

## CCO CONTRACTS MANUAL

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## **LIST OF ACRONYMS**

<b>AASHTO</b>	American Association of State Highway and Transportation Officials
<b>CCO</b>	Chief Counsel's Office
<b>FAA</b>	Federal Aviation Administration
<b>FHWA</b>	Federal Highway Administration
<b>FTA</b>	Federal Transit Authority
<b>JSP</b>	Job Special Provision
<b>MOU</b>	Memorandum of Understanding
<b>OA</b>	Office of Administration
<b>RFP</b>	Request for Proposal
<b>R/W</b>	Right of Way
<b>STP</b>	Surface Transportation Program
<b>TRB</b>	Transportation Research Board
<b>USDOT</b>	United States Department of Transportation

- (1) **Introduction:** This manual describes the Chief Counsel's Office (CCO) contract drafting and review process for all one-time or repeat use contract documents; it explains which contracts are exempt from the drafting process; and the manual describes the role which the division/unit plays to help a CCO attorney prepare the best possible contract to fit the district's or the division/unit's needs, now and in the future.

The key person in the contract drafting system is not the CCO attorney; it is the contract liaison in the district or the division/unit. The CCO attorney depends upon the district or division/unit to provide the information and input the CCO attorney needs to draft the contract right the first time, with sufficient advance notice to prepare the contract well. Further, the CCO attorney needs the division/unit to make sure that once a contract form is finished and approved, that it is used as intended, without unauthorized revisions or modifications. When revisions or modifications are needed, the division/unit must let the CCO attorney know so that the contract is drafted properly and consistently.

- (A) **The History of the Contract Review Process:** In the late 1980s, the Chief Counsel realized there was a problem in Missouri Department of Transportation (MoDOT) contract drafting and review: Contracts were taking too long to draft, too long to review, and still, the results of this process were not satisfactory. There was also a large turnover of attorneys in CCO, and similarly a large turnover of engineers and other staff in the divisions/units and districts who worked on these contracts.

The attorneys in the CCO who worked with contracts noticed a disturbing trend in the contracts they were receiving for review:

*The drafts were legally deficient or erroneous.* Certain key necessary elements had been omitted, or perhaps were phrased in a way that would impose additional and unnecessary liability on the Missouri Highways and Transportation Commission (MHTC) and MoDOT.

*The contracts were poorly drafted.* The provisions were not necessarily legally deficient, but they contained citation and other errors, and the text was not worded as well as it could have been.

*There were variations in contract forms among districts and divisions.* Differences had developed among the different districts and the headquarters division in the text and forms they used for the same type of contract, without any justification or good explanation for those variations.

*It was cumbersome and time-consuming to redraft the contract from scratch each time.* With no contract uniformity, both the engineers and the attorneys often found that each time a contract was needed, they were redrafting nearly all the contract terms. That was a terrible waste of time for the engineers and attorneys alike.

*It was cumbersome and time-consuming to review the entire contract for content and form each time.* The MoDOT engineering staff would often finish their

redraft of the contract in what they thought was sufficient time for the CCO attorneys to review and return the contract to them, but the attorneys were late in completing their revisions. This occurred because the attorneys had to review the entire contract, word for word, to make sure it was drafted in a correct and complete manner.

*The end result was a contract review process that was often both unsatisfactory and meaningless.* As the inevitable deadline occurred for the contract to be issued, the CCO attorney usually was faced with three undesirable options:

1. Approve the contract, even though the attorney wished he or she did not have to because it was deficient or erroneous to some extent;
2. Reject the contract, at the last second, often after the other party had already signed it. This was embarrassing for the CCO attorney, the engineers, and MHTC/MoDOT; or
3. Complete a perfunctory and meaningless legal review at the last minute, even though the attorney saw some drafting problems that really should have been changed or corrected.

This process resulted in a "lose-lose" situation for both the engineers and attorneys.

As a result, the Chief Counsel, in conjunction with the Chief Engineer's staff, decided to revamp the MoDOT contract drafting and review process, to streamline it and make it more efficient. CCO has developed a number of goals for the contract drafting and review process, which will help the engineers and attorneys alike.

**(B) Goals of the CCO Contract Drafting and Reviewing Process:** The CCO attorneys and staff want the contract drafting and review process to work well for all of us. We believe that with your help and cooperation, we can come much closer to achieving all of the goals listed below:

Our objective is to help the engineers in the districts and divisions/units, by:

*Easing much of the initial contract drafting burden.* It is possible that with some direction on the part of the district/division/unit, the CCO attorney working on the contract will complete the initial drafting for district or division/unit.

*Eliminate any contract drafting disputes the first time, so they will not reoccur.* A lot of discussion needs to take place when a contract is drafted, to make sure that all of the affected districts and divisions/units are satisfied. Quite often, differences of opinion will occur as to what should or should not be made a part of the contract. This is a healthy process, but it is best if it only occurs once; *not* every time the contract comes up for review or redrafting.

*Preparing the best possible draft, so that it can be used consistently by all the involved divisions/units and districts without unnecessary variation thereafter.* The CCO attorney will try to put together a contract form that the district\division is able to use for the current situation and for similar contract needs in the future. If any changes are made, they will occur only after consultation with the CCO to insure that those revisions or modifications are appropriate.

*Have CCO update your contracts.* With the electronic storage of all MHTC contract forms on the CCO intranet site, CCO should be able to make all of the needed revisions to the contracts, as citations and boilerplate terms are brought up to date or improved. Therefore, when a contract form is ready to use, it should not need overall review and revision.

*Contract use should be much easier and quicker, as the district\division will just have to "fill in the blanks".* A division/unit should have to do little more than fill in certain blanks with the variable terms you are already aware of, to complete a CCO contract form for reuse.

*Repeat use of an approved CCO contract form will be much quicker and easier, with no more last minute rejections by CCO.* This will improve the contracting timetable and relations with the parties MoDOT is contracting with.

Of course, the contract drafting and review procedures that this manual describes will aid CCO attorneys also. The CCO attorney will:

*Only have to do major, comprehensive contract drafting once, initially.* This will allow CCO attorneys to devote extra time, if needed, to help draft the contract well in the first instance. Later reuses of the contract will take much less of our time, so CCO can concentrate on other MHTC and MoDOT work.

*Have less difficulty revising and updating the approved CCO contract forms.* Since the forms will be in CCO computer memory banks, there will be direct access to them for revising and updating as laws, citations and boilerplate terms change.

*Have a good basic contract, requiring only limited revisions or modifications in the future.* Since MoDOT, CCO attorneys and engineers will have the basic contract form approved for general use, the CCO will only need to make limited revisions or one-time modifications to the contract when it is used later.

*Have good controls on the contract product, so that the CCO attorney will know the form is generally correct and will require little review.* As CCO attorneys review the contract forms, the attorneys will not have to spend time reviewing terms that are unchanged. Instead, the attorneys can review much more quickly those terms which the district\division has added by filling in the blanks, or by a one-time modification or a proposed revision.

*Be able to complete CCO review and approval of the contract form in minutes, not hours or days.* This will help the attorney meet the division's/unit's timetables for contract drafting and execution, if the attorney knows that only certain specific changes or completions have been made in the contract, and the rest of the contract is unchanged from its prior approval.

This process should result in a "win-win" situation for CCO attorneys and MoDOT staff alike. CCO believes that these goals can be met to help everyone in the contract drafting and review process.

Comments, both favorable and unfavorable, are encouraged and should be forwarded to the Assistant Chief Counsel-Project Development, (573) 751-7454.

## (2) **Types of Contracts:**

- (A) **Emergency Contracts:** From time to time, situations may arise in which regular contract procedures cannot be followed. These situations are limited to emergency situations in which the need to provide repairs to a damaged highway in order to prevent injuries to drivers or to protect the integrity of the structure of the highway itself overrides the need to meticulously comply with internal procurement procedures.

The first question that needs to be answered is whether there really is an emergency. Emergencies can include, but are not limited to, floods, tornadoes, storms, earthquakes, terrorist attacks, or significant collisions between a vehicle and a portion of the roadway. It is very important to stress that political and practical expediency does not constitute an emergency. Some state and federal agencies require that the president or governor declare a state of emergency before emergency contracting can be followed. Although there is no such requirement for MHTC and the state highway system, some sort of finding of genuine emergency by senior MoDOT management should be made. As such, the emergency that requires a contract should be approved by the Director, Chief Engineer, Chief Financial Officer, Director of System Management, Director of Program Delivery, or District Engineer, in writing before a contract is entered into. This written approval should identify the nature of the emergency and state the expected duration of the emergency situation.

In emergency circumstances, it is very important for the division/district requesting the contract to comply with any applicable internal MHTC/MoDOT and FHWA procedures for procuring emergency contracts. Failure to comply with these procedures could result in the inability to obtain federal funds for reimbursement. This process includes complying with Design Division policies and obtaining MoDOT management determination that a bona fide emergency exists. When an emergency arises, the division/district should provide written documentation to the file to: (1) sufficiently establish that a bona fide emergency exists; (2) show that MoDOT obtained as much open competition as circumstances would allow and the reasons for curtailing full and open competition; (3) explain the basis for the selection of the successful contractor; and (4) explain the steps taken to obtain competitive bids. Documenting the file will be the most critical factor in determining after the fact whether a bona fide emergency exists. During an emergency, events move quickly and once the emergency ends, details of why certain decisions were made are easily forgotten. The better the documentation in the file, the more likely that once the emergency passes, the situation will be affirmed as a genuine emergency and MoDOT obtains federal reimbursement.

Even if an emergency exists, it is very strongly encouraged that contracts should be competitively bid as much as possible under the circumstances. The level of competition must be determined by the seriousness of the emergency; some severe emergencies may justify no competition with contracts awarded as needed. However, it is important to note that even in the midst of the Great Flood of 1993,

MoDOT still followed some level of competitive bidding; even if only two telephone bids can be secured and documented, some form of competitive bidding is very strongly encouraged. In addition, the use of faxed Request For Proposal forms to several contractors with reduced notice and time to respond can encourage some form of competitive bidding. Specific problems to guard against include: (1) no record of what work was ordered or from whom; (2) same work awarded to multiple contractors; (3) no requirement that contractor reconstruct its actual costs; (4) unclear work orders; (5) contracting without MHTC authority; (6) sole source contracting when limited or open competition was possible; and (7) inflated costs.

Emergency contracts must be reviewed and approved by CCO and must be in approved format, see Exhibit 7. CCO will give emergency contracts immediate priority in order to meet any applicable deadlines for the needed goods or services and will review emergency contracts on an expedited basis. CCO has prepared emergency contracts for bridge and roadway repair (CCO forms DE40, DE41, and DE42) that are updated periodically and are ready to go in the event an emergency should arise. Forms GS9 and HR5 may be used for non-highway construction services (such as tree removal, towing services, and similar types of services). All forms mentioned in this paragraph are available for use in the contract section of the CCO intranet web site.

Items or services purchased under emergency contracting procedures must have a reasonable connection to the alleged emergency. In the absence of a rational nexus between the contracted goods or services and the emergency, significant internal and external scrutiny should be anticipated.

- (B) **Request for Proposals:** Although, Requests for Proposals (RFPs) are technically not contracts, they are a part of the contracting process and serve an important legal function. If prepared properly, a RFP can protect the Commission and assist in preventing bid disputes. If prepared poorly, a RFP can lead to disputes, misunderstandings and, perhaps, litigation. For purposes of contracts and contract approval, a RFP or any similar document acting as a RFP (a Request for Quotation, for example) will be treated as a one-time use contract, as defined, below. A RFP should be submitted to CCO for review of technical and legal accuracy and approval as to form before they are distributed to potential contractors or published in a periodical or newspaper. CCO has boilerplate RFP forms that can be modified to cover most situations; the common boilerplate RFP form is CCO10.

Another important aspect of the RFP process is evaluating the responses from bidders. In order to ensure consistency and establish a defensible selection, the RFP evaluation team should use a bid tally sheet. The bid tally sheet lists the evaluation criteria and their relative weight. CCO can assist in the preparation of an appropriate tally sheet.

- (C) **One-Time Use Contracts:** A one-time use contract is one that is drafted for a particular purpose and used only for that one occasion. A contract that falls



within this category is not to be included on the standardized list of contracts used in the division/unit. All technical requirements will, however, apply to one-time contracts. This determination should be made by the division/unit with concurrence by the appropriate CCO attorney. A one-time use contract should not be used on subsequent occasions unless specifically reviewed and approved by CCO prior to execution by the other party.

**(D) Standardized Multi-Use Contracts:** A contract that will be used frequently or on more than one occasion must be drafted, modified or revised to comply with CCO format. In determining the appropriate changes, the drafter should determine if this contract is a new CCO contract form, a previously approved CCO contract form, a contract that needs only to be revised, or a contract that needs to be modified. These terms are defined as follows:

1. **New CCO Contract Form:** A new CCO contract form is a contract which is drafted using the CCO contract format, and upon completion, will be approved by a CCO attorney for subsequent use on a routine basis.
2. **Approved CCO Contract Form:** A CCO contract form that has the designation "Approved" is a standard form contract that has been reviewed and approved by CCO.
3. **Revised CCO Contract Form:** A CCO contract form that has the designation "Revised" is a standard form contract that has been updated by CCO on its bi-annual review, or as necessary.
4. **Modified CCO Contract Form:** A CCO contract form that has the designation "Modified" is a standard form contract that has been changed for a particular purpose or situation. For example, a clause may need to be completely removed or replaced with a clause that is appropriate for the agreement's purpose. *A modified contract should not be considered a standard form and should not be used more than once without specific CCO approval.*

Once a determination has been made as to whether a previously approved contract form exists, and which form should be used in a particular situation, the drafter needs to comply with the appropriate drafting or revision requirements. A sample contract drafted in compliance with the approved CCO contract format is illustrated in the following pages.

**(E) Memorandum of Understanding:** A memorandum of understanding (MOU) is often an informal statement, or even a letter, between two or more parties in which the parties assign certain responsibilities. Although a MOU is less formal than a contract, it will likely be treated as one by a court of law and enforced as such if that is the intent of the parties. Therefore, in order to ensure that MHTC interests are protected, all MOUs should be reviewed and approved as to form by the Chief Counsel's Office. Generally, a MOU should be in approved CCO format, but some format requirements may be waived by counsel upon review of

the MOU.

