identify specifically how the reductions will impact the Contract budget and scope of performance. A budget with just a lump sum reduction in the bottom line or maximum obligation will not be helpful to the Contractor and will leave full discretion to the Contractor to make the required reductions. Therefore, performance expectations should be as detailed as possible either in the Notice of Suspension or by attachment.
- Departments must retain a copy of the Notice of Contract Suspension, the attachments with the performance and maximum expenditures that can be made during the period of the suspension, proof of receipt by the Contractor and any subsequent correspondence as part of each Contract file.
- The Notice of Suspension documents become the attachments to the Standard Contract Form and MMARS transactions to support the reductions in MMARS (without having to do a formal amendment) and will expedite the processing time for encumbrance reductions.

#### **What happens to the Suspension of current year performance if spending limits are not lifted?**

- If additional revenues do not support the lifting of spending limits, the Contract will terminate automatically for this fiscal year with no further action by the Department.
- For multi-year Contracts, the Contract will be automatically reactivated in the subsequent fiscal year subject to appropriation with no action by the Department, *unless* the suspension was made for the full period of the contract, or the original notice suspended the contract “until further notice”. If the suspension is until further notice or for the life of the contract, no action is required by the department to terminate the Contract if funding is permanently unavailable.

#### **Lifting Contract Suspensions (CONTRACT AMENDMENT NOT REQUIRED)**

- If revenues support the lifting of spending limits either in the current or subsequent fiscal year, the Department can provide a Notice to the Contractor lifting the suspension and allowing the resumption of performance.
- Since the suspension reduced authorized performance and the budget, as part of the Notice to lift the suspension, the Department must notify the Contractor if the contract performance and budget will be:
  - Reactivated in full for the remaining part of the current or subsequent fiscal year (which means that performance and amounts are still in effect for the full period of the Contract);
  - Remain at the reduced levels identified in the suspension (which means reductions for current or prior fiscal year are considered permanent and are not automatically added back into the Contract total); or
  - Will be readjusted in accordance with the terms of the Notice of Suspension lifting. The details of the adjustments to performance and the budget should be included as part of the Notice of Suspension lifting for each fiscal year of the Contract. As long as the details of the adjusted performance and budget are included as part of the Notice of Suspension lifting, a formal Contract Amendment is not needed unless the Department and Contractor choose to negotiate a Contract Amendment.

## **AMENDMENTS (PERMANENT CHANGE TO CONTRACT – FORMAL CONTRACT AMENDMENT NEEDED)**

A Notice of Amendment provided notice to the Contractor that full or partial performance changes will be effective as of a certain date or upon a specified level of expenditures. Amendments are appropriate when the Contract reduction or change is considered permanent for the fiscal year or term of the contract and may not be reinstated if spending limits are lifted.

Amendments are paper and time intensive for both the Contractor and Department staff. Amendments also require mutual assent, which may not be readily forthcoming from Contractors who want to delay execution. The same effect can be achieved through a Notice of Suspension with less paperwork and time for staff, so Departments should consider Suspensions as an acceptable expedited alternative, even if the suspension may be permanent.

### **NOTICE OF CONTRACT AMENDMENT**

Departments should provide as much notice of the upcoming Amendment reduction as possible. The Written Notice of Contract Amendment should identify

- The effective date of the Amendment or the date of the Contract performance reduction (for example, immediately or within a specified number of days from the date of the Notice, or as of a certain date) and the period of the suspension (such as “until further notice”, “for the current fiscal year” or “the period of the Contract”).
- instructions or restrictions concerning allowable activities (performance), costs or allowable obligations that can be made as a result of the Amendment
  - Please note that unless the purpose of the Amendment will permanently reduce the contract or dates of performance, the Amendment under a 9C action can be limited to a reduction of spending (obligations and expenditures) in the current or subsequent fiscal year and the dates do not have to be changed. The Contract dates can stay intact so that the Contract can be reactivated in the event spending limits are lifted. Therefore, the dates of performance can remain the same in MMARS with only a change in funding.
- Language of Notice of partial suspension or termination if Amendment not signed timely is recommended:

*“Please be advised that failure to execute and return the attached Amendment Form shall not operate to delay the Amendment changes and the effective date of these changes will be the date the Amendment is executed by the parties or no later than [enter date amendment terms will be effective].”*

*As we are not authorized to obligate or expend amounts above the authorized limits, this letter shall serve as written notice that performance above the levels outlined in the attached Amendment is not authorized, and will not be compensable under this contract. The Contractor may not bill or file any claim for payment for any performance made outside the scope of the attached Amendment. Failure to return the Amendment will operate as an automatic suspension of authorization for performance above the performance levels identified in the Amendment.”*

- For example, the Notice would state that, “The Contractor is not authorized to incur obligations in excess of \$\_\_\_\_\_ dollars” or “no greater than \_\_\_\_\_ units which may not exceed \$\_\_\_\_\_ dollars”, or “no greater than the attached scope of performance and budget.”

