

Nebraska Department of Transportation
Operating Instruction 45-5
January 17, 2001

AGREEMENTS

1. **Purpose:** To provide policy for the preparation, distribution, and disposition of agreements between the department and an outside party. This DOR-OI supersedes DOR-OI 45-5 dated November 2, 1992. The office of primary responsibility is the Project Development Division.
2. Due to the extensive number of agreements, the variable nature of technical performance, and the governmental requirements originating in many different areas, the Project Development Division (PDD) will prepare, coordinate, distribute, monitor, and maintain departmental agreements, excluding those agreements associated with bid lettings, right-of-way acquisition, purchasing, and the contracts and bonds for highway construction. Those divisions which normally prepare their own agreements, or use a standard form of agreement, will submit prepared agreements to the PDD for review prior to execution by outside parties.
3. When necessary, managers will request that agreements be prepared by the PDD and will submit a DR Form 65, "Request for Agreement."
4. Agreements will be reviewed "in-house" by the Controller Division and PDD prior to execution by any party.
5. Except for standard agreements which have had prior review, all agreements prepared outside the PDD should be submitted to the PDD for review before negotiations are begun. When a standard agreement is revised, it should also be submitted for review.
6. The originating office is responsible for obtaining the signatures of parties outside the department. Following execution by an outside party, agreements will be **hand-carried** to the PDD for internal coordination.
7. Internal coordination will be accomplished by using a RDP Form 656-A, "Agreement Monitoring System - Agreement File Update." The originating office will complete the description and coordination portion of the form. The computer portion will be completed by the PDD.
8. Individuals to whom agreements are routed for coordination will promptly coordinate and have the agreement hand-carried to the next office indicated on the coordination sheet and immediately advise the PDD, via telephone, if he/she disagrees with the contents of the agreement or believes that further coordination with other offices is required.
9. Signatory responsibility for agreements is defined by DOR-OI 45-6.

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10. Following execution by the department and approval (when necessary) of the FHWA, the PDD will coordinate with the originating office for the distribution of the agreements. The department's original, or a copy if the department is not a party to the agreement, will be retained in the PDD files. The PDD will then enter the basic data into the computerized agreement monitoring system.
11. Agreements retained in the PDD files will be microfilmed after ten years from the execution date. At that time, most originals will be destroyed. Agreement microfilm cards and a reader are available in the PDD for use by others.
12. The agreement number, which is a descriptive number indicating the originating office, agreement type, year, and sequence will be used by the PDD for filing purposes. Cross-reference listing by the agreement number, control number, and project number will be available in the PDD.
13. **Requirements for Agreement Preparation and Review:**
 - A. **Offer, acceptance, and a "meeting of the minds":**
 - (1) The preliminary definition of performance specifications is normally established through personal contact and written proposals.
 - (2) Where federal financing is involved, it is imperative to caution against beginning work before receiving notice to proceed, since work performed before federal authorization is ineligible for federal reimbursement.
 - (3) Failure of the contracting parties to interpret and understand all contract provisions identically tends to generate misunderstandings, disagreements, and legal problems. Accordingly, check each contract or agreement carefully for clarity and complete coverage of performance requirements as it affects each party to the contract.
 - (4) A "closing conference" with all parties is highly recommended on agreements containing complex performance details to assure complete understanding before contract execution.
 - B. **Cost Principles:** Managers will establish cost principles for use in determining the allowability of individual items of cost. These cost principles will be appropriately identified or referenced in each contractual document. If federal-aid is involved, cost principles will be those established by the applicable provisions of the governing Federal-Aid Highway Program Manual, grant agreement, Office of Management & Budget circular, other directives, and the contract cost principles and procedures set forth in the Federal Acquisition Regulations System (48 CFR, 1.31), as appropriate.

C. Consideration:

- (1) Check each agreement to see if the following are clearly answered. What are the pay items? When will payment be made? How will the amount to be paid be determined? Who is to be paid and who pays? Form of payment, i.e., cash offset against cost sharing, etc.?
- (2) In some cases, the requirement of consideration may be satisfied without monetary payment for work performance. An example of this would be obtaining covenants from counties, cities, and other political subdivisions to cause certain restrictions and to perform certain acts in consideration of the department making certain highway revisions either on its own behalf, or as an agent for the FHWA.

D. Performance:

- (1) Extra care and attention in defining and describing the detailed work to be done will do much toward eliminating misunderstanding, extra correspondence, and the need for supplemental agreements. Check each agreement carefully to see if the following are clearly answered. What is to be done? When will it be done? Where will it be done? Who will do it? How will it be done?
- (2) Attention should be directed to provisions in event of nonperformance.
- (3) Where applicable, attention should be directed to provisions concerning the handling of credits for materials recovered.

E. Authority: Contracts and agreements should be thoroughly checked for accurate inclusion, reference, and compliance with applicable laws, rules, and regulations.

F. Cost Sharing: Contracts and agreements should be reviewed for clear definition of the participants, sharing formula, when participants contribute, and how participants contribute.

G. Covenants: Contracts and agreements should be reviewed for clear definition of stewardship, liability, inspection, audit permission, retention of records, Disadvantaged Business Enterprises, and nondiscrimination.

H. Guidelines for Requesting Contract and Agreement Reviews from the Legal Counsel:

- (1) Agreements covering simple work performance and nominal amounts of consideration -- no review necessary.
- (2) Standard agreements and contracts -- request a review once for form and legal sufficiency unless changed and after each state legislative session or issue/revision of applicable FHWA publications.

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- (3) Agreements and contracts involving complex provisions – review regardless of consideration amount.
- (4) Formulation of policy is not a responsibility of the Legal Counsel. Questions involving policy will be taken to the applicable deputy director.

I. Guidelines for Requesting Contract and Agreement Reviews by the Operational Analysis & Audit Division (OAAD):

- (1) Contracts exceeding \$50,000 must be sent to the OAAD for a pre-award audit.
- (2) Contracts not based on a firm, fixed price must go to the OAAD for a post-audit to determine the total allowable contract costs.

J. General Guidelines:

- (1) Avoid indefinite or ambiguous language and be explicit. The terms "and/or" should never be used.
- (2) Insure that each agreement includes all of the proper parties, but not more parties than necessary to perform the subject of the agreement.
- (3) Do not automatically make the state a party to every agreement -- only when necessary.
- (4) FHWA publications will be included by reference, as applicable.

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