- (F) **Supplemental and Amended Agreements:** Frequently, circumstances change after the execution of an agreement that result in the desirability of amending or supplementing the agreement. For instance, the scope of work can change once the work has begun on a project and a supplemental agreement can expand (or reduce) the scope of work. In addition, if after the work begins on a project, the parties discover that a portion of the contract is factually incorrect, the parties may execute an amendment to the original agreement. Whatever the instance, CCO has sample supplemental agreement forms and amendment forms. Supplemental agreements and amendments should be sequentially numbered (i.e. First Supplemental Agreement, Second Supplemental Agreement, etc.). It is important to note that the original agreement does not need to be repeated in its entirety in the supplemental or amended agreement; only the provisions that are changed need to be addressed. Supplemental and amended agreements should contain a clause that states except as amended or altered by the supplemental/amended agreement, the terms of the original agreement remain in full force and effect and extend to the supplemental/amended agreement.
- (G) **Sole Source Contracts:** Occasionally circumstances arise where literally there is only one vendor that provides a certain product or service. In those instances, it would be impractical to competitively bid such a contract. MoDOT does not presently have rules governing sole source contracts. Lacking rules, MoDOT staff should follow the guidelines established for the State Office of Administration (OA) contained in 34.044 RSMo. Any determination that a product or service is only available through a sole source must be thoroughly documented.
- (H) **Office of Administration:** Although MHTC possesses independent purchasing authority for the construction and maintenance of the state highway system under Chapter 227 RSMo, a limited number of contracts must be entered into under OA's policies and practices. One such contract is data processing equipment. Section 37.110 RSMo mandates that OA will be responsible for approving the purchase any data processing equipment for all state agencies. Another type of mandatory OA purchase is printing services (as contained in 34.170 RSMo). In addition to instances where purchasing through OA is mandatory, there are additional instances where it may be desirable to purchase under an OA contract because OA, through bulk purchasing, has already obtained a good vendor at good prices and it would be convenient for MoDOT to purchase under that agreement. Sometimes OA will allow MHTC to purchase off of an existing contract with a vendor and other times OA may need to specifically approve a specific purchase. In either event, MoDOT should submit any proposed data processing agreement obtained through OA to CCO for review.
- (I) **Prison Industries Products:** Section 217.575 RSMo mandates that certain state purchases be made from the Department of Correction's Prison Industries. Prison Industries provides a number of services and notably provides office furniture. MoDOT also employs the services of prison work crews and Missouri Vocation

Enterprises for various roadside maintenance work and for reclamation of damaged traffic signs.

- (J) **Vending Services:** Section 8.705 RSMo provides blind vendors shall have a priority in providing vending services to all state property, including roadside rest areas. Vending services includes the sale of food, food products, beverages, confections, newspapers, books, periodicals, tobacco products and other articles or services dispensed automatically or manually prepared on or off the premises in accordance with applicable health laws. These facilities can include machines, cafeterias, snack bars, cart service, shelters, counters and other appropriate equipment.

**(3) Components of an Agreement and CCO Format:**

- (A) Technical Requirements of CCO Format:** CCO has established technical guidelines to be used when drafting, modifying and revising standardized contracts. Every contract that falls within this specialized category should be formatted to reflect these requirements. In order to determine what changes are appropriate and necessary in updating a particular contract, the drafter needs to evaluate whether the contract form will be used once or will be used on a repeat basis.
- (B) Exceptions to the Contract Format:** As with every rule, there are exceptions to CCO contract drafting and review procedures. Certain contracts which MHTC enters into do not have to be formatted, prepared and reviewed in accordance with the procedures set forth in this manual. These are:
1. **MHTC Highway and Building Construction Contracts:** CCO has prepared the basic shell form for all MHTC highway and other construction contracts in the proper contract format, as described in this text. However, a number of other documents (prevailing wage tables, federal contract provisions) are included in these contracts, as well as various job special provisions (**JSPs**) drafted especially for that contract. These construction contract terms and provisions and the completed contract form do not have to go through CCO contract review and approval process for one-time use contracts.
  2. **Change Orders:** These documents are an integral part of the construction contract process, and the general forms are reviewed periodically by CCO. It is not possible or productive to try to review change order forms each time they are used, because they are intended to provide for relatively quick and simple contract revisions. Therefore, it is not necessary for routine change orders to be prepared in or reviewed under the CCO contract format. However, non-routine change orders must be reviewed by CCO to ensure that if the parties intended the change order to be a release of a claim, that the appropriate release language is included. Non-routine change orders may include, but are not limited to, any type of change order that compromises a potential claim or contains release language.
  3. **Purchase Orders:** These types of contracts are intended for simple, standard MoDOT purchases, when the possibility of litigation over a purchase order form is remote, and the opportunity for review of each purchase order would be counterproductive or a waste of time. CCO does review the general purchase order form occasionally, but when it is used properly, there is no need to have the completed purchase order form reviewed for substance and format.
  4. **Contracts with Federal Agencies and National Transportation Organizations:** MHTC contracts with the Federal Highway

Administration (**FHWA**), Federal Transit Administration (**FTA**), Federal Aviation Administration (**FAA**), and other agencies of the U.S. Department of Transportation (**USDOT**) or other federal agencies, do not have to be put into CCO format, because the federal agencies normally control the form and the substance of these contracts. In addition, organizations which are national in scope, such as the American Association of State Highway and Transportation Officials (**AASHTO**), Transportation Research Board (**TRB**), etc., may be waived on occasion as factual circumstances may dictate for similar reasons.

5. **Aggregate Contracts:** CCO has prepared the basic shell form for all MHTC aggregate material contracts in the proper contract format, as described in this text. However, a number of other documents (prevailing wage tables, federal contract provisions) are included in these contracts, as well as various JSPs drafted especially for that contract. These contract terms and provisions and the completed contract form do not have to go through CCO contract review and approval process for one-time use contracts.
6. **Other Contracts:** Format requirements may be waived by Commission counsel in form agreements received from the contracting party where Commission counsel has determined that: (1) the format of the agreement cannot be negotiated, (2) counsel has reviewed all CCO boilerplate provisions and determines that any missing boilerplate clauses are not needed, and (3) the contract in question does not result in liability acceptance by the Commission or, if it does, that the Commission's liability acceptance procedures policy (see Exhibit 3 of this manual) has been complied with. Commission counsel will document these findings in the appropriate contract file.

All other contracts entered into by MoDOT division/unit or district staff should be drafted and reviewed in accord with the format and procedures described in this manual, unless CCO specifically exempts a contract from that drafting and review process.

- (C) **Cover Page for Recordable Documents:** State statutes require that documents that are to be recorded with the recorder of deeds must meet certain formatting standards. If the documents fail to meet these standards, a \$25 fee is required in order to file the document. For documents that are to be recorded, a cover letter, with a 3-inch margin, should be included as the very first page. A sample of a cover letter that meets state statutes appears on the next page. The words "Grantor" and "Grantee" can be changed if the document does not involve a grant. The full property description of the property to be conveyed should appear in an exhibit to the agreement.

**Space Above for Recorder's Use Only**  
**DOCUMENT COVER SHEET**

**TITLE OF DOCUMENT:** \_\_\_\_\_

**DATE OF DOCUMENT:** \_\_\_\_\_

**GRANTOR(S):** \_\_\_\_\_

**MAILING ADDRESS:** \_\_\_\_\_

**GRANTEE(S):** \_\_\_\_\_

**MAILING ADDRESS:** \_\_\_\_\_

**LEGAL DESCRIPTION:**      **See Exhibit A**

**REFERENCE BOOK AND**  
**PAGE:** \_\_\_\_\_

- (D) **Table of Contents:** Contracts that exceed 5 pages should have a table of contents, including a list of exhibits and list of acronyms, should appear on the first page of the contract. On the first page of plain white stationary, the contract header, title and table of contents should appear and the main body of the contract should then begin on the next page. The table of contents should substantially resemble the table of contents that appears as follows:

## **TABLE OF CONTENTS**

<b>IDENTIFICATION OF PARTIES</b> .....	(page #)
<b>RECITALS/WHEREAS CLAUSES</b> .....	
<b>CONSIDERATION</b> .....	
<b>(1) Purpose</b> .....	
<b>(2) Contractor Scope of Work</b> .....	
<b>(3) Fee Schedule</b> .....	
<b>(4) Commission Responsibilities</b> .....	
<b>(5) Indemnification</b> .....	
<b>(6) Venue</b> .....	
<b>(7) Assignment</b> .....	
<b>(8) Amendments</b> .....	
<b>EXECUTION, DATE AND SIGNATURE</b> .....	
<b>ACKNOWLEDGEMENT</b> .....	

## **LIST OF EXHIBITS**

**A:** Scope of Work

**B:** Price Page

## **LIST OF ACRONYMS**

<b>FAA</b>	Federal Aviation Administration
<b>OA</b>	Office of Administration

**(E) The Header, Title, and Body:**

1. **The Header:** One of the requirements of CCO format is the header contained in the upper left hand corner of the contract. Next to the term "CCO Form" is a number designated by CCO to identify a particular contract form. This number is usually the abbreviation of the division that the contract is being prepared for followed by the sequential number of the form. For instance, TR16 for the 16 contract of the Traffic Division or DE10, the tenth contract of the Design Division.

When the contract is "Approved", it will be noted in the heading with the appropriate month, year and initials of the CCO attorney who drafted or approved the contract. This designation should be made only after the contract has been approved by the appropriate MoDOT unit or division and the assigned CCO attorney and placed in final contract form.

A contract form that is "Revised", or updated, after originally conforming to CCO requirements will be designated as such in the appropriate header line with the month, year and the CCO attorney's initials who revised the contract.

If a contract form is "Modified", i.e. changed for a specific purpose and not used on a routine basis, it is noted in the appropriate header line with the month and year and the initials of the CCO attorney who made or approved the modifications. However, a "Modified" contract form may only be used for subsequent contracts upon approval of assigned counsel.

2. **The Title:** Each contract needs to be titled to accurately reflect the content of the contract. This should be capitalized and in bold print.
3. **First Paragraph:** The first paragraph needs to contain the appropriate parties and their short form designations referenced as (e.g. the Missouri Highways and Transportation Commission, hereinafter "Commission" and John Doe, Inc., hereinafter, "Contractor"). The contract should always refer to the "Commission" as the party contracting, and not "MoDOT" or the "Department". In addition, there should always be an "s" at the end of Highways whenever MHTC's full official name is referenced.
4. **WHEREAS Clauses:** The paragraphs entitled "Whereas" should be appropriately drafted by the division to explain the general facts and circumstances relating to the contract. These explanatory paragraphs are largely discretionary and do not need to appear in every contract. Whenever Whereas clauses are used, special care should be made to ensure that they accurately reflect the situation so that they are not subsequently used to interpret a contract in a way not intended by the Commission. See *State ex rel MHTC vs. Maryville Land Partnership*, 62 S.W.3d 485 (Mo. App. E.D. 2001) as an instance where information in a Whereas clause was used to interpret a contract in a manner contrary to



MHTC's intent.

5. **Consideration Clause:** Following the Whereas clauses, a consideration clause should be inserted. Consideration is a reference to old Common Law which required legal consideration by both parties before a contract could be binding. Although consideration is largely illusory today, a consideration clause should be included in order to ensure that the contract is binding.
  6. **Body of the Contract:** After the consideration clause, numbered paragraphs detailing the contract specifics should begin. The early clauses typically identify the primary responsibilities of the parties. Some contracts may start with a "Purpose" paragraph to help explain the purpose of the Agreement. Provisions that are considered standard (also known as "boilerplate") appear after the contract-specific paragraphs. The contract concludes with an execution page and, perhaps, an acknowledgment. The boilerplate, execution page, and acknowledgments are discussed later in this chapter.
  7. **Paragraph Numbering:** Each paragraph contained in the document should be titled and numbered in consecutive order. The title of the paragraph should accurately reflect the substance of the paragraph. If subsections are necessary under the main heading, they should be formatted as follows:
    - (1) PARAGRAPH NUMBERING SYSTEM:
      - (A) Subsection:
        1.
          - A.
            - (I)
              - (a)
                - I.
                  - a.
8. **Type Font, Size, and Line Spacing:** The type style font should be Arial and font size should be 12. Line spacing should be as appears in the sample contract in the subsequent pages. Deviations from the accepted CCO format will not be allowed unless otherwise agreed to by the division and the CCO attorney assigned to work on that contract.
- (F) **Sample Agreement:** A sample agreement as to how a typical agreement in CCO format will appear appears on the next page.

CCO Form: AC10  
Approved: 03/91 (KRR)  
Revised: 06/05 (BDG)  
Modified:

Sponsor \_\_\_\_\_

Project No. \_\_\_\_\_

Airport Name \_\_\_\_\_

**MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION  
(SAMPLE) STATE BLOCK GRANT AGREEMENT**

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## LIST OF EXHIBITS

**A:** Scope of Work

**B:** Price Page

## LIST OF ACRONYMS

<b>FAA</b>	Federal Aviation Administration
<b>AIP</b>	Airport Improvement Program
<b>USC</b>	United States Code
<b>CFR</b>	Code of Federal Regulations
<b>DBE</b>	Disadvantaged Business Enterprise
<b>FHWA</b>	Federal Highway Administration
<b>FICA</b>	Federal Insurance Contributions Act
<b>OMB</b>	Office of Management and Budget
<b>MoDOT</b>	Missouri Department of Transportation
<b>RSMo</b>	Revised Statutes of Missouri
<b>MUTCD</b>	Manual of Uniform Traffic Control Devices

THIS GRANT AGREEMENT is entered into by the Missouri Highways and Transportation Commission (hereinafter, "Commission") and \_\_\_\_\_ (hereinafter, "Sponsor"). Reference will also be made to the Federal Aviation Administration (hereinafter, "FAA") and the Federal Airport Improvement Program (hereinafter, "AIP").

WITNESSETH:

WHEREAS, Section 116 of the federal Airport Safety and Capacity Expansion Act of 1987 amended the previous act of 1982 by adding new section 534 entitled "State Block Grant Pilot Program": (49 U.S.C. App 2227); and

WHEREAS, the Commission has been selected by the FAA to administer state block grant federal funds under said program; and

WHEREAS, the Sponsor has applied to the Commission for a subgrant under said program; and

WHEREAS, the Commission has agreed to award said funds to the Sponsor with the understanding that such funds will be used for a project pursuant to this Agreement for the purposes generally described in Sponsor's grant application dated \_\_\_\_\_.

NOW, THEREFORE, in consideration of these mutual covenants, promises and representations, the parties agree as follows:

(1) PURPOSE: The purpose of this Agreement is to provide financial assistance to the Sponsor under the State Block Grant Pilot Program.

(2) AUTHORIZATION OF CONTRACTUAL AGREEMENT BETWEEN SPONSOR AND COMMISSION: In conjunction with Sponsor entering into this Agreement for the airport grant, the local governing body shall pass an ordinance or equivalent binding resolution of record authorizing the acceptance of the grant and all contractual conditions and covenants in association with it. The ordinance or resolution must also specify the authority of the local officials to execute this agreement.

***[At this point in the contract, the boilerplate provisions are inserted and followed by a signature page and, perhaps, an acknowledgment form]***

- (G) **"Boilerplate" Contract Clauses:** In addition to the technical requirements of formatting a contract, the drafter should understand that there are certain provisions entitled "boilerplate", which are necessary to complete the contract in accord with applicable law, and to avoid potential legal difficulties in contract construction and interpretation. Some boilerplate provisions are typically contained in every contract and boilerplate clauses are used only as needed. It is possible that all standard boilerplate provisions may not be necessary, or that certain provisions must be modified for the particular contract. This should be determined at the first available opportunity under the direction of the CCO attorney. After the table listing the current boilerplate provisions, below, the text of the boilerplate appears on the following pages. This list is constantly reexamined and revised, and will be updated by CCO regularly when changes or additions are necessary.