- The specific limit on expenditures by amount is necessary to enable contract encumbrance reductions to ensure encumbrances do not exceed the spending limits imposed by ANF. It is helpful to identify both the amount of the reduction (by fiscal year) and the total amount available for expenditure (by fiscal year) as part of the Notice of Amendment or by separate attachment
- For **Maximum Obligation Contracts or Rate Contracts with underlying Purchase Orders (PO) or Statements of Work (SOW)** the Notice of Amendment should include:
  - The specific amount of the reduction for each contract or for Rate Contracts, the reduction in the underlying PO or SOW; and
  - The new total Maximum Obligation for the total duration of the contract or for Rate Contracts, the new total Maximum Obligation for the underlying PO or SOW.
- **Rate Contracts.** Although most Rate Contracts depend upon the Department "requesting" performance before an obligation is incurred, for Rate Contracts **with no existing engagement or underlying POs or SOWs**, a Notice of Contract Amendment does not need to be done. Instead a Notice of Suspension is recommended to provide advance notice that the Department intends to decrease or halt anticipated performance and puts the Contractor on notice of the maximum allowable expenditures than can be requested and paid for under the Contract for the period of the suspension or that the Contract will not be used "until further notice". Notice is important to ensure that performance is not made in excess of this authorization inadvertently by a regional office or Department staff.
- Contract Amendments require the Department attach an adjusted scope of performance and budget or identify specifically how the reductions will impact the Contract budget and scope of performance. A budget with just a lump sum reduction in the bottom line or maximum obligation will not be helpful to the Contractor and will leave full discretion to the Contractor to make the required reductions. Therefore, performance expectations should be as detailed as possible either in the Notice of Suspension or by attachment.
- Departments must retain a copy of the Notice of Contract Amendment, the executed Standard Contract Form (if executed), the attachments with the performance and maximum expenditures that can be made, proof of receipt by the Contractor and any subsequent correspondence as part of each Contract file.
- The Standard Contract Amendment and attachments are necessary to support the encumbrance transaction reductions in MMARS and will expedite the processing time for encumbrance reductions.

#### **What happens to the Amendment if spending limits are not lifted?**

- If additional revenues do not support the lifting of spending limits no further action by the Department is required since the change was considered permanent. For multi-year Contracts, if the Amendment was done solely for the current fiscal year and the remaining fiscal years of the Contract were not altered, the Contract will need to be re-evaluated at the start of the subsequent fiscal year to ensure adequate funding and allotments.



## **Contract Amendment Reversals**

If revenues support the lifting of spending limits either in the current or subsequent fiscal year, the Department may decide to amend the Contract for additional performance provided the amendment is within the authorized period of procurement. The Department and Contractor would sign a Standard Contract Form Amendment identifying the Amendments and attach the amended performance requirements and budget.

## **CONTRACT FULL OR PARTIAL TERMINATION (PERMANENT CANCELLATION OF CONTRACT)**

Provides Notice to Contractor that full or partial performance termination will be effective as of a certain date or upon or upon a specified level of expenditures. Termination is appropriate when the Department determines that a permanent change is necessary and the Contract will not be re-activated in the event additional revenues support the lifting of spending limits.

Termination should be the last resort action and should not be used as a temporary halt to performance if the Department intends to continue contract performance if spending limits are lifted. A Suspension accomplishes the same effect and enables the contract to be easily revived. So Departments should carefully evaluate whether future performance is possible or desired before they choose to terminate a contract.

## **Contract Termination Reversals**

If revenues support the lifting of spending limits either in the current or subsequent fiscal year, the Department would have to execute ***either*** a **new Standard Contract Form** (with all required attachments) or a **Standard Contract Form Amendment**, provided the procurement was still active (if applicable).

