



CITY OF CLARKSVILLE, TENNESSEE

CONTRACT ADMINISTRATION POLICY

Effective Date: November 1, 2019

1.0 Contracts in General

1.1 Purpose and Scope

The purpose of this policy is to establish a consistent set of standards and processes that all City departments are to follow when contracting for goods and services which will mitigate risk to the City, assign responsibilities to City staff and provide for the monitoring and retention of contracts. These standards and processes shall be followed in conjunction with the Purchasing Policies and Procedures implemented by the Purchasing Department.

For the purpose of illustration only and not as a matter of limitation, this policy applies to, but is not limited to, the following types of documents:

- Contracts requiring payment or other type of performance by the City
- Amendments
- Change Orders
- Construction contracts
- Cooperative agreements
- Easements
- Grant agreements
- Intergovernmental agreements
- Leases
- Task or work Orders
- Personal services contracts
- Professional services contracts
- Purchase or sale of property

1.2 Purpose of a Written Contract

The purpose of a written contract is to embody the complete agreement in writing. The title of a document is irrelevant. Whether the document is called an agreement, contract, memorandum of agreement, memorandum of understanding, amendment, purchase order, or other similar name, it is subject to the requirements of this policy. No relevant terms should be left to an unwritten understanding or verbal agreement between the parties. The document should clearly identify all parties and be explicit in setting forth the rights and duties of each party.

1.3 Authority to Contract

The Mayor of the City of Clarksville is the sole contracting authority for the City and no contract is effective or binding on the City until it has been reviewed and approved by the City Attorney, fully executed by the Mayor, the Mayor's signature has been attested to by the City Clerk and the contract is delivered to the other party/parties.

1.4 Form Contracts

Whenever possible, standard forms such as EJCDC, AIA or City Attorney approved form contract should be utilized in order to assure that an agreement conforms to the requirements of this policy. If necessary to use a vendor/contractor generated contract, the using department should review said contract for adherence to this policy.

For construction or renovation of buildings involving architecture plans the City will use the American Institute of Architects (AIA) suite of contracts; for other construction projects involving engineering plans (utility work, street construction or improvement, e.g.) the City will use the Engineers Joint Contract Documents Committee (EJCDC) suite of contracts unless an alternative form is approved by the City Attorney.

1.5 Negotiation

The using department shall negotiate the contract, cause the contract to be prepared, and have the contract executed by the other party/parties prior to distribution to the required City departments for approval.

If a contract is procured through the bid process, the contract terms shall mirror the bid documents.

1.6 Terms to be Included in Contracts

All contracts shall include provisions for the following, unless otherwise approved by the City Attorney:

a. Parties to the contract.

Clearly and accurately identify the parties to the contract. Be sure to specify the full legal name of the vendor/contractor.

b. Scope of service.

All contracts shall specify the goods and/or services to be provided, price, quantity, payment terms, quality, etc. This provision should answer the “what, where, when, and how” questions about the purchase. The scope of services section is important when, and if, it becomes necessary for the City to determine whether the vendor/contractor has breached the contract.

c. Term of contract.

A contract shall be entered into for a period of time sufficient to adequately accomplish the objectives. This provision should include any renewal, extension or other term options. A contract may provide for automatic renewal if it contains language that allows for cancellation at the end of any fiscal year for lack of funding. In the event of automatic renewal, the maximum term of the contract, including renewal terms, is subject to section (2) below. For contracts procured competitively, any renewal, extension, or options must have been advertised in the City's original solicitation. If there are check boxes on vendor/contractor contracts for options on length of term, the box negotiated should be checked. The effective date should be left blank and will be inserted once the contract has been fully executed by the necessary City officials.

1. Short-Term/Annual Contract. A contract that has an initial term of no longer than twelve (12) months, but may contain renewable options for additional one-year periods. If the contract was procured competitively, the initial contract, plus the renewal options, cannot exceed a total period of three (3) years unless expressly approved by the Purchasing Director or his/her designee.