ACCEPTED WITHIN HIGHWAY SYSTEM  
ACCESS TO THE NEAREST LANE ONLY  
ADDITIONAL FUNDING  
AMENDMENTS  
ASSIGNMENT  
AUDIT OF RECORDS  
AUTHORITY TO EXECUTE  
BANKRUPTCY  
BOND  
BUY AMERICA  
CANCELLATION  
COMMINGLING OF FUNDS  
COMMISSION REPRESENTATIVE  
COMMISSION RIGHT OF WAY  
CONFIDENTIALITY  
CONSTRUCTION OF IMPROVEMENTS  
CONTINUING DURATION  
CONTRACT LANGUAGE  
CREDIT FOR DONATIONS OF FUNDS, MATERIALS OR SERVICES  
DBE REQUIREMENTS  
DIRECTLY ALLOCATED FEDERAL FUNDING  
DISADVANTAGED BUSINESS ENTERPRISES  
DISPUTES  
DURATION  
DURATION AND EXTENSION  
ENTIRE AGREEMENT  
EXECUTION IN COUNTERPARTS  
EXTENSION  
FHWA APPROVAL  
FINAL AUDIT  
FINANCIAL ADMINISTRATION  
FORCE MAJEURE  
ILLEGAL ALIENS  
INDEMNIFICATION  
INDEPENDENT CONTRACTOR  
INSPECTION  
INTERSTATE/DEFENSE HIGHWAY  
LACK OF WAIVER  
LAW OF MISSOURI TO GOVERN  
LIQUIDATED DAMAGES  
NO ADVERSE INFERENCE  
NO FIREARMS  
NO INTEREST  
NONCONFORMING LAND USES  
NON-EXCLUSIVE SERVICES AGREEMENT  
NONDISCRIMINATION ASSURANCE  
NONDISCRIMINATION COVENANT

NONSOLICITATION  
NON-LIABILITY OF COMMISSION PERSONNEL  
NOT A JOINT VENTURE  
NOTICE TO BIDDERS  
NOTICES  
OMB AUDIT  
ORIGINAL AGREEMENT  
[OTHER] PARTY REPRESENTATIVE  
OUTDOOR ADVERTISING  
PARTY ACKNOWLEDGMENT  
PERFORMANCE ON BUSINESS DAYS  
PERMITS  
PROTECTION AGAINST DAMAGE  
PROVISION OF LAW  
RELOCATION  
  
RESTRICTION ON LOBBYING  
REVERSION  
SECTION HEADINGS  
SELF RESPONSIBILITIES  
SEVERABILITY  
SIGNALS  
SOLE BENEFICIARY  
SOVEREIGN APPROPRIATION  
SOVEREIGN IMMUNITY  
SOVEREIGNTY  
SOURCE OF FUNDING  
STATE NONDISCRIMINATION CLAUSE  
STATE WAGE LAWS  
SUCCESSORS AND ASSIGNS  
SUPERSESSON  
SUSPENSION OR TERMINATION OF AGREEMENT  
TIME OF THE ESSENCE  
VENUE  
VOLUNTARY NATURE OF AGREEMENT  
WAGE LAWS  
WITHOLDING OF FUNDS  
WORK PRODUCT

(1) ACCEPTED WITHIN HIGHWAY SYSTEM: Effective upon execution of this Agreement, the Commission accepts the portion of the City street system described in this Agreement as part of the State Highway System for the purposes of this project. However, during the construction period contemplated in this Agreement:

(A) The Commission will assume no police or traffic control functions not obligatory upon Commission immediately prior to the execution of this Agreement, and

(B) The City shall perform or cause to be performed normal maintenance on the project site.

(2) ACCESS TO THE NEAREST LANE ONLY: The \_\_\_\_\_ hereby agrees that the access right conveyed by the Commission is to any adjacent outer roadway if and while it may be maintained by proper authority in front of said entrance located in the \_\_\_\_\_ Quarter (\_\_\_\_ ¼) of Section \_\_\_\_\_, Township \_\_\_\_\_ North, Range \_\_\_\_\_ West, and along said outer roadway to and from the nearest lane of the thruway. At all times when no outer roadway is being so maintained, the access right conveyed by the Commission is to the nearest lane of the thruway of Route \_\_\_\_\_.

(3) ADDITIONAL FUNDING: In the event the Commission obtains additional federal, state, local, private or other funds to construct the improvement being constructed pursuant to this Agreement that are not obligated at the time of execution of this Agreement, the \_\_\_\_\_ shall not receive an off-set for the deposited funds, a reduction in obligation, or a return of, a refund of, or a release of any funds deposited by the \_\_\_\_\_ with the Commission pursuant to this Agreement. Any claim for an off-set, refund, release, reduction, or return shall constitute a breach of this Agreement by the \_\_\_\_\_ and the Commission, in its sole discretion may cancel this Agreement and remove any portion of the constructed improvement from the Commission's right-of-way at the \_\_\_\_\_'s expense.

(4) AMENDMENTS: Any change in this Agreement, whether by modification or supplementation, must be accomplished by a formal contract amendment signed and approved by the duly authorized representative of the \_\_\_\_\_ and the Commission.

(5) ASSIGNMENT: The \_\_\_\_\_ shall not assign, transfer or delegate any interest in this Agreement without the prior written consent of the Commission.

(6) AUDIT OF RECORDS: The \_\_\_\_\_ must maintain all records relating to this Agreement, including but not limited to invoices, payrolls, etc. These records must be available at all reasonable times at no charge to the Commission and/or its designees or representatives during the period of this Agreement and any extension thereof, and for three (3) years from the date of final payment made under this Agreement.

(7) AUTHORITY TO EXECUTE: The signers of this Agreement warrant that they are acting officially and properly on behalf of their respective institutions and have

been duly authorized, directed and empowered to execute this Agreement.

(8) BANKRUPTCY: Upon filing for any bankruptcy or insolvency proceeding by or against the \_\_\_\_\_, whether voluntarily, or upon the appointment of a receiver, trustee, or assignee, for the benefit of creditors, the Commission reserves the right and sole discretion to either cancel this Agreement or affirm this Agreement and hold the \_\_\_\_\_ responsible for damages.

(9) BOND: The \_\_\_\_\_ shall secure sufficient bond, as determined by the Commission's District Engineer or authorized representative, for the construction of the proposed improvement on Commission right-of-way.

(10) BUY AMERICA: The \_\_\_\_\_ agrees to abide by the provisions of the Buy America requirements of the 49 CFR Part 661.

(11) CANCELLATION: The Commission may cancel this Agreement at any time for a material breach of contractual obligations by providing the \_\_\_\_\_ with written notice of cancellation. Should the Commission exercise its right to cancel the contract for such reasons, cancellation will become effective upon the date specified in the notice of cancellation sent to the \_\_\_\_\_.

(12) COMMINGLING OF FUNDS: The \_\_\_\_\_ agrees that all funds deposited by the \_\_\_\_\_ pursuant to this Agreement with the Commission may be commingled by the Commission with other similar monies deposited from other sources. Any deposit may be invested at the discretion of the Commission in such investments allowed for other state funds. All interest income shall be payable to the fund and credited to the \_\_\_\_\_ on its pro rata share of the investment. If the amount deposited with the Commission shall be less than the actual obligation of the \_\_\_\_\_ for this project, the \_\_\_\_\_, upon written notification by the Commission, shall tender the necessary monies to the Commission. Upon completion of the project, any excess funds or interest credited to the \_\_\_\_\_ shall be refunded to the \_\_\_\_\_.

(13) COMMISSION REPRESENTATIVE: The Commission's \_\_\_\_\_ is designated as the Commission's representative for the purpose of administering the provisions of this Agreement. The Commission's representative may designate by written notice other persons having the authority to act on behalf of the Commission in furtherance of the performance of this Agreement.

(14) COMMISSION RIGHT OF WAY: All improvements made within the state-owned right-of-way shall become the Commission's property, and all future alterations, modifications, or maintenance thereof, will be the responsibility of the Commission.

(15) CONFIDENTIALITY: The \_\_\_\_\_ shall not disclose to third parties confidential factual matters provided by the Commission except as may be required by statute, ordinance, or order of court, or as authorized by the Commission. The \_\_\_\_\_ shall notify the Commission immediately of any request for such information.



(16) CONSTRUCTION OF IMPROVEMENTS: All construction of the proposed improvements shall be according to the latest editions of the Missouri Highways and Transportation Commission's *Standard Specifications for Highway Construction*, *Standard Plans for Highway Construction* and the Missouri Department of Transportation's *Approved Products List for Traffic Signals and Highway Lighting*.

(17) CONTINUING DURATION: The term of this Agreement will be of a continuing duration until terminated pursuant to the terms of this Agreement or by mutual consent of the parties.

(18) CONTRACT LANGUAGE: The language of this Agreement reflects negotiations between the Commission and \_\_\_\_\_, each of which have had the opportunity to modify the text. In the event of litigation or other dispute concerning the language of this Agreement, general rules construing ambiguities against the drafter shall not apply. It is agreed that more than one copy of this document may be executed and that the original filed with the Secretary to the Missouri Highways and Transportation Commission shall pursuant be deemed to be the controlling original.

(19) CREDIT FOR DONATIONS OF FUNDS, MATERIALS, OR SERVICES: A person may offer to donate funds, materials or services in connection with this project. Any donated funds, or the fair market value of any donated materials or services that are accepted and incorporated into this project shall be credited according to 23 USC Section 323.

(20) DBE REQUIREMENTS: The Commission will advise the \_\_\_\_\_ of any required goals for participation by disadvantaged business enterprises to be included in the \_\_\_\_\_ proposal for the work to be performed. The \_\_\_\_\_ shall submit for Commission approval a disadvantaged business enterprise goal or plan. The \_\_\_\_\_ shall comply with the plan or goal that is approved by the Commission and all requirements of 49 CFR Part 26 as amended.

(21) DIRECTLY ALLOCATED FEDERAL FUNDING: In the event the United States of America allocates direct Federal funding for any portion of the proposed project described in this Agreement separate from the formula funding allocated to the Commission by the United States of America, the parties agree that the specifically allocated Federal funding will be split equally between the Commission and \_\_\_\_\_ and applied toward each party's respective financial obligations under this Agreement. The provisions of this paragraph do not apply to any formula funds allocated by the United States of America to the Commission.

(22) DISADVANTAGED BUSINESS ENTERPRISES: The \_\_\_\_\_ agrees to prepare and submit for the Commission approval a disadvantaged business enterprise plan as defined in 49 CFR, part 26, if the \_\_\_\_\_ received a total of \$100,000 or more of financial planning assistance from the U.S. Department of Transportation, Federal Transit Administration or if the \_\_\_\_\_ is required to do so by 49 CFR 26.

(23) DISPUTES: Any disputes that arise under this Agreement shall be decided by the Commission or its representative.

(24) DURATION: Unless otherwise terminated, this Agreement shall be in effect for \_\_\_\_\_ (years) (months) (days) from the execution of this Agreement.

(25) DURATION AND EXTENSION: Unless otherwise terminated, this Agreement shall be in effect for \_\_\_\_\_ (years) (months) (days) from the execution of this Agreement. Upon the approval of both parties, the terms and conditions of this Agreement are renewable for an additional \_\_\_\_\_ (years) (months) (days) from the date of the expiration of the Agreement. Any extension shall be memorialized in an appropriate Supplemental Agreement and executed by the duly authorized representatives of the parties.

(26) ENTIRE AGREEMENT: This Agreement represents the entire understanding between the parties regarding this subject and supersedes all prior written or oral communications between the parties regarding this subject.

(27) EXECUTION IN COUNTERPARTS: This Agreement may be executed simultaneously in several counterparts, each of which shall be deemed to be an original and all of which shall constitute but one and the same agreement.

(28) EXTENSION: Upon the approval of both parties, the terms and conditions of this Agreement are renewable for an additional \_\_\_\_\_ (years) (months) (days) from the date of the expiration of the Agreement. Any extension shall be memorialized in an appropriate Supplemental Agreement and executed by the duly authorized representatives of the parties.

(29) FHWA APPROVAL: This Agreement is entered into subject to the approval of the Federal Highway Administration.

(30) FINAL AUDIT: The Commission may, in its sole discretion, perform a final audit of project costs. The Commission will reimburse the \_\_\_\_\_ any monies due from the appropriate program account. The \_\_\_\_\_ shall refund any overpayments as determined by the final audit.

(31) FINANCIAL ADMINISTRATION: There will be no exchange of funds between the parties under this Agreement. The Commission will fulfill its cost share obligation by means of employee services, and the purchase of supplies and/or services from others. The \_\_\_\_\_ will fulfill its cost share obligations by contributing labor and heavy equipment and materials.

(32) FORCE MAJEURE: This Agreement is subject to force majeure, and is contingent on strikes, accidents, acts of God, weather conditions, inability to secure labor, restrictions imposed by any government or governmental agency, or other delays beyond the control of the parties. If completion of the work within the contract time is prevented by any cause of force majeure, then this Agreement shall be void without penalty to either party for any such portion of the work not completed for such cause.

(33) ILLEGAL ALIENS: The Contractor shall comply with all the provisions of Executive Order 07-13, issued by the Honorable Matt Blunt, Governor of Missouri, on the sixth (6<sup>th</sup>) day of March, 2007. This Executive Order, which promulgates the State of Missouri's position to not tolerate persons who contract with the state engaging in or supporting illegal activities of employing individuals who are not eligible to work in the United States, is incorporated herein by reference and made a part of this Agreement.

(A) By signing this Agreement, the Contractor hereby certifies that any employee of the Contractor assigned to perform services under the contract is eligible and authorized to work in the United States in compliance with federal law."

(B) In the event the Contractor fails to comply with the provisions of the Executive Order 07-13, or in the event the Commission has reasonable cause to believe that the contractor has knowingly employed individuals who are not eligible to work in the United States in violation of federal law, the Commission reserves the right to impose such contract sanctions as it may determine to be appropriate, including but not limited to contract cancellation, termination or suspension in whole or in part or both.

(C) The Contractor shall include the provisions of paragraph \_\_\_\_ of this Agreement in every subcontract. The Contractor shall take such action with respect to any subcontract as the Commission may direct as a means of enforcing such provisions, including sanctions for noncompliance.

**NOTE: ALTERNATE 1**

(34) INDEMNIFICATION: The \_\_\_\_\_ shall defend, indemnify and hold harmless the Commission, including its members and department employees, from any claim or liability whether based on a claim for damages to real or personal property or to a person for any matter relating to or arising out of the \_\_\_\_\_'s performance of its obligations under this Agreement.

**NOTE: ALTERNATE 2 - Use for Local Government Entities**

(34) INDEMNIFICATION:

(A) To the extent allowed or imposed by law, the \_\_\_\_\_ shall defend, indemnify and hold harmless the Commission, including its members and department employees, from any claim or liability whether based on a claim for damages to real or personal property or to a person for any matter relating to or arising out of the \_\_\_\_\_'s wrongful or negligent performance of its obligations under this Agreement.

(B) The \_\_\_\_\_ will require any contractor procured by the \_\_\_\_\_ to work under this Agreement:

(1) To obtain a no cost permit from the Commission's district engineer prior to working on the Commission's right-of-way, which shall be signed by an

authorized contractor representative (a permit from the Commission's district engineer will not be required for work outside of the Commission's right-of-way); and

(2) To carry commercial general liability insurance and commercial automobile liability insurance from a company authorized to issue insurance in Missouri, and to name the Commission, and the Missouri Department of Transportation and its employees, as additional named insureds in amounts sufficient to cover the sovereign immunity limits for Missouri public entities (\$500,000 per claimant and \$3,000,000 per occurrence) as calculated by the Missouri Department of Insurance, Financial Institutions and Professional Registration, and published annually in the Missouri Register pursuant to Section 537.610, RSMo.