## **PRIOR WRITTEN NOTICE.**

Contractors must receive as much prior written notice as possible when contracts will be reduced, amended or terminated. Any notice shall be deemed delivered and received when submitted in writing in person or when delivered by any other appropriate method evidencing actual receipt by the Department or the Contractor. **IT IS IMPERATIVE THAT DEPARTMENTS DETERMINE NOTICE RESTRICTIONS FOR EACH CONTRACT.**

The *Standard Contract Form and Instructions* allows email delivery to listed Contract Manager provided there is confirmation of actual receipt for Contracts using the *Commonwealth of Massachusetts Standard Contract Form*, the "Contract Manager" is the person to receive notices unless otherwise specified in the Contract.

*"Unless otherwise specified in the Contract, legal notice sent or received by the Contractor's Contract Manager (with confirmation of actual receipt) through the listed fax number(s) or electronic mail address will meet any requirements for written notice under the Contract".*

For other types of Contracts (construction, leases, etc.) Departments should carefully review the language for the person and form of receipt of notice that is required.

Departments may not incur obligations in excess of appropriations AND allotments. Even if a Contract has an extended prior notice provision, in the event an appropriation OR allotments are eliminated or reduced Departments must take the appropriate actions to reduce contract obligations to match available appropriations and allotments, which may require immediate suspension or termination.

Departments will need to document that the 9C reduction decisions were made in good faith and were fair based upon the Departments 9C Reduction Plan. Note that the reductions do not have to be equal across programs or Contractors.

Departments are cautioned about including performance deficiencies as part of the reason why certain 9C reductions were made or as part of 9C Notices.

Performance deficiencies may be considered as part of 9C reduction determinations ONLY if the Contractor has been provided with the appropriate notice and opportunity to cure and has failed to achieve the required performance PRIOR to the Notice under 9C.

### **For Human Service Purchase of Service Contracts**

For Departments using the [Commonwealth Terms and Conditions for Human and Social Services](#). The Contract allows for either immediate termination in the absence of appropriation or allotment or other authorization to discharges it obligations, or with 45 calendar days notice of termination for a reduction in funding, with an alternative to provide a conditional notice with a proposed amendment.

*A Contract shall terminate immediately upon receipt of written notice of termination under the following conditions: the absence of appropriation, allotment, availability or authorization to the Department to discharge its obligations under the Contract in the fiscal year... A Contract may be terminated by providing notice of termination effective not less than forty-five (45) calendar days after date of notice ...there is a reduction of funds appropriated for Contracts...For termination due to reduction in funding, the Department may alternatively provide a conditional notice of termination with a proposed amendment to a Contract."*

Therefore, the ability to suspend, amend or terminate will depend on what line-items have been reduced or eliminated as part the 9C reduction process. Contracts tied to specific earmarked language that has been eliminated completely may terminate or suspend immediately if the full level of funding has been eliminated. If not, then the Department should attempt to provide as much of the 45 prior notice of suspension or termination as possible WITHOUT obligating more than the authorized spending limits. The use of suspensions and amendments is available in lieu of termination as prescribed above.

For termination due to reduction in funding, dependent upon the reason for the reduction the Department will determine the appropriate action for termination, suspension, or amendment. If an appropriation is not re-authorized, is vetoed or otherwise reduced, a Department may not incur obligations that exceed appropriations. Whenever possible the Department should provide a minimum of 45 days notice unless the Department alternatively provides a conditional notice of termination with a proposed amendment to a Contract, subject to sufficient allotments.

Whenever an appropriation is reduced or discontinued, or under M.G.L. c. 29, 9C when revenues are insufficient to support appropriations, and a reduction in allotments are insufficient to support continued performance during a 45 day notice period, Departments must take appropriate suspension, amendment or termination actions to ensure that obligations are not incurred that exceed authorized appropriations, allotments or other available funding with as much prior notice as possible.

## **NOTICES SHOULD BE SENT BY AUTHORIZED SIGNATORY AND DOCUMENT ACTUAL RECEIPT OF ALL NOTICES**

Notices should be sent by Authorized Signatory so there is no challenge later that sender had no authority to send notice. For all notices, Department must document a Contractor's actual receipt of notice. (Please see notice receipt requirements in Commonwealth Terms and Conditions, the [Commonwealth Procurement Information Center \(PIC\)](#) , and the [Commonwealth of Massachusetts Standard Contract Form and Instructions](#)).

Notice may be made orally, but written notice must be provided in the format authorized under the contract, provided that actual receipt is confirmed. For the purposes of time periods for notice, the time clock does not being to tick until actual receipt of notice by the Contractor.

An email confirmation followed up by a telephone conversation to review notice should be documented in the Contract file. Some Departments will send both an email and fax and retain confirmations in addition to a confirming phone call.