2. Long-Term Contract. A contract that has an initial term of greater than twelve (12) months, but no more than thirty-six (36) months, unless otherwise expressly approved by the Purchasing Director. If the contract was procured competitively, the term of the initial contract, plus all renewal options, shall not exceed sixty (60)

months unless otherwise expressly approved by Purchasing Director. The term of all multi-year contracts and conditions of renewals or extensions, if any, must be stated in the solicitation. The using department must submit written justification to the Purchasing Director as to why such a long-term contract is advantageous and/or necessary by the City. Long-term contracts must contain a provision that the contract is subject to the availability and annual appropriation of funds for such goods or services and that in the event funds are not appropriated or otherwise made available to support continuation of performance, the City may immediately terminate the contract without any penalties, damages, etc.

d. Contract Amount.

Contracts shall state the dollar value of the contract, including any “not to exceed” values as well as the quantity of goods to be provided. If the contract amount is an estimated figure because the exact quantity is unknown, include a table of cost per unit and the statement "quantity and contract amount are estimated and invoicing/compensation shall be only for actual goods and/or services provided, based upon the unit cost herein." Such provision would be helpful in determining a pro rata payment in the event of early termination.

e. Notice to Proceed.

Construction contracts shall include a provision for the notice to proceed.

f. Invoicing.

All contracts shall include instructions for invoicing and any payment conditions. Payments are to be made only upon submittal of an invoice by the vendor/contractor after the goods are received or the services performed; however, advance payments may be made upon approval of the Chief Financial Officer or Director of Finance.

g. Progress payments and retainage, if applicable.

Contracts shall detail how progress payments to a vendor/contractor for a percentage of the work completed on a project are requested and made. These payments are to be approved by the Architect, Engineer, or Project Manager and the using department. At the discretion of the using department and in consultation with the City Attorney and Chief Financial Officer or Director of Finance, five percent (5%) of each progress

payment may be withheld, when allowed, (retainage) until the project is substantially completed and approved by the City. In no circumstance shall any more than five percent (5%) retainage be withheld. In addition to retainage amounts withheld or in the alternative the using department may establish a lump sum project closeout amount to be paid with the final payment.

h. Prevailing wage rates, if applicable.

Contracts involving the use of federal dollars must follow the Davis-Bacon Act and any other federal law relating to prevailing wage rates and shall contain a provision setting forth the minimum wages to be paid to various classes of workers employed under the contract.

Contracts involving state-funded highway construction projects must follow the State of Tennessee Prevailing Wage Act and shall contain a provision stating that all contractors and subcontractors will pay the prevailing wage established by the Prevailing Wage Commission.

i. Liquidated damages, if required or deemed necessary by the using department, or Director of Purchasing.

Liquidated damages is a sum stipulated and agreed upon by the parties at the time they enter the contract, to be paid to compensate for injuries should a breach occur. The stipulated amount of liquidated damages should represent an estimate of potential damages in the event of a contractual breach. Liquidated damages provisions should not penalize the defaulting party rather, the stipulated amount should be reasonable in light of anticipated damages likely to occur by a breach.

j. Surety bond requirements.

Contracts that require a bid bond, performance bond or payment bond pursuant to the City of Clarksville Purchasing Policy shall include a provision setting out the bond requirements.

At least two originals of all performance and payment bonds shall be provided by the vendor/contractor with one original kept by the Purchasing Department and one original kept by the Finance Department for retention. Copies of the original performance and payment bonds are to be sent to the legal department and the using department.

k. Indemnification/Hold Harmless.

Indemnification or hold harmless agreements are an undertaking by one party to compensate the other party for certain costs and expenses and/or to pay certain sums of money or to perform other acts that will prevent harm or loss to the other party resulting from acts of negligent or intentional conduct by a party or their employees or agents.

It is advisable for contracts to have an indemnification clause in favor of the City that states that the other party/parties to the contract will indemnify and hold harmless the City but such a provision is not required.

l. Governing Law.

Governing law provisions allow the parties to agree that a particular state's laws will be used to interpret the agreement should a dispute occur. Contracts shall state that the governing law is Tennessee.

m. Venue.

Venue is the court where any lawsuit regarding the contract must be filed if there is a breach or dispute. Contracts shall provide that venue for any dispute is in the State Courts of Montgomery County, Tennessee or the U.S. District Court for the Middle District of Tennessee at Nashville.

n. Compliance with Laws.

Contracts shall include a provision stating that the parties will abide by all applicable laws.

o. Notice.

All contracts shall state the name and address where any notices required or permitted under the contract are to be sent for all parties to the contract.

p. Insurance Requirements.