(C) In no event shall the language of this Agreement constitute or be construed as a waiver or limitation for either party's rights or defenses with regard to each party's applicable sovereign, governmental, or official immunities and protections as provided by federal and state constitution or law.

(35) INDEPENDENT CONTRACTOR: The \_\_\_\_\_ represents itself to be an independent contractor offering such services to the general public and shall not represent itself or its employees to be an employee of the Commission. Therefore, the \_\_\_\_\_ shall assume all legal and financial responsibility for taxes, FICA, employee fringe benefits, workers compensation, employee insurance, minimum wage requirements, overtime, etc., and agrees to indemnify, save, and hold the Commission, its officers, agents, and employees harmless from and against, any and all loss, cost (including attorney fees), and damage of any kind related to such matters. The \_\_\_\_\_ shall further understand that the Commission cannot save and hold harmless or indemnify the \_\_\_\_\_ and/or its employees against any liability incurred or arising as a result of any activity of the \_\_\_\_\_ or any activity of the \_\_\_\_\_'s employees performed in connection with this Agreement.

(36) INSPECTION: The \_\_\_\_\_ will allow inspection of the construction of the herein contemplated improvements by the Commission's District Engineer, or his authorized representative, at any time and shall take no attempts to prevent said inspection. Within thirty (30) days following notice by the \_\_\_\_\_ to the Commission that construction is complete, the Commission will inspect the work to determine that it is acceptable. The traffic signal will not be placed in operation until the Commission authorizes.

(37) INTERSTATE/DEFENSE HIGHWAY: It is expressly agreed and understood by the \_\_\_\_\_, that \_\_\_\_\_ is an Interstate and Defense Highway and that the work contemplated by this Agreement must comply with the Federal Highway Administration requirements governing Interstate and Defense Highways. The Commission will obtain the Federal Highway Administration's approval of the final plans and specifications prepared by the \_\_\_\_\_.

(38) LACK OF WAIVER: In no event shall payment of funds to the \_\_\_\_\_ by the Commission constitute or be construed as a waiver by the Commission of any breach of covenants, or any default which may exist on the part of

the \_\_\_\_\_ and the making of any such payment by the Commission while any such breach or default shall exist shall in no way impair or prejudice any right or remedy available to the Commission with the respect to such breach or default.

(39) LAW OF MISSOURI TO GOVERN: This Agreement shall be construed according to the laws of the State of Missouri. The \_\_\_\_\_ shall comply with all local, state and federal laws and regulations relating to the performance of this Agreement.

(40) LIQUIDATED DAMAGES: The parties agree that time is of the essence. The Commission is damaged by any delay in the performance of the terms of this Agreement and the \_\_\_\_\_ acknowledges that the Commission is damaged by any delay in the performance of the terms of this Agreement and liquidated damages in the amount of \_\_\_\_\_ dollars per day shall be assessed against the \_\_\_\_\_ for any delay in the performance of the terms and services required in this Agreement. The liquidated damages are due on the day the damage is assessed and shall be cumulative.

(41) NO ADVERSE INFERENCE: This Agreement shall not be construed more strongly against one party or the other. The parties to this Agreement had equal access to, input with respect to, and influence over the provisions of this Agreement. Accordingly, no rule of construction which requires that any allegedly ambiguous provision be interpreted more strongly against one party than the other shall be used in interpreting this Agreement.

(42) NO INTEREST: By contributing to the cost of this project or improvement, the \_\_\_\_\_ gains no property interest in the constructed project or improvement whatsoever. The Commission shall not be obligated to keep the constructed project or improvements in place if the Commission, in its sole discretion, determines removal or modification of the constructed project or improvements is in the best interests of the state highway system or the Commission.

(43) NO FIREARMS: The parties acknowledge that the Commission has a policy of prohibiting the presence of firearms on property owned or leased by the Commission and that the Commission may post signs or other notices on the property prohibiting the presence of firearms.

(44) NONCONFORMING LAND USES:

(A) Existing Nonconforming Land Uses: In the event the construction of the contemplated improvement as designed would result in the elimination of an existing nonconforming land use on a neighboring piece of property, the City agrees to grant such variances, permits, and exceptions to the neighboring property owners to allow the unabated continuance of any existing nonconforming land uses on the remaining property.

(B) Creation of New Nonconforming Use: In addition, in the event the construction of the contemplated improvement as designed would result in the creation of a nonconforming land use on neighboring property that had otherwise been a legal

conforming land use prior to taking by the Commission, the City agrees to grant such variances, permits, and exceptions to the neighboring property owners so as to allow the unabated continuance of any existing conforming land uses on the property prior to taking by the Commission after the taking of the property by the Commission.

(C) Continuance of Pre-Acquisition Activities: In the event physical limitations on the property itself limit the possibility of restoring the property to the condition prior to the Commission's acquisition of right of way, the City agrees to allow the property owner to continue the pre-acquisition land uses to the fullest extent possible.

***NOTE: USE THE FOLLOWING CLAUSE WHEN FEDERAL MONEY IS INVOLVED.***

(45) NONDISCRIMINATION ASSURANCE: With regard to work under this Agreement, the \_\_\_\_\_ agrees as follows:

(A) Civil Rights Statutes: The \_\_\_\_\_ shall comply with all state and federal statutes relating to nondiscrimination, including but not limited to Title VI and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d and 2000e, *et seq.*), as well as any applicable titles of the Americans with Disabilities Act. In addition, if the \_\_\_\_\_ is providing services or operating programs on behalf of the Department or the Commission, it shall comply with all applicable provisions of Title II of the Americans with Disabilities Act.

(B) Administrative Rules: The \_\_\_\_\_ shall comply with the administrative rules of the United States Department of Transportation relative to nondiscrimination in federally-assisted programs of the United States Department of Transportation (49 CFR Subtitle A, Part 21) which are herein incorporated by reference and made part of this Agreement.

(C) Nondiscrimination: The \_\_\_\_\_ shall not discriminate on grounds of the race, color, religion, creed, sex, disability, national origin, age or ancestry of any individual in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The \_\_\_\_\_ shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR 21.5, including employment practices.

(D) Solicitations for Subcontracts, Including Procurements of Material and Equipment: These assurances concerning nondiscrimination also apply to subcontractors and suppliers of the \_\_\_\_\_. These apply to all solicitations either by competitive bidding or negotiation made by the \_\_\_\_\_ for work to be performed under a subcontract including procurement of materials or equipment. Each potential subcontractor or supplier shall be notified by the \_\_\_\_\_ of the requirements of this Agreement relative to nondiscrimination on grounds of the race, color, religion, creed, sex, disability or national origin, age or ancestry of any individual.

(E) Information and Reports: The \_\_\_\_\_ shall provide all information and reports required by this Agreement, or orders and instructions issued pursuant

thereto, and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Commission or the United States Department of Transportation to be necessary to ascertain compliance with other contracts, orders and instructions. Where any information required of the \_\_\_\_\_ is in the exclusive possession of another who fails or refuses to furnish this information, the \_\_\_\_\_ shall so certify to the Commission or the United States Department of Transportation as appropriate and shall set forth what efforts it has made to obtain the information.

(F) Sanctions for Noncompliance: In the event the \_\_\_\_\_ fails to comply with the nondiscrimination provisions of this Agreement, the Commission shall impose such contract sanctions as it or the United States Department of Transportation may determine to be appropriate, including but not limited to:

1. Withholding of payments under this Agreement until the \_\_\_\_\_ complies; and/or
2. Cancellation, termination or suspension of this Agreement, in whole or in part, or both.

(G) Incorporation of Provisions: The \_\_\_\_\_ shall include the provisions of paragraph \_\_\_\_ of this Agreement in every subcontract, including procurements of materials and leases of equipment, unless exempted by the statutes, executive order, administrative rules or instructions issued by the Commission or the United States Department of Transportation. The \_\_\_\_\_ will take such action with respect to any subcontract or procurement as the Commission or the United States Department of Transportation may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided that in the event the \_\_\_\_\_ becomes involved or is threatened with litigation with a subcontractor or supplier as a result of such direction, the \_\_\_\_\_ may request the United States to enter into such litigation to protect the interests of the United States.

(46) NONDISCRIMINATION COVENANT: The \_\_\_\_\_ for themselves, their representatives, successors in interest, and assigns, as part of the consideration hereof, do hereby covenant and agree as a covenant running with the property that no person on the grounds of race, color, religion, creed, national origin, sex, or age shall be denied by them the benefits or otherwise be subjected to them, to discrimination in the use of the property.

(47) NON-EXCLUSIVE SERVICES AGREEMENT: The parties agree that no terms of the above-attached Agreement and any Attached Exhibits shall be deemed to create an exclusive services agreement and/or contract. The Commission retains the discretionary right to elect to bid or negotiate with other vendors or consultants for any project or services.

(48) NON-LIABILITY OF COMMISSION PERSONNEL: Neither the commissioners, nor any other officer, official, employee, or agent of the Commission or

Missouri Department of Transportation shall be *personally* responsible for any liability arising under or growing out of this Agreement.

(49) NONSOLICITATION: The \_\_\_\_\_ warrants that it has not employed or retained any company or person, other than a bona fide employee working for the \_\_\_\_\_, to solicit or secure this Agreement, and that it has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, the Commission shall have the right to annul this Agreement without liability, or in its discretion, to deduct from this Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.

(50) NOT A JOINT VENTURE: Nothing contained in this Agreement shall be deemed to constitute the Commission and \_\_\_\_\_ as partners in a partnership or joint venture for any purpose whatsoever.

(51) NOTICE TO BIDDERS: The \_\_\_\_\_ shall notify the prospective bidders that disadvantaged business enterprises shall be afforded full and affirmative opportunity to submit bids in response to the invitation and will not be discriminated against on grounds of race, color, sex, or national origin in consideration for an award.

(52) NOTICES: Any notice or other communication required or permitted to be given hereunder shall be in writing and shall be deemed given three (3) days after delivery by United States mail, regular mail postage prepaid, or upon receipt by personal or facsimile delivery, addressed as follows:

(A) To the \_\_\_\_\_:

\_\_\_\_\_  
\_\_\_\_\_

Facsimile No: \_\_\_\_\_

(B) To the Commission:

\_\_\_\_\_  
\_\_\_\_\_

Facsimile No: \_\_\_\_\_

or to such other place as the parties may designate in accordance with this Agreement. To be valid, facsimile delivery shall be followed by delivery of the original document, or a clear and legible copy thereof, within three (3) business days of the date of facsimile transmission of that document.

(53) OMB AUDIT: If the \_\_\_\_\_ receives five hundred thousand dollars (\$500,000) or more per year total of all federal financial assistance, it is required to have an independent annual audit done in accordance with OMB Circular A-133. A



copy of the audit report shall be submitted to the Missouri Department of Transportation (MoDOT) within thirty (30) days of the issuance of the report. Subject to the requirements of OMB Circular A-133, if the \_\_\_\_\_ obtains less than five hundred thousand dollars (\$500,000), the \_\_\_\_\_ may be exempt from auditing requirements, but records must be available for review by the applicable state and federal authorities.

***NOTE: TO BE USED IN FIRST SUPPLEMENTAL AGREEMENTS***

(54) ORIGINAL AGREEMENT: Except as otherwise modified, amended, or supplemented by this Supplemental Agreement, the Original Agreement between the parties shall remain in full force and effect and the unaltered terms of the Original Agreement shall extend and apply to this Supplemental Agreement.

***NOTE: TO BE USED IN SECOND AND SUBSEQUENT SUPPLEMENTAL AGREEMENTS***

(55) ORIGINAL AGREEMENT: Except as otherwise modified, amended, or supplemented by this Supplemental Agreement, the Original Agreement and all previous Supplemental Agreements between the parties shall remain in full force and effect and the unaltered terms of the Original Agreement shall extend and apply to this Supplemental Agreement.

(56) [OTHER PARTY] REPRESENTATIVE: The [other party's] \_\_\_\_\_ is designated as the [other party's] representative for the purpose of administering the provisions of this Agreement. The \_\_\_\_\_ representative may designate by written notice other persons having the authority to act on behalf of the \_\_\_\_\_ in furtherance of the performance of this Agreement.

(57) OUTDOOR ADVERTISING: The \_\_\_\_\_ further agrees that the right of way provided pursuant to this Agreement will be held and maintained inviolate for public highway or street purposes, and will enact and enforce any ordinances or regulations necessary to prohibit the presence of billboards or other advertising signs or devices and the vending or sale of merchandise on such right of way, and will remove or cause to be removed from such right of way any sign, private installation of any nature, or any privately owned object or thing which may interfere with the free flow of traffic or impair the full use and safety of the highway or street.

(58) PARTY ACKNOWLEDGMENT: The parties acknowledge that they rely solely upon their own judgment, with the advice and assistance of counsel, in making and entering into this Agreement, and completely understand and agree that this Agreement fully settles and discharges all of the aforementioned claims and damages whatsoever, without being considered an admission of liability or fault on the part of any of the parties.

(59) PERFORMANCE ON BUSINESS DAYS: If any date for the occurrence of an event or act under the Agreement falls on a Saturday or Sunday or legal holiday of the State of Missouri, then the time for the occurrence of such event or act shall be

extended to the next succeeding business day.

(60) PERMITS: The \_\_\_\_\_ shall secure any necessary approvals or permits from the Federal Government and the State of Missouri as required to permit the construction and maintenance of the contemplated improvements.

(61) PERMITS: Before beginning work, the \_\_\_\_\_ shall secure from the Commission's District Engineer a permit for the proposed improvement.

(62) PROTECTION AGAINST DAMAGE: The \_\_\_\_\_ will protect and defend the Premises against damage. The Missouri Highways and Transportation Commission will not be responsible for any damage to the \_\_\_\_\_'s property, the buildings, improvements, or the property of any invitee, guest, agent, employee, client or visitor from debris being thrown from or falling from the highway and highway facilities within the (Lease/Agreement) area.

(63) PROVISION OF LAW: Each and every provision of law required to be in this Agreement is incorporated herein as though set out verbatim in this Agreement.

(64) RELOCATION: The \_\_\_\_\_ shall secure the removal, relocation or adjustment of any public or private utilities located on private easements or public right-of way, if the construction of the herein contemplated improvements so required, without cost to the Commission.

(66) RESTRICTION ON LOBBYING: The \_\_\_\_\_ shall comply with the requirements of 31 U.S.C. Section 1352.

(67) REVERSION: The herein change in limited access between the property and the highway shall continue so as long as the Missouri Highways and Transportation Commission does not upgrade the present highway to an expressway or freeway. If the Missouri Highways and Transportation Commission makes the decision that the highway should be upgraded to expressway or freeway standards, then the herein access change will cease and any access between the property and the highway will revert back to the access status which existed immediately prior to the execution of this document. This condition is a covenant running with the land and will be binding upon all successors and assigns of the parties herein. Further, the reversion to the earlier access status will be without any compensation to the holder of the access rights. The reversion to the earlier access status will not affect any compensation to be paid for the acquisition of additional right of way. The decision to upgrade the highway to expressway or freeway standards is in the sole discretion of the Missouri Highways and Transportation Commission.

(68) SECTION HEADINGS: All section headings contained in this Agreement are for the convenience of reference only and are not intended to define or limit the scope of any provision of this Agreement.

