

## **Guidelines for Preparation of a Fixed Price Systems Development Contract**

These guidelines are provided to assist Government of Alberta departments in completing the following fixed price systems development contract templates:

- Contract A - "Fixed Price New Systems Development". This contract would be used when all Materials are to be developed for the department. No Pre-existing Work or Commercial Software would be part of the delivered system;
- Contract B - "Fixed Price Systems Development including Pre-existing Work". This contract would be used when a component of Pre-existing work is permitted as part of the system to be developed; and
- Contract C - "Fixed Price Systems Development including Pre-existing Work and Commercial Software". This contract would be used when a component of Pre-existing Work or Commercial Software is permitted as part of the system to be developed.

Prior to selecting the contract form to be included in the RFP, departments should closely review the Material Ownership rights that are provided for in each contract.

The templates have been prepared by Contracted Services Section (CSS), Procurement Services, Service Alberta and reviewed by Legal Services, Alberta Justice and Risk Management and Insurance Division, Alberta Finance.

These templates require a Request for Proposals (RFP) and a Proposal to fully describe the nature of the services to be provided and any attendant specifications and requirements of the Vendor.

The contract clauses to be completed by the department prior to release of the RFP are as follows:

If Contract A:

- Clause 4(a)
- Clause 6(c)
- Clause 15(a)
- Clause 18(c); and
- Clause 19(a)(ii)

If Contract B:

- Clause 4(a)
- Clause 6(c)
- Clause 15(a)
- Clause 18(c); and
- Clause 19(a)(ii)

If Contract C:

- Clause 4(a)
- Clause 6(c)
- Clause 16(a)
- Clause 19(c); and
- Clause 20(a)(ii)

The remaining contract clauses would be completed following the selection of the preferred vendor for the project.

Any proposed changes to the clauses, other than those items provided below, should first be discussed with CSS, when CSS is involved in the procurement process. Any changes to the standard provisions should be reviewed with Legal Services. Risk Management and Insurance should be consulted where changes to the liability or insurance provisions are contemplated by the department.

Contract Preparation:

1. **Contract Number:** Insert the number used to identify the contract.
2. **Between: (defines the parties to the Contract)** Insert the name of the department after "Minister of" (for example - Minister of Service Alberta).

Insert the registered company name of the Vendor in place of (Name of Corporation). The registered company name should be verified with Corporate Registry, Service Alberta.

3. **Background:** In the first paragraph, insert the date the Request for Proposals was issued. In the second paragraph insert the date of the Vendor's Proposal and the date(s) of any additional correspondence provided by the Vendor to be included in the Contract.
4. **Reporting (clause 4(a)):** Insert a time period (e.g. 10 days or 2 weeks) for the frequency of reporting required by the Vendor.

5. **Term (clause 5):** Insert the start date and the completion date for the performance of the Services/delivery of the Materials.
6. **Payment (clause 6):** Insert the fixed price contract value in 6(a). This amount would be the amount approved by CSS if the acquisition was completed through CSS.

The appropriate performance security for the project must be determined by the department. A holdback of 10% or a Letter of Credit for 10% of the Contract value are most often used, however, a higher or lower amount may be appropriate based on project approach and risk factors. It is appropriate to require only one form of performance security as more than one form or an unreasonably high percentage or dollar amount could result in harsh financial consequences for the Vendor. All forms of performance securities impact the cost bid by the Vendor.

**If a holdback is required of the Vendor for the project, insert the appropriate percentage of holdback in clause 6(c).**

**If a Letter of Credit is required of the Vendor, the following changes would be made to the Contract:**

.1 Delete clause 6(c) and replace with the following Letter of Credit wording:

- (c) Within ten Business Days of Contract signature by the Vendor and the Minister, the Vendor shall provide the Minister with an irrevocable, unconditional Letter of Credit ("Letter of Credit"). The Letter of Credit shall be in the form and from a recognized Canadian financial institution acceptable to the Minister, in the amount of \_\_\_ percent of the value of the Contract or one million dollars (\$1,000,000.00) (Canadian funds) whichever is the lesser, payable to the Minister of Finance of Alberta. Before any call can be made against the Letter of Credit for an alleged Vendor default under this Contract or if the Vendor is alleged to have not completed the contracted for Services, the Minister shall notify the Vendor of the anticipated call on the Letter of Credit and the parties shall have up to twenty-one days to attempt to resolve any disagreement. If a resolution cannot be achieved within the twenty-one day period, and the Vendor is in default of this Contract other than this clause 6(c), then the Minister may call on the Letter of Credit. For greater certainty, the Minister is not required to obtain the decision of a judge or any other independent third party that the Vendor is actually in default before calling on the Letter of Credit pursuant to the prior sentence. The amount called and paid for under the Letter of Credit is not a form of liquidated damages nor to be a windfall to the Minister and may require an adjustment on the final determination of the damages mutually agreed in writing by the parties or by the courts.