Common types of insurance required by the City are Commercial General Liability, Auto, Builder's Risk, Workers' Compensation, and Professional Liability.

Insurance is required for all construction contracts and contracts where work is performed on City property where the City may be exposed to risk of liability loss, property loss, workers' compensation or employee injury losses, or lawsuits.

Insurance may be required for some service contracts and some equipment and material contracts. The City Risk Manager shall be consulted to determine if insurance is needed and the type of insurance coverage required for these types of contracts as well as construction projects.

The decision for the insurance requirements shall be documented in writing.

In cases where there is an Invitation to Bid or Request for Proposal process, it is the using department's responsibility to contact the City Risk Manager to determine the need of insurance coverage and what type of coverage is required prior to the Invitation to Bid or Request for Proposals being let. These requirements shall be included in the bid specifications or the requirements of the Request for Proposals.

Minimum insurance requirements will be determined in conjunction with the originating department and the City Risk Manager and shall be stated in the contract along with a provision that the failure of the vendor/contractor to maintain the required insurance coverage and to provide a current certificate of insurance for the duration of the contract term may result in cancellation/termination of the contract. Any required insurance policy shall list the City of Clarksville as an additional insured on the certificate of insurance.

q. Termination of Contract.

All contract provisions should be reciprocal, meaning that provisions should not be so one-sided that it is unfair to the other party. This is especially important in negotiating termination provisions. It is advisable that termination provisions be the same for all parties.

Contracts shall provide for termination:

1. For Cause if the vendor/contractor fails to fulfill its obligations under the contract in a timely or proper manner or fails to comply with any term or provision of the contract; and

2. Without Cause at any time, following written notification of the City's intent to terminate pursuant to the terms of the contract, in which instance the City will pay on a pro-rata basis for all acceptable goods and services received by the City up to the date of termination.

r. Right to Audit.

Contracts shall include the following language or a similar provision approved by the City Attorney and/or Director of Internal Audit or Chief Financial Officer or Director of Finance:

Vendors/contractors shall establish a reasonable invoice accounting system which enables ready identification of costs of goods and use of funds. The City or its representative may audit the vendor/contractor's records any time within four (4) years after final payment (or until all disputed claims have been settled, whichever is longer) to verify the City's payment obligation and the use of the City's funds. This right to audit shall include subcontractors from whom goods or services are subcontracted by the vendor/contractor. Vendor/contractor shall ensure the City has these rights with subcontractors. Any disputed claims will be verified by an independent auditor at the cost of the City unless the vendor/contractor is found to have overcharged the City in which case the vendor/contractor will pay the cost of the audit as well as repay all overcharges.

s. Contingency Funds, if applicable.

In cases where contingency funds are allowed, the amount or percent shall be clearly stated in the contract documents. Contingency funds will not be allowed if not originally stated in the original bid documents.

t. Modification, Change Orders.

A contract shall provide for the proper method of submitting and getting approval of change orders. For contracts involving governmental funds, change orders shall be fully executed prior to the modified work being authorized. For contracts involving enterprise

funds, a field order or work change directive may be issued and a subsequent change order shall be entered in accordance with this section. Within the scope of the contract, a change order may be used to:

1. authorize the contractor to perform work that deviated from the original specifications as is in the best interest to the City;

2. increase or decrease the quantities resulting from variations between estimated quantities in a fixed-unit cost contract and the actual quantities; or

3. for a contract modification related to timing where weather has been an issue in the completion of the project or in cases involving force majeure events.

A contract cannot be modified to avoid competition requirements.

u. Warranties and Guarantees.

Any warranty as to goods, services or workmanship should be clearly stated in the contract.

1.7 Impermissible Contract Provisions

Unless otherwise approved by the City Attorney, contracts shall not include the following clauses:

a. Hold harmless/Indemnification by the City.

The City cannot contractually agree to indemnify or hold harmless another entity. The Tennessee Attorney General's Office has opined that the City does not have the power to enter into an indemnity clause which extends its liability beyond that imposed by law because it constitutes an unauthorized unconstitutional act. Tenn. Op. Att'y Gen. 93-01 (January 4, 1993)

b. Limitation on time within which the City may bring suit.