If multiple contracts are involved, your staff may want to have a spreadsheet with all the contracts and the date and format of actual receipt.

All documentation related to a Notice of Suspension, Amendment or Termination must be retained in the contract file or other location referenced in the contract file in case a challenge to notice is raised at a later date. See [815 CMR 10.00](#) for Records Management requirements for contracts.

Don't just do a dump and run by just sending an email or fax. Personally contact each contractor to ensure they are clear on Notice. Customer Service is professional.

### **MMARS CHANGES** (State Accounting System)

MMARS encumbrance adjustments must be made to reduce encumbrances for the current fiscal year to match reduced performance and budget authorization in the suspension notice. MMARS reductions may not be made until the Department has confirmed and documented actual receipt of the Notice of Suspension, Amendment, or Termination.

MMARS is considered the "official record" or "record copy" of fiscal activities which will supersede paper or other formats of the same information. Don't forget to enter changes in MMARS so MMARS and paperwork matches. Encumbrance reductions and Payments must use the same MMARS Doc ID as the contract being amended to keep all documentation together. The same MMARS Doc ID must be retained from year to year for the life of the contract and must appear on the top of all contract documents for Records Management and Audit purposes.

In addition, just because Department staff are capable of processing a transaction to "Final" status in MMARS will not be interpreted to mean that the transaction, or underlying documentation are automatically legal, appropriate or in compliance with applicable laws, regulations, policies or procedures. Compliance responsibility remains at all times with the Department employees who process transactions to "Final" status. Since MMARS will track the UAID of the Department employee who approves transactions, quality assurance reviews will identify not only the transactions that will be reviewed, but also the security identification (UAID) of the employee who approved the transactions.

### **BE CAREFUL OF "CREATIVE" ACCOUNTING TRAPS**

- Bringing a transaction to "Final" in MMARS (encumbrance or payment) acts as Department Head certification that transaction complies with state finance law.
- Resist the temptation to move contracts around to other line-items, trust accounts, federal or capital accounts.
- Knowingly violating policies may subject user to [M.G.L. c. 29, s. 66](#) penalties

- You may not “transfer” charges or payments made to other accounts unless the original charge was a mistake. See [Expenditure Correction \(EX\) policy](#).
- Trust accounts, federal or capital accounts have specific restrictions and obligations, payments and transferred charges must meet these terms.
- Beware of the temptation to move personnel and contract employees to trust accounts or other non-operating accounts.
- Fringe and other mandated charges follow the employees and contract employees and may trigger higher costs.
- Some trusts and federal grants limit the level of administrative costs which might violate trust language.
- If trust or retained revenue account has legislative language which authorizes the Comptroller to allow obligations to be incurred “*in anticipation of revenue*” Departments will have to certify that revenues will support the obligations to ensure that the Department does not have a deficiency if revenues fall short.
- Beware of the temptation to:
  - pre-pay for contract performance now in anticipation of reductions (advance or pre-payments are prohibited)
  - Deferring payment until next fiscal year (*payments must be made for performance in this fiscal year with current fiscal year funds*).
  - Holding invoices until next fiscal year to trigger a Prior Year Deficiency
  - Re-negotiating TELPs or leases to reduce current payments by extending period of TELP or lease, or accepting a higher interest rate.
- See [Contract Policies](#) and [Payment Policies](#) for restrictions

## **PAYMENTS**

- Ensure that [Bill Payment Policy](#) is followed for all invoices properly received for performance properly made and accepted.
- Know when obligations are “capable of being incurred” for each Contract to determine when the Department would be subject to a payment obligation and ensure that obligations are not incurred that exceed authorized spending limits.
- Departments can not “refuse” to accept performance if made as requested.
- Certain goods can be returned subject to return policies (not specialty items built to specs).
- Don’t hold invoices. Invoices must be rejected for inaccuracies or errors within 15 days and paid within period for Prompt Pay Discounts, or no later than 45 days (but in no event later than August 31<sup>st</sup> – accounts payable period – budgetary funds).

## **PAYMENT TRANSACTION OVERRIDES**

Certain payments will reject due to spending controls and other edits in MMARS that are designed to prevent overspending. Properly authorized payments within approved ANF spending limits can be overridden to process. An Authorized Signatory of the Department should send email to with transaction type, transaction # Doc ID, the reason for the override and certification that the payment is within approved ANF spending limits to: Kathy Sheppard AND Michael Eyob at CTR.