(69) SELF RESPONSIBILITIES: Each party will be responsible for its own acts and the results arising from those actions and shall not be responsible for the acts of the

other party and results arising from those actions. Each party agrees, to the extent allowed by law, that it will assume all risk and liability to itself, its agents or employees for any injury to persons or property resulting from any operations or conduct of its agents or employees under this Agreement, and for any loss, cost, damage or expense resulting at any time from any and all causes due to any acts or omissions, of negligence, or failure to exercise proper precautions, of or by itself or its own agents or own employees, while performing its obligations under this Agreement. Each party's liabilities shall be governed by applicable state law.

(70) SEVERABILITY: If any clause or provision of this Agreement is found to be void or unenforceable by a court or agency of proper jurisdiction, then the remaining provisions not void or unenforceable shall remain in full force and effect.

(71) SIGNALS: All pavement marking, signs, and traffic signals installed with the proposed improvements shall be in accordance with the latest revision of the *Manual on Uniform Traffic Control Devices for Streets and Highways*.

(72) SOLE BENEFICIARY: This Agreement is made for the sole benefit of the parties hereto and nothing in this Agreement shall be construed to give any rights or benefits to anyone other than the Commission and the \_\_\_\_\_.

**NOTE:** *USE THE FOLLOWING PROVISION ONLY IF SPECIAL FUNDING IS UTILIZED TO IMPROVE A ROADWAY THAT IS NOT PART OF THE STATE HIGHWAY SYSTEM.*

(73) SOURCE OF FUNDING: All parties recognize that Route \_\_\_\_\_ is not included within the system of state highways. Because the Missouri Constitution, Article IV, Section 7, does not provide for the use of state road funds to improve roadways that are not included within the state highway system, the improvements contemplated herein will be funded by \_\_\_\_\_.

**NOTE:** *USE THE FOLLOWING TWO CLAUSES IN AGREEMENTS WITH OTHER STATES*

(74) SOVEREIGN APPROPRIATION: \_\_\_\_\_'s obligations under this Agreement shall cease immediately, without penalty of further payment being required, in any year for which the Legislature of the state of \_\_\_\_\_ or federal funding source for the subject of this Agreement fails to make an appropriation or re-appropriation to pay such obligations, and \_\_\_\_\_'s obligations under this Agreement shall cease immediately without penalty of further payment being required at any time where there are not sufficient authorized funds lawfully available to \_\_\_\_\_ to meet such obligations. \_\_\_\_\_ shall give \_\_\_\_\_ notice of such termination of funding as soon as practicable after \_\_\_\_\_ becomes aware of the failure of funding. In the event \_\_\_\_\_ provides such notice, \_\_\_\_\_ may terminate this Agreement or any part of this Agreement.

(75) SOVEREIGN IMMUNITY AND NO THIRD PARTY BENEFICIARIES: Nothing herein shall be construed as consent by the State of Missouri to suit in the

courts of the State of \_\_\_\_\_ or a waiver of its sovereign immunity or rights under the Eleventh Article of Amendment to the Constitution of the United States. Nothing herein shall be construed as consent by the State of \_\_\_\_\_ to suit in courts of the State of Missouri or a waiver of its sovereign immunity or rights under the Eleventh Article of Amendment to the Constitution of the United States. Nothing in this Agreement shall be deemed to create or give rise to any right of action in, or any liability to, or any third party claiming to have suffered a loss, damage or injury by virtue of any alleged failure by either party to comply with the terms of this Agreement. This Agreement does not grant any rights to any party except \_\_\_\_\_ and Missouri.

(76) SOVEREIGNTY: Missouri and \_\_\_\_\_ enter into this Agreement as sovereign states and not as principal and agent or as a joint venture.

***NOTE: USE THE FOLLOWING CLAUSE WHEN ONLY STATE MONEY IS INVOLVED.***

(77) STATE NONDISCRIMINATION CLAUSE: The \_\_\_\_\_ shall comply with all state and federal statutes applicable to \_\_\_\_\_ relating to nondiscrimination, including, but not limited to, Chapter 213, RSMo; Title VI and Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. Sections 2000d and 2000e, *et seq.*); and with any provision of the "Americans with Disabilities Act" (42 U.S.C. Section 12101, *et seq.*).

***NOTE: USE THE FOLLOWING CLAUSE ONLY FOR A STATE-FINANCED PUBLIC WORKS PROJECT***

(78) STATE WAGE LAWS: The \_\_\_\_\_ and its subcontractors shall pay the prevailing hourly rate of wages for each craft or type of worker required to execute this project work as determined by the Department of Labor and Industrial Relations of Missouri, and they shall further comply in every respect with the minimum wage laws of Missouri. The \_\_\_\_\_ shall take those acts which may be required to fully inform itself of the terms of, and to comply with, any applicable state wage laws.

(79) SUCCESSORS AND ASSIGNS: The provisions of this Agreement shall apply to and be binding upon the parties executing this Agreement, their successors, assigns, agents, subsidiaries, affiliates, and lessees, including officers, employees, agents, servants, corporations, and any persons acting under, through, or for the parties agreeing hereto.

(80) SUPERSESSON: This Agreement supersedes the \_\_\_\_\_ Agreement dated \_\_\_\_\_, between the \_\_\_\_\_ and Commission. The \_\_\_\_\_ Agreement dated \_\_\_\_\_, between the \_\_\_\_\_ and Commission shall terminate upon execution of this Agreement.

(81) SUSPENSION OR TERMINATION OF AGREEMENT: The Commission may, without being in breach hereof, suspend or terminate the \_\_\_\_\_'s services under this Agreement, or any part of them, for cause, without cause and/or for the convenience of the Commission. \_\_\_\_\_ shall, in that event, be entitled to compensation earned and expenses incurred to that date, not to exceed the amount set forth herein.

(82) TIME OF THE ESSENCE: Time is of the essence with respect to each and every provision of this Agreement.

(83) TRAFFIC CONTROL: The plans for the improvements or project contemplated by this Agreement shall provide for handling traffic with signs, signal and marking in accordance with the Manual of Uniform Traffic Control Devices (MUTCD).

**NOTE: ALTERNATE 1**

(84) VENUE: It is agreed by the parties that any action at law, suit in equity, or other judicial proceeding to enforce or construe this Agreement, or regarding its alleged breach, shall be instituted only in the Circuit Court of Cole County, Missouri.

**NOTE: ALTERNATE 2**

(84) VENUE: No action may be brought by either party concerning any matter, thing or dispute arising out of or relating to the terms, performance, nonperformance or otherwise of this Agreement except in the Circuit Court of Cole County, Missouri. The parties agree that this contract is entered into at Jefferson City, Missouri, and substantial elements of its performance will take place or be delivered at Jefferson City, Missouri, by reason of which the \_\_\_\_\_ consents to venue of any action against it in Cole County, Missouri. The \_\_\_\_\_ shall cause this provision to be incorporated in all of its Agreements with, and to be binding upon, all subcontractors of the \_\_\_\_\_.

(85) VOLUNTARY NATURE OF AGREEMENT: Each party to this Agreement warrants and certifies that it enters into this transaction and executes this Agreement freely and voluntarily and without being in a state of duress or under threats or coercion.

**NOTE: USE THE FOLLOWING CLAUSE ONLY FOR A JOINT FEDERAL-STATE FINANCED PUBLIC WORKS PROJECT.**

(86) WAGE LAWS: The \_\_\_\_\_ and its subcontractors shall pay the prevailing hourly rate of wages for each craft or type of worker required to execute this project work as determined by the Department of Labor and Industrial Relations of Missouri, and they shall further comply in every respect with the minimum wage laws of Missouri and the United States. Federal wage rates under the Davis-Bacon or other federal acts apply to and govern this Agreement also for such work which is performed at the jobsite, in accord with 29 CFR Part 5. Thus, this Agreement is subject to the "Contract Work Hours and Safety Standards Act", as amended (40 U.S.C. Sections 327, *et seq.*), and its implementing regulations. The \_\_\_\_\_ shall take the acts which may be required to fully inform itself of the terms of, and to comply with, state and federal laws.

(87) WITHHOLDING OF FUNDS: In the event that the City fails, neglects, or refuses to enact, keep in force or enforce ordinances specified or enacts ordinances contrary to the provisions in this Agreement, or in any other manner fails, neglects or refuses to perform any of the obligations assumed by it under this Agreement, the

Commission may, after serving written request upon the City for compliance and the City's failure to comply, withhold the expenditure of further funds for maintenance, improvement, construction, or reconstruction of the state highway system in the City.

(88) WORK PRODUCT: All documents, reports, exhibits, etc. produced by the \_\_\_\_\_ at the direction of the Commission and information supplied by the Commission shall remain the property of the Commission.

*(Remainder of Page Intentionally Left Blank)*

- (H) **Execution Page and Acknowledgements:** As shown on the next, there are two blocks of execution lines, one for the Commission and the second for the other contracting party. When preparing the contract, the drafter should align the margins so that all 3 of the signatures of the Commission's representatives (Department signer, Commission Secretary, and CCO) appear on the same page. It is possible that if the attestation by the Commission Secretary is not on the same page as the executor, the attestation may be invalid. If ensuring all 3 signatures are on one page creates a large bottom margin on the page preceding the execution page, the drafter should insert the following language after the last substantive paragraph: *Remainder of Page Intentionally Left Blank*, as was done on the previous page of this manual.

Contracts should be executed by the other party first, and then sent to the CCO for completion of the "Approval as to form" blank and for execution by the designated representatives of the Commission. In rare instances, primarily when dealing with Federal agencies, the Commission may sign the contract first. In such instances, counsel must give approval to the Commission executing the agreement first and the Department must forward a fully executed original contract to the Commission Secretary after the other party executes the agreement.

The drafter should check the Commission's *Execution of Documents Policy* (a copy of which is included as Exhibit 2 of this manual) or consult with the CCO attorney to determine if the Secretary to the Commission must attest the contract. If not, or if no approval as to form is required, the unnecessary section or sections may be deleted from the Commission's execution block. Likewise, the other contracting party may not need the provisions for attestation or approval as to form in each instance.

It should be noted and personnel should be warned that if personnel execute contracts that they have not specifically been granted authority to sign in the *Execution of Documents Policy* [Exhibit 2], the agreement may not be enforceable [see *Miller v. MoDOT*, 32 S.W.3d 170 (Mo. App. W.D. 2000), in which the Western District Court of Appeals invalidated a property sale because MoDOT staff did not comply with MHTC execution of documents policy] and could result in that employee being personally liable for damages.

In addition, the contract execution may be acknowledged by a notary public. Acknowledgment forms should be included in all property transactions, documents that will be filed in the County Recorder of Deeds office, controversial matters, and contracts as directed by counsel. CCO keeps electronic copies of acknowledgment forms on the CCO intranet site in the Contract section under the Acknowledgment file. CCO's current listing of acknowledgment forms includes acknowledgments for cities, the Commission, corporations, counties, individuals, LLCs, LLPs, partnerships, school districts, trusts, and universities. Copies of the current CCO acknowledgment forms are included in the subsequent pages. Custom acknowledgments forms can be made using any of these forms as a base and, if need, be additional standard acknowledgment forms can be created and added to CCO's listing.

**SAMPLE EXECUTION LINES**

IN WITNESS WHEREOF, the parties have entered into this Agreement on the date last written below.

Executed by the \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Executed by the Commission this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

MISSOURI HIGHWAYS AND  
TRANSPORTATION COMMISSION

\_\_\_\_\_

Title \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Secretary to the Commission

Approved as to Form:

\_\_\_\_\_  
Commission Counsel

\_\_\_\_\_

By \_\_\_\_\_

Title \_\_\_\_\_

ATTEST:

By \_\_\_\_\_

Title \_\_\_\_\_

Approved as to Form:

\_\_\_\_\_

Title \_\_\_\_\_

**[If needed to authorize a city official  
to execute the agreement.]**

Ordinance No. \_\_\_\_\_



**(1) ACKNOWLEDGMENT BY CITY**

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ )      ss

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me appeared \_\_\_\_\_ personally known to me, who being by me duly sworn, did say that he/she is the (title) of the City of \_\_\_\_\_ and that the foregoing instrument was signed and sealed on behalf of the City of \_\_\_\_\_ and that he/she acknowledged said instrument to be the free act and deed of the City of \_\_\_\_\_ and that it was executed for the consideration stated therein and no other.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

**(2) ACKNOWLEDGMENT BY COMMISSION**

STATE OF MISSOURI                    )  
  )       ss  
COUNTY OF COLE                    )

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me appeared \_\_\_\_\_ personally known to me, who being by me duly sworn, did say that he/she is the \_\_\_\_\_ (title) \_\_\_\_\_ of the Missouri Highways and Transportation Commission and the seal affixed to the foregoing instrument is the official seal of said Commission and that said instrument was signed in behalf of said Commission by authority of the Missouri Highways and Transportation Commission and said \_\_\_\_\_ acknowledged said instrument to be the free act and deed of said Commission.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

**(3) ACKNOWLEDGMENT BY CORPORATION**

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ ) ss

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me appeared \_\_\_\_\_ personally known to me, who being by me duly sworn, did say that he/she is the \_\_\_\_\_ (title) of \_\_\_\_\_ (corporation name) \_\_\_\_\_ and that the foregoing instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and that he/she acknowledged said instrument to be the free act and deed of said corporation and that it was executed for the consideration stated therein and no other.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

**(4) ACKNOWLEDGMENT BY COUNTY**

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ ) ss

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me appeared \_\_\_\_\_ personally known to me, who being by me duly sworn, did say that he/she is the \_\_\_\_ (title) \_\_\_\_ of the County of \_\_\_\_\_ and that the foregoing instrument was signed and sealed on behalf of the County of \_\_\_\_\_ and that he/she acknowledged said instrument to be the free act and deed of the County of \_\_\_\_\_ and that it was executed for the consideration stated therein and no other.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

**(5) ACKNOWLEDGMENT BY INDIVIDUAL**

STATE OF \_\_\_\_\_ )  
 ) ss  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me appeared \_\_\_\_\_, personally known to me to be the person who executed the foregoing instrument and acknowledged to me that he/she executed the same as his/her free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

**(6) ACKNOWLEDGMENT BY LIMITED LIABILITY COMPANY**

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ ) ss

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me appeared \_\_\_\_\_ personally known to me, who being by me duly sworn, did say that he/she is a member of the \_\_\_\_ (llc name) \_\_\_\_\_ with authority to bind said limited liability company and that the foregoing instrument was signed and sealed on behalf of said limited liability company by authority of its membership, and that he/she acknowledged said instrument to be the free act and deed of said limited liability company and that it was executed for the consideration stated therein and no other.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

**(7) ACKNOWLEDGMENT BY LIMITED LIABILITY PARTNERSHIP**

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ ) ss

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me appeared \_\_\_\_\_ personally known to me, who being by me duly sworn, did say that he/she is a general partner of the \_\_\_\_\_ (llp name) \_\_\_\_\_ with authority to bind said limited liability partnership and that the foregoing instrument was signed and sealed on behalf of said limited liability partnership by authority of the limited liability partnership, and that he/she acknowledged said instrument to be the free act and deed of said limited liability partnership and that it was executed for the consideration stated therein and no other.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

**(8) ACKNOWLEDGMENT BY PARTNERSHIP**

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ ) ss

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me appeared \_\_\_\_\_ personally known to me, who being by me duly sworn, did say that he/she is a general partner of \_\_\_\_\_ (partnership name) and that the foregoing instrument was signed and sealed on behalf of said partnership by authority of the partners, and that he/she acknowledged said instrument to be the free act and deed of said partnership and that it was executed for the consideration stated therein and no other.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_



**(9) ACKNOWLEDGMENT BY SCHOOL DISTRICT**

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ ) ss

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me appeared \_\_\_\_\_ personally known to me, who being by me duly sworn, did say that he/she is the \_\_\_\_ (title) \_\_\_\_ of the \_\_\_\_\_ School District and that the foregoing instrument was signed and sealed on behalf of the \_\_\_\_\_ School District by authority of its School Board and that he/she acknowledged said instrument to be the free act and deed of the \_\_\_\_\_ School District and that it was executed for the consideration stated therein and no other.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

(10) ACKNOWLEDGMENT BY TRUST

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ ) ss

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me appeared \_\_\_\_\_ personally known to me, who being by me duly sworn, did say that he/she is the Trustee of \_\_\_\_\_ (trust name) and that the foregoing instrument was signed and sealed on behalf of said trust by authority of its Declaration of Trust, and that he/she acknowledged said instrument to be the free act and deed of said trust and that it was executed for the consideration stated therein and no other.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

## **(11) ACKNOWLEDGMENT BY UNIVERSITY**

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ ) SS

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me appeared \_\_\_\_\_ personally known to me, who being by me duly sworn, did say that he/she is the \_\_\_\_\_ (title) of \_\_\_\_\_ (university name) \_\_\_\_\_ and that the foregoing instrument was signed and sealed on behalf of said university by authority of its \_\_\_\_\_ (name of governing body) \_\_\_\_\_, and that he/she acknowledged said instrument to be the free act and deed of said university and that it was executed for the consideration stated therein and no other.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the county and state aforesaid the day and year written above.