Tennessee statute of limitation provisions govern the timeframe within which the City must bring a suit, and limiting the time within which the City may bring suit may be an impermissible waiver of sovereignty.

c. Contract term with no specific termination date.

Whenever possible all contracts should state the effective date and the date of termination or set out a schedule for the execution of the contract. (Example: The term of this Agreement shall be one year commencing upon execution and shall automatically renew for additional one-year periods.)

d. Provisions requiring advanced deposits or payments from City other than those approved by the Chief Financial Officer or Director of Finance.

e. Provisions requiring the City to pay any taxes associated with the contract other than those allowed under state or federal law.

f. Clauses assessing attorney's fees, court fees, expert fees, penalties and/or liquidated damages in case of breach by the City.

Such provisions are impermissible because the City is liable for actual damages only and will not voluntarily agree to pay another party's court costs, attorney fees, etc.

g. Clause granting the vendor/contractor unilateral authority to assign contract.

Any purported assignment of the contract must be subject to the City's prior written consent.

h. Governing law other than Tennessee/consent to jurisdiction/venue outside the State Courts of Montgomery County, Tennessee or the U.S. District Court for the Middle District of Tennessee at Nashville.

i. Provisions requiring payment of interest, late charges or finance charges in excess of the Tennessee Prompt Pay Act.

The City will not agree to a payment term of less than 30 days from the date of invoicing.

j. Confidentiality.

Provisions requiring confidentiality and nondisclosure may violate the Tennessee Public Records Act. Should a contract include a confidentiality provision to limit disclosure of “confidential” information, there shall be a qualifying statement that any confidentiality obligation is limited to the extent allowed under the Tennessee Open Records and Open Meetings Acts.

The City Attorney shall be consulted regarding the language of any non-disclosure agreement or confidentiality clause contained in a contract.

k. Binding Arbitration or Mediation.

The City Council, or the City Attorney in instances where they have been granted authority, must approve the compromise and settlement of any claim or civil litigation to which the City might be a party. Terms that require binding arbitration or mediation are a limitation on the authority of the City Council or the City Attorney.

l. Blanks.

All necessary measures shall be taken to ensure all blank lines are completely filled in or marked N/A and all optional boxes are marked.

1.8. Piggyback/Using Other Existing Contracts.

Using departments shall provide a copy of the contract on which they are piggybacking when submitting the contract for the approval and execution process.

1.9 Questions, Problems, Advice and/or Authority.

Questions pertaining to the procurement process shall be directed to the Purchasing Director. Questions or problems pertaining to insurance requirements shall be directed to the Risk Manager. Questions regarding any matter of legal significance shall be directed to the City Attorney.

1.10 Approval and Execution Process.

Unless expressly authorized by the City Attorney or Purchasing Director to do otherwise, all contracts, along with any required supporting documentation such as current certificates of

insurance and performance and payment bonds, shall be forwarded and approved by the following individuals and/or departments **in this order**:

1. The using department for initial review
2. The awarded vendor/contractor – full signature
3. The using department – initialed to confirm contract content
4. The Purchasing Department – initialed to signify purchasing requirements are met and to be reviewed by Contract Manager
5. The Legal Department – initialed to confirm approved as to form
6. The Mayor – full signature
7. City Clerk – to attest signature of Mayor

Contracts involving banking, credit card acceptance, taxes, leases and any contract requiring the Finance Department to do recurring billing or to make recurring payments must be initialed by the Chief Financial Officer or Director of Finance prior to being sent to the vendor/contractor.

All required certificates of insurance and performance and payment bonds **MUST** be attached to the contract and reviewed by the contract manager before being sent to the Mayor.

Handwritten changes are not preferred however, should any handwritten changes to a contract such as strikethroughs be necessary, they shall be initialed by all parties to the contract.

Once fully executed, the original contract and supporting documentation shall be sent to the Purchasing Department for conversion of the requisition to a purchase order, if applicable, and retention. For all capital projects and contracts that require retainage, the Purchasing Department will send a copy of the fully executed contract to the Chief Financial Officer or Director of Finance. A copy will be forwarded to the using department who will then send a copy to the vendor/contractor.

Any modification, amendment, change order, extension or rate adjustment to an existing contract shall be processed just as an original contract.