The Minister may also call for payment under the Letter of Credit if the Vendor fails, ten Business Days prior to the expiration date of the Letter of Credit or replacement

thereof, to deliver to the Minister a like Letter of Credit in the same amount as originally provided. The Letter of Credit shall be kept in place for the later of the expiration of the Contract or the Warranty Period.

- .2 Delete clause 6(d).
- .3 Delete clause 15(c) for Contracts A and B, or clause 16(c) if Contract C is being used, and replace with the following:
  - (c) If a defect or a series of defects are not corrected to function and perform in accordance with this Contract within a reasonable period of time, the Minister may terminate this Contract.
- .4 Delete clause 22(b)(iv) for Contract A, clause 22(b)(v) in Contract B, or clause 23(b)(v) if Contract C is being used, and replace with the following:
  - (iv) the Minister shall only have to pay the Vendor for the Services completed and Materials delivered, in accordance with this Contract, up to the effective date of termination.

**8. Material Ownership (clause 12):**

The department may decide to allow the Vendor to retain one copy of the Materials, in consideration for obtaining the rights to the Pre-existing Work, in which case the following would be inserted as clause 12(f) in Contracts B and C:

- (f) The Vendor may retain one copy of the Materials. The Minister grants to the Vendor:
  - (i) an irrevocable, non-exclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, distribute (internally and externally) copies of and prepare derivative works based on the Materials; and
  - (ii) the right to authorize others to do any of the former.

**9. Warranty (clause 15(a) of Contracts A & B, and clause 16(a) of Contract C):**  
Insert the appropriate number of days for the Warranty Period.

**10. Responsibility and Limitation of Liability - Claims by the Minister (clause 18(c) of Contracts A & B, clause 19(c) of Contract C):** This clause was developed in response to Vendors' concerns with previous contract provisions that made Vendors responsible for unlimited liability for losses suffered by the Minister, resulting from the Vendor's Services. It was agreed that unlimited liability may be inappropriate, thus the clause limits the Vendor's liability for losses suffered by the Minister. There is no limitation for third party losses. The department must determine the appropriate level of liability for the Vendor, keeping in mind that any losses suffered by the department in excess of the limitation amount will be the responsibility of the department.

When determining the level of responsibility to be included in this clause, the department must determine the potential for the department to suffer a financial

loss as a result of an error, omission or negligence of the Vendor. Consideration must be given to the possible consequences of errors, omissions or negligence of the Vendor. The department should also consider whether there have been any past mistakes caused by the department's own personnel which resulted in losses to the department, including the extent of the loss, and whether a Vendor could make a similar mistake. The department may also consider the amount of money to be paid to the Vendor under the Contract. However, it is important to keep in mind that the size of the contract does not always correlate to the level of risk. It is possible that a low-valued contract could present significant risk of loss to the department. The scope of services for the RFP should be reviewed to help identify possible areas where losses could occur.

When determining an appropriate limitation amount, the department should consult with Risk Management and Insurance Division, Alberta Finance and/or departmental finance or risk management representatives to determine the appropriate level of monetary liability required for the Contract.

11. **Insurance (clause 19(a)(ii) of Contracts A & B, clause 20(a)(ii) of Contract C):** The department should consult with Risk Management and Insurance Division, Alberta Finance and/or departmental finance or risk management representatives to determine if Errors and Omissions insurance is required and if applicable, the appropriate amount to be inserted in this clause. If Errors and Omissions insurance is not required, clause (a)(ii) should be deleted.

Where Errors and Omissions insurance is required, a certificate of insurance should be obtained on an annual basis from the Vendor.

12. **Notices (clause 21(a) of Contracts A & B, clause 22(a) of Contract C):** Identify to whom and where notices and payments are to be sent, including the title of each party's representative, their address and fax number.
13. **Delegation (clause 25(a) of Contracts A & B, clause 26(a) of Contract C):** Insert the title of the appropriate Minister's designate, and the branch, division, and department name.
14. **Signature Blocks (following "The parties have made this Contract"):** Format the document so that at least the last clause of the Contract is included with the signature blocks. Insert the department name and the Vendor name in the same manner as stated on the front page of the Contract. The Vendor's signature to the

Contract should be obtained first, then the signature of the appropriate authority representing the Minister.

For acquisitions managed by *CSS*, add the following signature block:

Reviewed by:  
Contracted Services Section  
Procurement Services  
Service Alberta

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Signature

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Title

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Date