Notary Public

My Commission Expires: \_\_\_\_\_

- (I) **Ordinance Requirement and Model Ordinance:** Generally, cities and other municipalities have broad powers under Missouri law. Subject to a few limitations, such broad power includes the authority to enter into binding contracts. However, the assent of the municipality's governing body, usually a city council, to entering a contract is required. Without some type of manifestation of the city's desire to enter into the contract, the contract is ultra vires and may not be enforceable against the city. Generally, no type of ordinance is needed when contracting with a county. However, some counties of the first class with charter forms of government (such as St. Charles, St. Louis, and Jefferson Counties) pass ordinances for each contract.

Evidence of the city council's assent is reflected in an ordinance. Some larger cities have standing ordinances or bylaws that designate a certain individual to sign certain types of agreements on behalf of the city. Other cities pass an ordinance approving contracts on an individual basis. In some instances, some smaller municipalities request assistance from MHTC in preparing an ordinance that would allow the city to enter into a contract with MHTC. To assist the city in preparing an ordinance, a model ordinance appears on the following page. This model ordinance can be adapted to apply to most situations.

When submitting a contract to the Chief Counsel's Office in which a city or other municipality (or some first class counties with charter forms of government) is a party to the contract, copies of the ordinance allowing the city to enter into the agreement should be submitted with the contract. Failure to include such an ordinance can lead to a delay in the execution of the contract and may result in the CCO's refusal to approve the contract as to form.

In the following model ordinance, the term "Mayor" can be replaced with "City Manager" or other city officials, as appropriate.

CITY OF \_\_\_\_\_

ORDINANCE NO. \_\_\_\_\_

BILL NO. \_\_\_\_\_

An Ordinance to authorize the Mayor to execute a contract between the City of \_\_\_\_\_ and the Missouri Highways and Transportation Commission providing for \_\_\_\_\_.

Be it ordained by the City Council of \_\_\_\_\_ as follows:

Section 1. That the Mayor is hereby authorized to execute on behalf of the City of \_\_\_\_\_ a contract with the Missouri Highways and Transportation Commission providing for \_\_\_\_\_.

Section 2. That all ordinances or parts of ordinances therefore enacted which are in conflict herewith are hereby repealed.

Section 3. This ordinance shall be in full force and effect from and after the date of its passage and approval. Read three times, passed and approved on the day of \_\_\_\_\_, 20\_\_\_\_.

APPROVED AS TO FORM

\_\_\_\_\_  
City Attorney

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
Presiding Officer

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
Chairman of the Board

***\*When appropriate, replace "Mayor" with "City Manager".***

(J) **Drafting Tips for Preparing Form Contracts:** To express the subject matter as clearly and simply as possible, contracts should be drafted in accordance with the following:

1. **"Plain English" Theory:** The writing should be similar to informal speech, but using tighter structure and more exact expression.
  - A. Keep the sentence length to 20 words or under.
  - B. If sentences must be longer, even out the readability by having a number of short sentences.
  - C. There may be approximately 10% long words (three syllables or more) per sentence.
2. **Consistency:** Do not use the same word to denote different things and do not use different words to denote the same idea.
3. **Parallelism:** Elements that are alike in thought should be parallel in form. Consistency will be aided if you remember that:
  - A. If items in a list begin with an article, all items in that list should begin similarly.
  - B. If clauses are used in a list, continue with clauses.
4. **Choice of Language:** The language should be carefully considered and selected to transmit the drafter's intended thought.
  - A. Avoid the following legalese expressions:
    - (1) Above (as an adjective)
    - (2) Aforesaid
    - (3) Aforementioned
    - (4) And/or (say "A or B, or both" although it may be used occasionally)
    - (5) Before (as an adjective)
    - (6) Before-mentioned
    - (7) Cognizance
    - (8) Hereby
    - (9) Herein/herewith
    - (10) Hereinafter
    - (11) Hereinbefore
    - (12) Same (as a substitute for it, he, she)
    - (13) To wit
    - (14) Whatsoever
    - (15) Whenssoever
    - (16) Whereas

- (17) Wheresoever
- (18) Whosoever
- (19) Within named

**B.** Avoid the following word pairs that have like meanings:

- (1) Any and all
- (2) Authorized and empowered
- (3) By and with
- (4) By and under
- (5) Each and all
- (6) Each and every
- (7) Final and conclusive
- (8) Full and complete
- (9) Full force and effect
- (10) Null and void
- (11) Order and direct
- (12) Over and above
- (13) Rules and regulations
- (14) Sole and exclusive
- (15) Terms and conditions
- (16) Terms and limitations
- (17) Type and kind
- (18) Unless and until

**C.** Avoid the following inclusive word pairs using either the broad or the narrow term as required:

- (1) Any and all
- (2) Authorized and directed
- (3) Desire and require
- (4) Means and includes
- (5) Necessary or desirable

**D.** Avoid the following expressions:

- (1) None whatsoever
- (2) Make a determination
- (3) Shall be considered to be
- (4) Shall be deemed to be
- (5) May be treated as
- (6) Have the effect of

**E.** These words are commonly confused:

- (1) Affect, effect - Only effect is a noun meaning result or condition. Both words are verbs. To effect means to bring about, to achieve; to affect means to influence.

- (2) All ready, already - All ready means entirely ready; already means previously.
- (3) Amount, number - To count the units, use number. Amount refers to bulk, weight or sums.
- (4) Anxious, eager - Anxious implies worry, eager conveys keen desire.
- (5) Anyone, any one - Anyone means any person at all. Any one refers to a specific person or thing in a group. Similar forms are everyone - every one and someone - some one.
- (6) Between, among - As a rule, between involves two people or two groups, among, three or more.
- (7) Continual, continuous - continual means to occur frequently. Continuous means without stopping.
- (8) Data - A singular verb (data is) can be safely used with this word when all the facts are considered as a unit.
- (9) Different from, different than - Although both are acceptable, different from is usually preferred.
- (10) Fewer, less - If the items can be counted, use fewer; less refers to amount or quantity.
- (11) Imply, infer - Imply means to insinuate, to suggest; infer means to reach a conclusion based on evidence. A writer or a speaker implies, whereas a reader infers.
- (12) It's, its - It's is a contraction for it is. Its is a possessive form.
- (13) Lie, lay, lain - Lie means to rest in a horizontal position. Lay, laid, lain - Lay means to place or put something somewhere.
- (14) Maybe, may be - Maybe is an adverb meaning perhaps. May be is a verb form.
- (15) Principal, principle - Principal means chief or chief official. Principle means fundamental rule.
- (16) Shall, will, may - Shall is used for commands and an obligation to act has been imposed. The subject of a sentence using shall should be an entity capable of decision-making or action. (Check for proper usage by substituting "has the duty to" for "shall".) Use shall not if an obligation not to act has been imposed. Will indicates intention, promise or willingness. An agency might remind the public that it has a particular power by using "will." Will also shows an intention to act in the future. May indicates discretion to act and confers a power, right or privilege. Use "may" or "may not" to indicate that a power, right or privilege has been abridged. "May not" or "no person may" imposes a prohibition. Use "may" with a negative subject - "no client may not" "no client shall." "No client shall" means no one is required to act. The obligation to act is negated, the permission to act is not. "No person may" is the stronger prohibition because the



- permission is also negated.
- (17) Their, there, they're - Their is a possessive pronoun; there is an adverb or an expletive; they're is a contraction of they are.
- (18) Which, who, that - That refers to persons or things; who to people; which to things.

**F.** Certain terms are preferred over the use of others.

<u>Terms Not Preferred</u>	<u>Terms Preferred</u>
abeyance	wait, postpone
accompanied by	action
admit of	with
affix signature of	allow
afford the opportunity	sign
afforded	allow, permit
all of the	given
and/or	all the
as of the date of	and, or
this ____	(exact date)
at an early age	soon (the exact date)
at the same	when
at the time	when
by means of	by
cause it to be done	have it done
cease	stop
commence, institute	start, begin
contiguous to	next to
corporation organized	Missouri
and existing under	corporation
Missouri law	
deem	consider
does not operate to	does not
due to the fact that	because
during such time as	while
during the course of	during
each, each and every	a, an
earliest practicable	(the exact date)
date	
effectuate	carry out
endeavor to (ascertain)	try to (find out)
enter into a contract	contract with
evidence	show
excessive number of	too many
finalize	end, finish,
	complete, conclude

for the duration of	during
for the purpose of	to state (or other
stating (or other	infinitive)
verbal)	
for the reason that	because
forthwith	immediately
full and adequate	full
give consideration	consider
give recognition to	recognize
have knowledge of	know
have need of	need
hereafter	after this...takes
	effect
herein	in this (these)
hereinabove	previously
	mentioned (stated,
	exact cite within
	the rule)
heretofore	before
	this...takes
	effect
i.e.	that is
implement	carry out, put
	into effect
in case	may
in case of	may be requested
in case of which	when, where (use
	whenever or
	wherever only for
	emphasis)
in close proximity to	close to
in compliance with	as requested
request	
in order to	to
in sections (1) - (5)	in sections (1) - (5)
inclusive	
institute	start, begin
in the determination of	to determine
in the event that	may, if
in the interest of	for
is able to	can
is (shall be) applicable	applies
is authorized to	shall
is binding upon	binds
is dependent on	depends on
... is directed	shall
is empowered	may
is entitled (has the	is called

name	
is entitled to	may
is in attendance at	attends
is unable to	cannot
it is directed	shall
it is the duty of	shall
... to	
it shall be lawful to	may
make application	apply
make payment	pay
make provision	provide
may, at his discretion	may
necessitate	require
obligation	debt
occasion (as a verb)	cause
of a technical nature	technical
on his own application	upon request
on the part of	by
or, in the alternative	or
over the signature of	signed by
paragraph 1 of sub-	paragraph (1)(A)1.
section (A) of section (1)	
per annum	a year
percentum	percent
portion	part
preclude	prevent, shut out
procure	get, obtain
provisions of law	law
purchase	buy
render (cause to be)	make
render (give)	give
secure	take, get, obtain
so as to	to
specified (mentioned or	named
listed)	
state of Missouri	Missouri or state
subsequent	later
successfully completes	completes or
or passes	passes
such	the, that, those
	it or them (to
	refer back)
suffer (permit)	permit
sufficient number of	enough
terminate	end
telephonically	by telephone
the manner in which	how
thereof	OMIT!, (if

to the effect that	necessary) of
under the provision of	them, of it
until such time as	that
utilize, employ (use)	under
verification	until
	use
	proof, verify,
	verified
whether or not	whether
with the objective	to prove (or other
of proving	infinitive)

5. **Capitalization:** As a general rule, when in doubt use lower case.

**A.** The following words should be in lower case unless they are part of a proper name:

- (1) administration
- (2) administrator
- (3) board
- (4) commissioner
- (5) court
- (6) department
- (7) director
- (8) executive branch
- (9) federal
- (10) government
- (11) governor
- (12) judicial branch
- (13) legislative branch
- (14) legislature
- (15) state

**B.** Titles.

- (1) If the title precedes a name it should be capitalized.
  - (A) Secretary of State, Dean Acheson
- (2) If the title follows a name or stands alone, it should not be capitalized.
  - (A) Dean Acheson, secretary of state...
  - (B) The governor said today...

**C.** Titles of authority.

- (1) If the title of authority precedes a name, it should be capitalized.

(A) Director John B. Smith...

- (2) If the title of authority follows a name or stands alone, it should not be capitalized.

(A) John B. Smith, director...

(B) The director shall have the authority

**D.** Full titles should be capitalized.

- (1) Federal Election Commission

**E.** Nouns.

- (1) Common nouns that are part of a formal name should be capitalized.

(A) Bagnell Dam

(B) Missouri River

(C) Capitol Drive

- (2) If the noun forms an essential part of the name of a place, it should be capitalized.

(A) Cole County

(B) City of St. Louis

(C) Southwest Missouri

**F.** Text designations.

- (1) Chapters should be capitalized when followed by a specific number or letter designation.

(A) Chapter 202

- (2) All other text designations should be lower case.

(A) section

(B) paragraph

(C) subsection

**6. Abbreviations:**

**A.** Missouri

- (1) Abbreviate Missouri as MO in an address

- (2) Never abbreviate Missouri in titles  
Missouri - Illinois Bridge Commission

**B.** Time Zones: May be abbreviated.

- (1) CDT
- (2) CST

**C.** Months: Should not be abbreviated.

**D.** Addresses: Only the following words may be abbreviated:

- (1) St.
- (2) Dr.
- (3) Rd.
- (4) Ave.
- (5) Blvd.
- (6) Ter.

**E.** Lower case abbreviations: These usually take periods, particularly if the abbreviations would spell words without them.

- (1) c.o.d.
- (2) f.o.b.
- (3) m.p.h.
- (4) a.m.
- (5) p.m.

**7. Numbers:**

**A.** Spell out the number first and put the numerals in parenthesis.

- (1) Ninety-four (94)

(A) If there is a discrepancy, the spelled number controls.

**B.** Use of numerals.

- (1) Use numerals for large numbers.
- (2) With highly technical writing, use numerals.

(A) If the technical phrase contains small numbers and large numbers, use only numerals.

- (3) With units of measurement, follow the spelled out amount with numerals and the abbreviation in parenthesis.