2. Post Execution

2.1 Contract Manager.

The Contract Manager shall track the contract through the approval and execution process and shall review contracts to identify compliance items that need to be monitored such as insurance,

bonds and reporting requirements. Throughout the life of the contract the Contract Manager is responsible for obtaining supporting documentation from the Project Manager, internal point of contact or vendor/contractor to ensure compliance. After the contract has expired or ended, the Contract Manager shall monitor all contracts for compliance with document retention standards.

Prior to the expiration of the contract the Contract Manager will contact the using department to determine if they wish to allow the contract to renew pursuant to the terms of the contract, renegotiate the contract or terminate the contract. It is the responsibility of the using department to communicate this determination to the Contract Manager in a timely manner so that the appropriate steps may be taken.

2.2 Project Manager.

For project related contracts (i.e. construction projects) the using department shall assign a Project Manager to be the point of contact for the Contract Manager. Project Managers are responsible for ensuring compliance with performance and programmatic requirements, such as ensuring that vendors/contractors are meeting their performance objectives and that projects are completed pursuant to the terms of the contract. The Project Manager shall track expenditures to ensure they do not exceed the contracted amount and to ensure that any requirement amendments are made in an appropriate time frame. The Project Manager shall be responsible for advising the Contract Manager of any change orders, amendments, updated certificates of insurance, dates of substantial completion, breach, termination, etc., in a timely manner.

2.3 Service Contracts.

For service contracts (i.e. copier services) the using department shall advise the Contract Manager regarding any changes made to contracts such as termination, amendment, extension, renewal, etc.

2.4 Pre-Performance Conference.

Contracts which are deemed either high cost, long term or complex by the Purchasing Director shall require a pre-performance, post award conference. When requesting a bid for service, any requesting department may stipulate that a pre-performance conference is desired. It is during this conference that the Project Manager, vendor/contractor and any other vital team members meet to discuss project schedules, specific procedures for certain items, such as submittals, pay

applications, record documents, and to designate representatives who will be the main point of contact for each party.

If not required by the contract's scope of work or scope of services and in cases where a pre-performance conference is required or requested, any Notice to Proceed commencement date shall not be dated prior to the pre-performance meeting.

2.5 Process for Change Orders.

1. If required per the terms of the contract, the applicable party must submit written notification to the other party of its desire to renew, extend or amend the contract. If such notification is required from the City, the using department must submit to the vendor/contractor's written notification of the City's intent to modify the contract.

2. The using department must prepare and forward the signed contract modification document(s) to the Purchasing Department for processing. The document must include a justification for the modification. Additional documentation regarding the modification may be required. The modification document must reference the contract number, section(s) of the contract being modified and describe how the contract is being changed. When submitting a contract amendment for review and signature, a copy of the original contract and all previously executed renewals and amendments may be required.

3. The Purchasing Department shall have the authority to distribute all change orders to the Mayor for his execution.

4. Change Orders shall have at a minimum the following signatures:

1. Vendor/contractor
2. Department head or his/her designee of the using department
3. Chief Financial Officer or Director of Finance
4. Mayor

The change order shall not be valid without the signature of at all four individuals listed above.

2.6 Change in Subcontractor.

The Project Manager shall immediately advise the Purchasing Director of any change in the award of a subcontract from the subcontractor listed on the base bid envelope.

2.7 Default.

In case of default by the vendor/contractor (e.g., failure to complete within the specified time, failure to provide goods in conformance with the purchase order or contract, etc.), the using department shall notify the Purchasing Director so that the City may, by written notice in accordance with the terms of the contract, cancel the contract and purchase substitute goods or services from another source. In that event, the City may recover any excess costs from the vendor/contractor. Excess costs are defined as the difference between the price stated in the contract and the actual cost incurred by the City, including but not limited to re-procurement costs. In addition, the City may, exercise any additional remedies specified in the contract and/or which are available at law or in equity.

The using department should consult with the City Attorney if they desire any further legal action to be taken in case of a default by another party to the contract.

3.0 Policy

3.1. Review

This policy shall be reviewed no less than once every two (2) years to ensure compliance with all applicable laws, rules, and regulations, and that it is appropriate and accurate. Any changes may be approved by the Purchasing Director pursuant to Art. III Section 4 of the Charter of the City of Clarksville and Clarksville City Code Title 6-102(k).