

**SECTION 8: SPECIAL COMMODITY PROCEDURES**

**SUBJECT: PERSONAL SERVICES CONTRACTS**

**Procedure 8.5**

**POLICY:** Personal services purchases are governed by the same procurement laws (and competitive thresholds) as other procurement contracts at the University. However, contracts for services (including personal services) are governed by the common law, not the UCC. Although the requirements for competition are the same, there are some unique considerations for personal services contracts.

**PROCEDURE:**

Personal services refers to a set of services that require professional knowledge and expertise to complete a project or solve a problem. Common types of personal services that the University of Washington uses include management and information technology consulting, economic analysis, financial and investment advising and statistical analysis.

Personal services contracts are governed by the same set of laws and regulations as other goods and services contracts in the State of Washington.<sup>1</sup> The legal requirements and procedures for entering into a contract for personal services are the same as for purchasing other goods or services. Additionally, any requirements dictated by the funding source (such as the applicability of federal flowdown terms) apply to personal services contracts.

**Competition & Sole Source**

As with other purchases, purchases under \$10,000 do not require competition or a valid sole source justification, purchases between \$10,000 and \$99,999 require informal competition or a valid sole source justification, and purchases of \$100,000 or more require formal competition or a valid sole source justification.

**Common Law v. UCC**

In Washington, as with many states, contracts for services are subject to the common law, while contracts for goods are governed by the Uniform Commercial Code. There are several important distinctions between the common law and UCC. Two distinctions, in particular, can affect the way these contracts should be handled.

**Offer & Acceptance**

The first is that under the common law “Mirror Image Rule,” any response to an “offer” with different or additional terms is a rejection and a counteroffer. This counteroffer may then be accepted by the other party, but it is not possible to accept a contract with different or additional terms. Under the UCC, a contract may be accepted with different or additional proposed terms, and the final terms of the contract will be governed by the UCC “Battle of the Forms.”

**Amendments**

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<sup>1</sup> Chapter 39.26 RCW and WAC 200-300

The second major difference between the common law and UCC is that modifications (amendments) to services (common law) contracts require separate consideration<sup>2</sup>, whereas goods (UCC) contracts do not. Consideration is simply something of value (even nominal, or minimal value) exchanged by each party. For example, if the scope of work is increased by amendment, the University must provide consideration to the contractor; such consideration could include additional payment (for the additional work done), additional time for the entire project, or even an award of additional work (in compliance with all other procurement regulations).

### **Additional Considerations**

When entering into a personal services contract, the following additional considerations should be given particular attention:

**Assignment and Subcontracting:** The contract should not be assignable or subcontracted by the vendor. The University is typically contracting with this vendor and/or its subcontractors due to a particular expertise or skillset.

**Confidentiality:** Ensure that the vendor is required to protect Personal Information, and may not use or disseminate such information except as defined in the scope of work and as necessary to complete the contract.

**Insurance:** Typically, the contractor will need to have commercial general liability insurance as well as professional liability insurance.<sup>3</sup>

**Intellectual Property:** In most instances, the University should own any IP created as a result of the contract. At the very least, the University must retain a royalty-free license to use any IP created—otherwise the University may be required to pay royalties to use intellectual property it paid the vendor to create.

**Data Security Agreement:** If the vendor will use or have access to University Data or Confidential Data, the vendor must sign the UW Data Security Agreement

**Independent Contractor:** The vendor should be defined as an independent contractor

**Proprietary Information:** Ensure the vendor is aware that any information not marked as confidential is subject to disclosure in the event of a public records request, and even information marked confidential may be disclosed.

**HIPAA Business Associate:** If the vendor will have access to any Protected Health Information, they must sign the University's HIPAA Business Associate Agreement form.

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<sup>2</sup> See, e.g.: *Rosellini v. Banchemo*, 517 P.2d 955, 83 Wn.2d 268 (Wash. 1974): where one party's obligations are changed by a second agreement, "the second agreement must be supported by consideration."

<sup>3</sup> See Policy 7.2.11 for minimum insurance amount requirements and *Baker v. City of Seatac*, 994 F.Supp.2d 1148 (W.D.Wash. 2014): "modification of a contract requires consideration in addition to that promised in original contract" citing *Rosellini*.

**Scope of Work:** The scope of work should clearly define what is within the scope of the project and what is outside of the scope of the project. Anything that the University expects the vendor to complete should be included in the Scope of Work.

**Reimbursement for Costs:** Reimbursements should either be capped at a maximum amount or based upon a mutually agreed upon schedule agreed to in the contract.