(A) twenty feet (20')

- (B) six inches (6")
- (C) twenty degrees Fahrenheit (20° F)

C. Numbers over three figures should have commas inserted.

- (1) 4,500 (not 4500)

8. **Money:**

A. The amount should be written followed by the dollar sign or cent sign and numerals within parenthesis.

- (1) five hundred dollars (\$500)
- (2) sixty-five cents (\$.65)

B. If there are more than seven digits, you should use the numeral plus the spelled out amount.

- (1) Seven (7) million dollars

C. If there are no cents in the amount, omit the decimal point and the last two zeros.

- (1) \$8

9. **Punctuation:** The main purpose of punctuation is clarity.

A. Commas.

- (1) In a series, use commas to separate the elements.

(A) Conjunctions

(I) Do not put a comma before the conjunction in a single series.

- (a) Computer terminal expenses include a one-time installation fee, set-up fee, a modem and a monthly rental charge.

(II) If part of the list requires a conjunction, a comma should be placed before the final conjunction.

- (a) Computer terminal expenses include user charges, a modem, and a one

time installation.

(III) In a complex series of phrases, a comma should be used before the final conjunction.

(B) Non-essential clause (one not needed to complete the meaning of the sentence): The clause should be set off by commas.

(I) The board of directors, who met briefly, drafted chapter seven.

(C) Essential clause (a clause which if absent would change the meaning of the sentence): Do not use commas to set off essential clauses.

(I) The board of directors who removed critical language from the rule have been criticized.

10. **Legal Citations:**

A. Citation form to be followed:

- (1) Missouri Register: 10 MoReg 88
- (2) Code of State Regulations: 12 CSR 40-2.090
- (3) Code of Federal Regulations: 32 CFR 562.40
- (4) Missouri Statutes (codified): section 259.010 RSMo

11. **Contract Drafting Miscellany:**

A. Avoid pronouns that indicate gender.

- (1) If the pronoun is indispensable, use s/he.

B. Use the third person singular.

- (1) A person shall...(not you shall)

C. Think active.

- (1) Place the active portion of the sentence first.
- (2) Use the active rather than the passive voice.
- (3) Use active verbs in place of gerunds, infinitives, participles or other verbals.
- (4) Apply (not make application for).

D. Say one thing, and only one thing, in each sentence.



**E.** Use abbreviations only if necessary and, if used, placed the abbreviation in parentheses following the word it represents.

(1) Environmental Protection Agency (EPA)

**F.** Do not use split infinitives.

(1) An agency shall file a fiscal note if a rule costs more than five hundred dollars (\$500)

or

If a rule costs more than five hundred dollars (\$500) the agency shall file a fiscal note

not

An agency shall, if a rule costs more than five hundred dollars (\$500) file a fiscal note.

**G.** Do not use above and below to describe locations within a contract. By the time the material is actually printed, the location may no longer be below. Say mentioned previously, as follows or cite precisely to referred location.

**H.** Avoid technical jargon if at all possible. Certain terms may be understood by a special group of people, but not the average reader.

**I.** Organize the contract carefully. Printing costs may be cut by running material together, using commas and semicolons, rather than vertically extending the contract as a long list (laundry list).

(1) Conservation district funds or funds for the benefit of the conservation district shall not be expended for the following: per diem for supervisors in excess of fifteen dollars (\$15) per meeting; gifts; flowers; donations and contributions; meals at board meetings for supervisors, their spouses and staff; spouses' expenses; or per diem for associate supervisors.

not

Conservation district funds or funds for the benefit of the conservation district shall not be expended for the following:

(A) per diem for supervisors in excess of fifteen dollars (\$15) per meeting;

- (B) gifts;
- (C) flowers;
- (D) donations and contributions;
- (E) meals at board meetings for supervisors, their spouses and staff;
- (F) spouses' expenses; or
- (G) per diem for associate supervisors.

**J.** Try to maintain a paragraph style when writing contracts. There is no reason to assign each sentence a separate designation. If all the material is related, put several sentences in a single section or subsection.

**(K) CCO Standard Contract Checklist:** When preparing a contract, a preparer may want to use the below checklist to ensure all necessary items have been included.

CCO Contract # \_\_\_\_\_

DATE \_\_\_\_\_

**CCO FORMAT:**

*Technical Requirements*

- \_\_\_\_\_ Type style font-12 arial
- \_\_\_\_\_ Paragraph format

*Heading Designations*

- \_\_\_\_\_ CCO Form:
- \_\_\_\_\_ Approved:
- \_\_\_\_\_ Revised: (if necessary)
- \_\_\_\_\_ Modified (if necessary)

- \_\_\_\_\_ Contract Title
- \_\_\_\_\_ Designation of Contracting Parties
- \_\_\_\_\_ Whereas clauses (if necessary)
- \_\_\_\_\_ Therefore clause (if necessary)

*Standard Contract Clauses*

- \_\_\_\_\_ Purpose Clause
- \_\_\_\_\_ Authorization of Contracting Party (if necessary)
- \_\_\_\_\_ Scope of Work (if necessary)
- \_\_\_\_\_ Project time period (if necessary)

*Boilerplate (as appropriate)*

- \_\_\_\_\_ Indemnification
- \_\_\_\_\_ Amendments
- \_\_\_\_\_ Commission Representative
- \_\_\_\_\_ Nondiscrimination Assurance
  - \_\_\_\_\_ State
  - \_\_\_\_\_ Federal
- \_\_\_\_\_ Assignment
- \_\_\_\_\_ Bankruptcy
- \_\_\_\_\_ Wage Laws
  - \_\_\_\_\_ State
  - \_\_\_\_\_ Federal
- \_\_\_\_\_ Law of Missouri to Govern
- \_\_\_\_\_ Cancellation
- \_\_\_\_\_ Audit
- \_\_\_\_\_ Venue
- \_\_\_\_\_ Work Product
- \_\_\_\_\_ Confidentiality
- \_\_\_\_\_ Nonsolicitation
- \_\_\_\_\_ Section Headings
- \_\_\_\_\_ Execution in Counterparts
- \_\_\_\_\_ Original Agreement
- \_\_\_\_\_ Contracting Party Authorization

*Problematic Clauses*

- \_\_\_\_\_ MHTC indemnification of contracting party if yes
- \_\_\_\_\_ consult liability acceptance policy
- \_\_\_\_\_ MHTC should not be held to comply with all local ordinances/laws.
- \_\_\_\_\_ Bonding Requirements (if necessary)

*Closing and Execution*

- \_\_\_\_\_ MHTC
- \_\_\_\_\_ Contracting Party

*Signature*

- \_\_\_\_\_ MHTC
- \_\_\_\_\_ Contracting Party
- \_\_\_\_\_ Execution of Documents
- \_\_\_\_\_ Delegated Authority
- \_\_\_\_\_ Commission approval necessary
- \_\_\_\_\_ Ordinance (if necessary)

*Acknowledgement*

- \_\_\_\_\_ Individual
- \_\_\_\_\_ Corporation
- \_\_\_\_\_ Partnership
- \_\_\_\_\_ LLC
- \_\_\_\_\_ LLP
- \_\_\_\_\_ City
- \_\_\_\_\_ County
- \_\_\_\_\_ School District
- \_\_\_\_\_ University
- \_\_\_\_\_ Trust
- \_\_\_\_\_ Commission

#### (4) **Contract Review Procedures and Policies:**

- (A) **Selecting a Contracting Party:** The first step in creating a contract is selecting a contracting party. Much of this manual presupposes that proper procedures were followed in selecting a contracting party. Some situations only require that internal MoDOT criteria are met and other situations mandate that specific statutory procedures be followed.

For example, the Traffic Division of MoDOT is responsible for contracts such as entrance shifting/widening and installation of traffic signals. These contracts are not competitively bid. Instead, these contracts are granted based on geographic need, whether sites meet certain traffic volume requirements and the willingness of another party to pay for the signal/access. Likewise, the Transportation Planning division administers various federal grant programs such as the Bridge Rehabilitation program, Surface Transportation Program (STP) Funds, Transportation Enhancement Funds, and Congestion Mitigation and Air Quality program. These contracts are awarded pursuant to program criteria and whether the recipient meets program requirements. Another type of non-competitively bid contract is a municipal/county agreement. This type of agreement is secured through the Design Division and generally focuses on a project between a city or county and the Commission. These contracts assign responsibility between the parties and are based on transportation planning and needs, instead of competitive bidding. With all of these contracts, MoDOT does not need to be concerned with competitively bidding the contracts, but rather, MoDOT must follow internal guidelines. Other examples of non-competitively bid contracts include: utility reimbursement agreements, maintenance agreements, cost participation agreements, scenic by-ways agreements, and road relinquishment agreements. There are many additional types of contracts that fall within this category that are not listed.

It is important to note that other types of agreements require competitive bidding and have specific award criteria. Usually, this type of contract requires the expenditure of state money. These types of contracts include:

1. Highway construction contracts (lowest responsible bid under Chapter 227 RSMo);
2. Emergency construction contracts (lowest responsible bid under Chapter 227 RSMo) (procedures related to emergency contracts are discussed above in Section (2)(A) of this manual);
3. Purchase of equipment and materials by purchase order (General Services policy);
4. Purchase of equipment and materials under MoDOT procurement rule 7 CSR 10-11;
5. Engineering, land surveying and architectural services under Chapter 8

RSMo;

6. Non-engineering services based on lowest and best bids;
7. Government agency master contract/task order; and
8. Insurance, banking or financial services through broker.
9. As a general policy, competitive bidding with as broad of a contractor pool as possible is encouraged, even when it is not required by law. Expanding the pool of contractors can be done through sending Requests for Proposals to known contractors in the industry and through advertising in newspapers statewide. It is exceptionally important that bidding procedures be followed when they exist. Therefore, if you have any questions as to selecting a contractor, please contact CCO or General Services, as appropriate.

**(B) A Note on Re-Bidding a Contract Versus Extending an Existing Agreement and Duration of Service Agreements:** Sometimes a contract provides for an extension of the duration of the contract period or a question arises as to whether MoDOT needs to re-bid a contract or simply extend the existing contract without re-bidding. Although there is no legal requirement to re-bid MHTC contracts, CCO should always identify this issue for the client when present in a contract and encourage re-bidding contracts unless there is a compelling business reason not to. Generally speaking, CCO generally encourages the duration of service agreements to be 3 years with two optional additional 1-year extension periods. If the proposed extension includes new or significantly different services, it must be rebid instead.

**(C) Duration and Extension of Service Contracts:** Service contracts should not be open-ended in duration. Instead, CCO recommends that service contracts be in effect for no longer than a 3-year period with no more than two additional 1-year extensions (if extensions are so desired) upon approval of the parties.

In addition, if an agreement is extended by mutual assent of the parties, an appropriate supplemental agreement should be prepared memorializing the extension. The same process used for executing the original contract should be used for executing the contract extension. If the original agreement was executed by MoDOT staff in accordance with the *Execution of Documents Policy*, the extension should be executed by that same employee or successor in that position in accordance with the policy. If the original contract was approved by MHTC at one of its meetings, then the extension should also be presented to MHTC for approval.

**(D) Preparation of Contracts and Forms:** CCO has developed a contract review procedure for placing contracts into the CCO contract format and for updating the existing contracts that have been previously reviewed and approved by CCO. This section will provide an overview of the contract review procedure for the

following types of contracts:

1. One-time use contracts;
2. New CCO standard form contracts;
3. Previously approved CCO standard form contracts;
4. Modified standard form contracts; and
5. Revised standard form contracts.

In addition, this section describes the general review process that CCO attorneys follow in determining whether the contracts are legally sufficient.

- A. **Transmittal Form:** When sending a contract in for execution by MHTC or when seeking the CCO's assistance in preparing a contract, the transmittal form that is included in this manual as Exhibit 4 should be used. If the contract is approved and signed by the authorized CCO counsel, the CCO will forward the contract to the Commission Secretary for attestation and execution. If the contract is simply a request for CCO assistance in the preparation of a contract, fill-in as much information on the form as possible and attach as much information or draft contract as available. If CCO needs more information to complete the request, CCO will contact the requester to coordinate the preparation of the contract. This transmittal form can be found as a template in Word under "MHTC Contr" in the new documents function. [Pathway: File - New - MoDOT - MHTC Contr]. In addition, the form is available on the CCO intranet site under the "Misc Documents" folder in the Contract section of the website.
- B. **Procedure for Drafting One-Time Use Contracts:** During the course of MoDOT's daily operations, situations arise that require the execution of a special contract between the Commission and another party. Typically, these types of contracts are unique in that they are drafted with the expectation that they will only be used once for a particular situation. The CCO refers to these contracts as "one time use contracts."

As defined in this manual, a one-time use contract is a type of contract that is excluded from the list of CCO standard contracts that are put in CCO contract format. However, because CCO attorneys and the unit/division liaisons are involved in drafting one time use contracts, this type of contract does fall under CCO contract review procedure. For procedural and review purposes, RFPs and MOUs are considered one-time use contracts.

The following flow chart sets forth the basic steps to be taken in drafting one time only contracts:

## PROCEDURE FOR DRAFTING ONE TIME USE CONTRACTS

*Unit/District determines that a one time use contract is needed*

*Unit/District compiles a list of technical contract provisions needed*

*Unit reviews Execution of Documents Policy to determine if Commission approval is required and whether attestation or approval as to form is needed*

*Unit submits transmittal memo to the appropriate Assistant Chief Counsel requesting CCO assistance*

*Assigned CCO Attorney and unit Liaison work together to draft contract*

*Assigned CCO attorney conducts legal review and determines applicable boilerplate provisions*

*Unit circulates each draft of contract for review and comment within unit and provides the draft to other units, if necessary*

*Assigned CCO attorney provides final draft to unit with any required instructions for contract completion and execution*

*Unit provides approved contract form to contracting party for execution*

Each step in this procedure is an important aspect of the contract development process. The following comments provide further explanation of four of those steps. First of all, the key factor in determining whether a particular situation calls for a one-time use contract, is whether the contract will be used later under the same or similar circumstances. If the situation is truly unique, is not likely to occur again, and there is not currently a contract form designed to cover the situation, then a one time use contract would be appropriate.

The second step of the one time use contract drafting procedure states that the unit/division is to compile a list of technical requirements to be included in the contract. Examples of technical requirements would include items such as the purpose statement, scope of work, billing procedures, requirements of the Federal Highway Administration, and a list of responsibilities of MHTC and the contracting party.

The third step in this procedure is to review the *Execution of Documents Policy*. A copy of the *Execution of Documents Policy* is included Exhibit 2 of this manual. This is an important step during the initial drafting stages in order to determine the length of time to allow for final execution of the contract. If Commission approval is required, then the presentation of the contract to the Commission for approval will have to be incorporated into the contract drafting and execution process. The Execution of Documents Policy will also state which contracts do not need Commission approval, will not need attestation by the Commission Secretary or formal approval as to form by a CCO attorney.

Regarding the fourth step, as with standard form contracts, one-time use contracts will need to have certain boilerplate provisions. Thus, after consultation with the division, the assigned CCO attorney will determine which boilerplate provisions should be included in the contract and will conduct an overall review of the contract to make sure it is legally sufficient.

3. **Procedure for Drafting New CCO Contract Forms:** MoDOT currently has numerous standard form contracts designed to cover a variety of circumstances. However, situations arise which require the creation of new contracts. As a result, a new CCO contract form may need to be drafted. As discussed in this manual, a new CCO contract is one that upon creation will subsequently be used as a standard form and will be used on a routine basis.