## 9C IMPACT ON PROCUREMENTS IN PROCESS

For procurements governed by 801 CMR 21.00, please contact OSD for specific guidance. If RFRs are posted on COMMBUYS, review the COMMBUYS procedures to determine posting requirements for these options, or contact OSD for guidance. The following options are available in the event a procurement is in process at the time of 9C Allotment Reductions.

1. Cancel the procurement. Post a notice canceling the procurement and repost when funding is available (essentially starting over). This option makes sense only if the procurement was recently posted and the project is a single year or short term project and funding availability is unlikely in the current fiscal year.
2. Postpone date of Response Submission. Post an RFR Amendment to postpone the date of submission of Responses (extend the date out) so that the procurement/application process is extended. This may have to be done periodically if funding delays extend well into the current fiscal year.
3. Complete Procurement/Contracts, but Delay Start of Performance. Post an RFR Amendment that the Department intends to complete the procurement/grant application process and execute Contracts, however that the Contracts will contain language that performance may not begin until funding is available and the Department provides a notice to proceed with performance, and that no performance made prior to this notice will be compensable. This option would allow the department to have all the paperwork completed and contracts ready to go depending upon the length of delay of funding. The contracts might have to be amended if performance scope or budget need to be adjusted if funding becomes available. Since Bidders will have notice that selection will be based upon the Responses as submitted and
4. Complete Procurement/Delay Contract Execution. Post an RFR Amendment that the Department intends to complete the procurement/grant application process and select contractors, but that contract execution will be delayed until funding is available. Since Responses for 801 CMR 21.00 procurements are only valid for 90 days, if the delay in final contract execution will/might extend beyond 90 days from the date of submission of Responses, the Department should request that Bidders submit a letter extending the Responses for an additional 90 days (which may have to be done periodically if funding delays extend well into the current fiscal year. Once funding is available, contracts can be executed and performance may begin.
  - For options #2, #3 or #4, the Department will have to determine if the delay in funding will significantly change or impact the scope of the original procurement. In some cases, the delay will have no impact on the goods or services sought by the Department, but will just delay when the Department can obtain the goods or services.
  - However, if the delay will impact the ability of a Contractor to meet the contract requirements (e.g., if the performance was required to be completed on a certain date which can no longer be accommodated with the delayed contract start), or the delay in contract execution or the start of performance would be unfair to Contractors the Department should consider whether the RFR should be amended so that Bidders/Grantees can submit Responses based upon the anticipated delay.

## OFFICE OF THE ATTORNEY GENERAL (Trial Division 617-727-2200)

- Critical to review contract terms to ensure 9C decisions do not violate contract terms
- Coordinate the legal and fiscal staff on decision-making
- "Failure of Appropriation" language in many leases does not mean a reduction of appropriation, but loss of all funding to support lease payments. If a Department has a choice about what to cut or reduce it will not meet the level of a failure and pre-termination penalties may apply.
- 9C decisions and documentation must demonstrate Department was acting in good faith

- Ensure that performance already made or for which payment obligation has been created is honored
- Contact the AGO with any questions or for recommendations related to the potential suspension, amendment or termination of a contract or whenever litigation is threatened or challenges may be made on a contract action (by the Contractor or anyone else)
- Notify Agency Counsel and AGO of any potential or threatened litigation or potentially contentious interactions
- Difficult potential or actual interactions with contractors should be coordinated with the Department's legal counsel who may be able to provide negotiation assistance and prevent escalating problems or potential litigation.
- Threats of litigation must be brought immediately to the attention of the Department's legal counsel, and from there immediately to the Office of the Attorney General (AGO).

SAMPLE NOTICE OF CONTRACT SUSPENSION

[Date]

[Contractor Name]

[Contractor Address]

[City, State, Zip]

RE: NOTICE OF CONTRACT SUSPENSION

Dear [Contractor Name]:

Due to recent spending reductions beyond our control, we have been required pursuant to M.G.L. c. 29, s. 9C to reassess our available funding for contracts, and as a result, the Department must suspend your contract # [enter contract number/name]. This letter serves as written Notice of Suspension as of [enter date of suspension], 20\_\_ through June 30, 20\_\_.

Attached is the scope of the performance and budget for authorized performance during the period of suspension, with any instructions or restrictions concerning allowable activities (performance), costs or allowable expenditures that can be made during the period of the suspension. You will be compensated for the performance authorized and accepted during this suspension period in accordance with the Contract and this Notice of Suspension.

Please review these materials and contact the Contract Manager if you have any questions. We are not able to negotiate amounts above a maximum expenditure of \$[enter maximum expenditure in dollars] in the current fiscal year through June 30, 20, although we are willing to negotiate amended performance alternatives that achieve the best value within this maximum amount.

As we are not authorized to obligate or expend amounts above the authorized limits, this letter shall serve as written notice that performance above the levels outlined in the attached Amendment is not authorized, and will not be compensable under this Contract. The Contractor may not bill or file any claim for payment for any performance made outside the scope of the Attachment and this Notice of Suspension.

This Notice shall operate to suspend performance under this Contract, which may be reactivated upon the availability of sufficient funds. For multi-year contracts, this suspension is anticipated to impact performance solely in the current fiscal year and not subsequent fiscal years of the Contract, unless otherwise specified.

We will work with you to implement this change and appreciate your cooperation and patience during this challenging time. We apologize for any inconvenience.

Sincerely,

Attachments

**Amendments, Suspensions and Terminations**

**Page 63 of 65**

SAMPLE OF CONTRACT AMENDMENT

[Date]

[Contractor Name]

[Contractor Address]

[City, State, Zip]

RE: NOTICE OF CONTRACT AMENDMENT

Dear [Contractor Name]:

Due to recent spending reductions beyond our control, we have been required pursuant to M.G.L. c. 29, s. 9C to reassess our available funding for contracts, and as a result, the Department must amend the performance anticipated under this contract #[enter contract number/name]. Attached is the Commonwealth of Massachusetts [enter either the *Standard Contract Form, Interdepartmental Service Agreement Amendment Form or modified Subsidy Agreement as applicable*], the scope of the performance and budgetary changes impacted by the reduction in performance, with instructions or restrictions concerning allowable activities (performance), costs or allowable expenditures that can be made as a result of this Amendment. You will be compensated for the performance authorized and accepted during this period in accordance with the Contract and this Notice of Amendment.

Please review these materials and contact the Contract Manager if you have any questions. We are not able to negotiate amounts above a maximum expenditure of \$[enter maximum obligation in dollars] in the current fiscal year through June 30, 20, although we are willing to negotiate amended performance alternatives that achieve the best value within this maximum amount.

Please be advised that failure to execute and return the attached Amendment Form shall not operate to delay the Amendment changes and the effective date of these changes will be the date the Amendment is executed by the parties or no later than [enter date amendment terms will be effective].

As we are not authorized to obligate or expend amounts above the authorized limits, this letter shall serve as written notice that performance above the levels outlined in the attached Amendment is not authorized, and will not be compensable under this contract. The Contractor may not bill or file any claim for payment for any performance made outside the scope of the attached Amendment. Failure to return the Amendment will operate as an automatic suspension of authorization for performance above the performance levels identified in the Amendment.

If this contract is a multi-year contract performance is modified solely for the current fiscal year, unless otherwise specified and subsequent fiscal years of the contract are not currently affected by this Amendment. We will work with you to implement this change and appreciate your cooperation and patience during this challenging time. We apologize for any inconvenience.

Sincerely,

Attachments



SAMPLE NOTICE OF CONTRACT TERMINATION

[Date]

[Contractor Name]

[Contractor Address]

[City, State, Zip]

RE: NOTICE OF CONTRACT TERMINATION

Dear [Contractor Name]:

Due to recent budgetary reductions beyond our control, we have been required pursuant to M.G.L. c. 29, s. 9C to reassess our available funding for contracts, and as a result, the Department must terminate your contract #[*enter contract number/name*]. This letter serves as written notice of termination as of [*enter date of termination*], 20\_\_\_. Attached is the scope of the performance and budget for authorized performance during the remaining duration of the contract, with instructions or restrictions concerning allowable activities (performance), costs or allowable expenditures that can be made during this period of termination. You will be compensated for the performance authorized and accepted during this period in accordance with the Contract and this Notice of Termination.

Please review these materials and contact the Contract Manager if you have any questions. We are not able to negotiate amounts above a maximum expenditure of \$[*enter maximum expenditure in dollars*] in the current fiscal year through June 30, 20, although we are willing to negotiate amended performance alternatives that achieve the best value within this maximum amount.

As we are not authorized to obligate or expend amounts above the authorized limits, this letter shall serve as written notice that performance above the levels outlined in this Notice of Termination and attachments is not authorized, and will not be compensable under this Contract. The Contractor may not bill or file any claim for payment for any performance made outside the scope of the attachments and this Notice of Termination.

We will work with you to implement this change and appreciate your cooperation and patience during this challenging time. We apologize for any inconvenience.

Sincerely,

Attachments