The following flow chart describes the procedure for drafting new CCO form contracts:



## PROCEDURE FOR DRAFTING NEW CCO CONTRACT FORMS

*Unit/District determines that a new CCO contract form is needed*

*Unit/District compiles list of Technical contract provisions needed*

*Unit reviews Execution of Documents Policy to determine if Commission approval is required and whether attestation or approval as to form is needed*

*Unit submits **transmittal** memo to the appropriate Assistant Chief Counsel requesting CCO assistance*

*Assigned CCO Attorney and unit Liaison work together to draft contract*

*Assigned attorney puts contract in CCO contract format and determines applicable boilerplate provisions*

*Unit circulates each draft of contract for review and comment within unit and provides to other units, if necessary*

*Assigned CCO attorney provides final draft to unit with instructions on how to complete contract form*

*CCO places contract on CCO intranet site in contract directory for future use*

The procedure for drafting new CCO contracts is very similar to the procedure for drafting one time use contracts. As a result, the brief descriptions relating to examples of technical provisions and the Execution of Documents Policy are applicable here as well.

However, there are a few major differences. First, a new CCO contract form will be given a CCO form number and an initial CCO approval date. Second, the new contract will be placed on the CCO's Master Listing of Contract Forms for subsequent updating under the CCO contract revision process. Finally, the new form will eventually be placed on the CCO intranet web site and will be available for future use as a routine form contract.

4. **Procedure for Reusing or Modifying Previously Approved CCO Contracts:** There are two types of contracts that fall under the procedure for reusing previously approved CCO contracts. The first type is the standard form contract that has already been placed in the CCO contract format and approved by CCO.

Contracts of this nature are the most common type of contract used by MoDOT. These contracts typically do not require a review by CCO until after the document has been executed by the contracting party. Upon execution by the other party, these contracts are usually sent to the CCO for approval as to form, and then sent to the Commission Secretary's office for execution.

Sometimes circumstances arise which require that a particular provision in a standard form be changed to suit a particular situation. If a one-time change is required, the contract is considered a "modified contract" as the term is defined in the section on technical requirements in this manual. Remember that if a modification is needed, the contract will be designated as such by including the modification date and the CCO attorney's initials in the upper left hand corner of the document.

The following flow chart illustrates the procedure for reusing previously approved CCO contracts. This chart describes the procedure for standard contracts and modified contracts:

**PROCEDURE FOR REUSING PREVIOUSLY  
APPROVED CCO CONTRACT FORMS**

*Unit/Division/District determines  
which CCO contract form is applicable*

*Unit/Division/District checks CCO form  
number, approval date and/or revision  
date to make sure correct form is used*

*Unit/Division/District determines whether  
modification to CCO contract form  
is necessary*

*If no modification,  
Unit/Division/District  
completes  
Contract form and sends  
Out for execution*

*If modification is needed  
Unit/Division contacts CCO to  
Discuss modification and decide  
on appropriate language*

*Unit/Division/District  
provides draft  
copy of modified  
contract to CCO for final  
review*

*Unit/District/Division completes  
contract form and sends out  
for execution*

- (E) **Procedure For Revising CCO Contracts:** Another aspect of the CCO's contract review procedure is the updating process that must be undertaken in order to ensure that MoDOT's contracts adequately reflect current state and federal law as well as up-to-date technical provisions. As previously stated, a revised contract is a previously approved CCO form that has subsequently been updated.

One of the CCO goals is to make sure that MoDOT's standard contracts are all placed in the CCO format and initially approved by a CCO attorney. Assistance from the units/divisions with updating and prioritizing the CCO's listing of form contracts will help the CCO attorneys accomplish that goal.

At the same time, however, a revision process of previously approved CCO contract forms is also necessary to keep those forms current. CCO has set a goal of reviewing and updating the form contracts every two years. However, revisions to form may be needed earlier due to changes in the law or for other reasons that may come to the attention of the divisions or districts.

Included in Exhibit 1 to this manual is a list of the lead CCO attorneys assigned to work with the respective units/divisions on the contract revision process.

The following flow chart sets out the procedure for revising previously approved CCO standard form contracts:

**PROCEDURE FOR REVISING PREVIOUSLY APPROVED  
CCO CONTRACT FORMS**

*Unit/Division liaison and assigned CCO attorney determine which contracts need to be revised*

*Assigned CCO attorney updates boilerplate provisions, legal citations and conducts general contract content legal review*

*Unit/Division liaison reviews contract form to determine if technical aspects of form need to be updated*

*Unit/Division liaison and assigned CCO attorney work together to complete initial contract revisions*

*Unit/Division liaison circulates each draft of contract for review and comment within unit and provides draft to other units, if necessary*

*Assigned CCO attorney provides final draft to Unit/Division with instructions on how to complete contract form*

*CCO places revised contract on CCO Intranet in contract directory for future use*

Once a contract form has been revised, the form would show in the upper left hand corner the initial approval date and the date that the contract form was revised. Subsequent to that revision date, the division/district should exercise caution to ensure that the revised contract is used routinely. However, it may be necessary to phase in the use of the revised contract depending on the status of pending projects at the time of the contract revision.

- (F) **Logging and Tracking Contract Agreements:** Whenever CCO receives a request to draft, review, or approve a contract, the request is entered into a contract log. There are two types of contract logs, one for contracts that only require signature and the other log that includes drafting and review of contracts. Each attorney that works on contracts has these two logs. The log entries include the date the contract was received, followed by the division, district, requestor, contract name (and other contract specific information), contracting party and date the contract was approved by CCO. It is the individual attorney's responsibility to see to it that their contracts are being properly logged. A typical log entry appears as follows:

7/8/05

D10 DE (John Doe) Route K, Cape Girardeau County, Job J0S0890, Municipal Agreement

**Approved 7/9/05**

Any MoDOT employee may contact CCO to inquire of the status of any contract request by contacting their division's contract contact attorney as indicated in Exhibit 1.

- (G) **CCO General Contract Content Legal Review Procedure:** When a CCO attorney reviews a contract for legal sufficiency, there are several items within the contract that must be evaluated. On occasion style changes will be necessary to meet CCO format and content. Any concerns over the style changes should be directed to the approving counsel. The following is a summary of the items that the CCO attorneys look for in performing a legal sufficiency review:

1. **General Legal Accuracy:** (Example: Use "Commission", not "Department", as the contracting entity.);
2. **Citations** (To ISTEA, Federal and State Laws and Regulations, Acts, etc.);
3. **Insurance and Bonding Questions:** (If these are not correct, Commission cannot always recover, and the Commission members may be individually liable if the Commission doesn't have a needed bond.);
4. **Liability, Indemnification, and "Hold Harmless" Issues:** (If these are too weak, the Commission doesn't get the protection it needs. If these are

too stringent, the other party won't sign or bid on the work. These are difficult legal and policy questions.)

5. **"Principal-Agent" or "Independent Contractor"; and "Master-Servant" Relationships:** (The nature of the contract relationship is important in determining issues of duty and liability later.);
6. **"Federal Law Compliance:** (Are the terms consistent with Federal law? Do they contain all of the contract provisions required by Federal law?);
7. **Missouri State Law Compliance:** (Are the terms consistent with State law? Do they contain all of the contract provisions required by State law?);
8. **Personal, Corporate or Governmental Status:** (The legal status of the party we contract with makes a difference as to what needs to appear in the contract; the apparent authority of the person signing it; the form of, or the need for, a form Acknowledgement, etc.);
9. **Execution of Documents Policy:** (Has the Commission delegated authority to execute the contract or does it have to be approved by the Commission?).
10. **Fictitious and Corporate Registration:** (If the contracting party is operating under a fictitious name, has it been registered with the Secretary of State?)

(H) **Acceptance of Liability Procedure Policy:** In reviewing a contract, the assigned CCO attorney will check for compliance with the Commission's Acceptance of Liability Procedure Policy. This policy addresses liability issues beyond regular standards of doing business and provides a framework for review and consideration of this liability issues prior to entering into an agreement. A copy of the Acceptance of Liability Procedure Policy is included as Exhibit 3. Examples of acceptance of liability include instances where MHTC may be asked to indemnify another party or awarding a project before utilities are cleared. Compliance with the Acceptance of Liability Procedures is mandatory.

This acceptance of liability procedure does not preclude the chief counsel from agreeing to the request to assume liability on the part of MHTC. Counsel should consider the possibility of CCO waiving a required contract clause before counsel starts a division director/DE through the procedure for acceptance of liability where it is obvious that the waiver is acceptable and where the use of the indemnification clause is not appropriate.

Counsel may advise department personnel in how to comply with the *Acceptance of Liability Procedures Policy and Procedure*. However, counsel shall not draft

or co-sign any request for liability acceptance under step (1) of the procedure to avoid creating a conflict that prevents assisting with full and candid review of any liability acceptance request.

- (I) **Reviewing a Contract and Bond for Highway Construction:** When reviewing a contract and bond for highway construction work, CCO primarily reviews the pink pages in the middle of the contract. These pages are the contract that binds the contractor and the bond in which the surety will guarantee the contractor's performance of the work. Both the contract and bond are CCO prepared standard forms that should not be altered. In addition to the CCO forms, the surety usually includes a power of attorney form designating an agent to execute the bond. When reviewing these contract and bonds, the assigned CCO attorney may want to utilize the checklist that appears on the following page.



COMPLETED BY: \_\_\_\_\_  
PROJECT NO.: \_\_\_\_\_  
JOB NO.: \_\_\_\_\_

DATE: \_\_\_\_\_

**CONSTRUCTION CONTRACT CHECKLIST**  
**(Pink Sheets Only)**

**CONTRACT AGREEMENT**

Page 1:	Name properly completed	_____
	City and state noted	_____
	Project designated	_____
Page 2:	Dated	_____
	Named contractor signed	_____
	Title listed	_____
	Secretary signed	_____
	Seal affixed	_____
	Seal name matches contractor name	_____

**CONTRACT BOND**

Page 1:	Contractor name matches contract	_____
	Surety listed	_____
	\$ bond = written designation	_____
	and itemized proposal	_____
	Dated	_____
	Project matches contract	_____
	Contract date provided	_____
	Make sure bond amount is not greater	_____
	than surety's POA	_____
Page 2:	Principal name matches contractor name	_____
	Secretary signed	_____
	Seal name matches contractor name	_____
	Surety signature matches POA	_____
	Surety's title noted	_____
	Seal name matches surety name	_____
	Surety's address noted	_____
	Agent's name and address noted	_____

**POWER OF ATTORNEY**

Attached	_____
Effective on contract date	_____
Contains no conditions precedent	_____
Contains no expiration date	_____

**CONTRACTOR'S ACKNOWLEDGMENT**

Proper section completed	_____
Contract signature notarized	_____
Notary commission not expired	_____

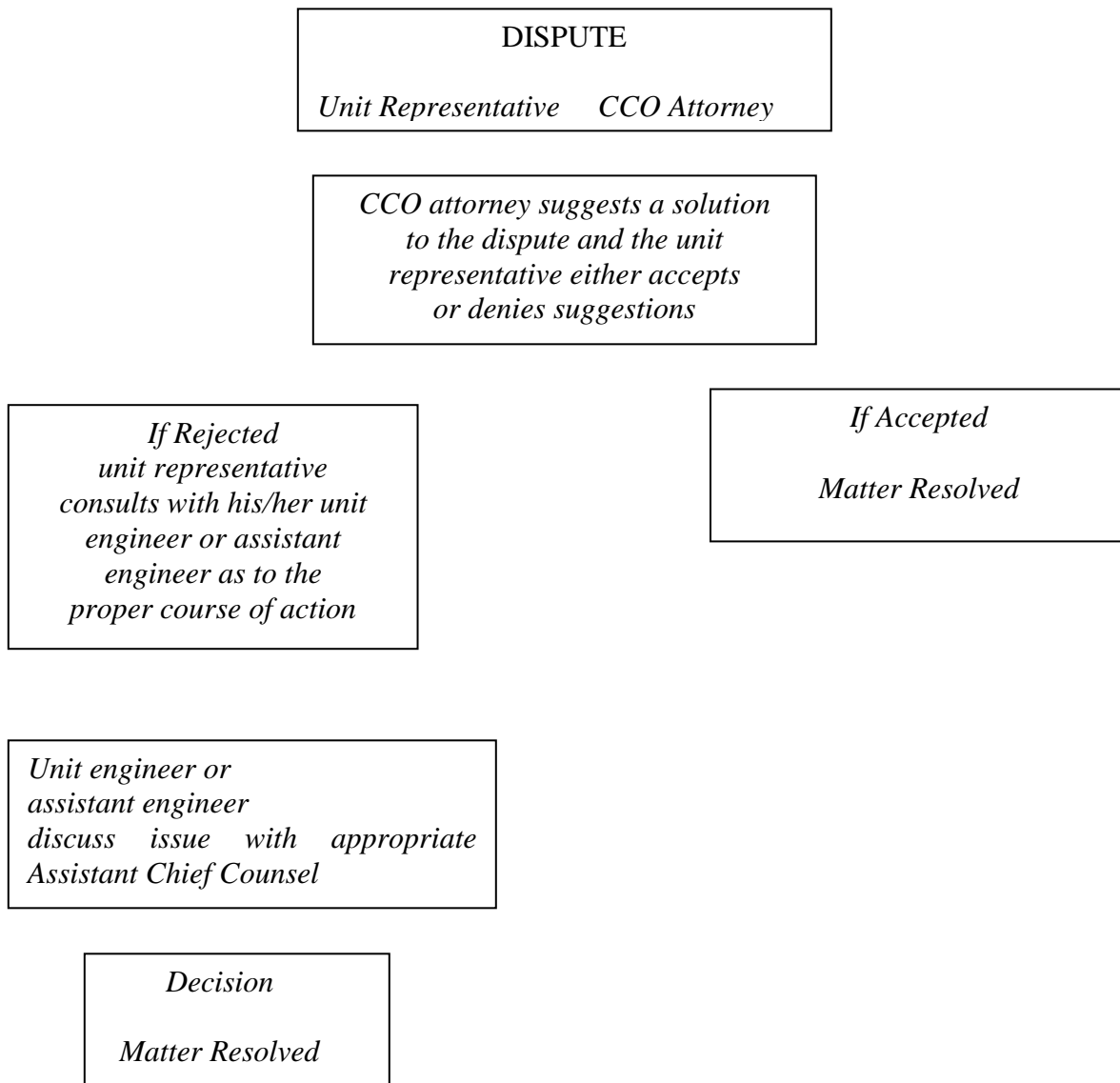
**COMMENTS:** \_\_\_\_\_  
**ATTORNEY ACTION (if any):** \_\_\_\_\_

- (J) **Contract Dispute Resolution Procedure:** When working with the business units, divisions and districts on the various contracts that are executed by the Commission, usually there is internal agreement on the manner in which the contract should be worded. However, sometimes the assigned CCO attorney and the unit liaison may have differing viewpoints on particular provisions within a contract.

When there is a difference of opinion, the following procedure is recommended for use by the CCO attorney and the unit liaison so that the matter can be resolved and a decision can be made in a timely fashion:

### **CONTRACT DISPUTE RESOLUTION PROCEDURE**

(To be used if a contract drafting dispute develops between the unit liaison and the CCO attorney assigned to the contract)



- (K) **Execution Process:** After a contract has been drafted and the parties agree to the terms of the contract, the next step in the process is obtaining the necessary signatures to execute the agreement.

The drafter should check the Commission's *Execution of Documents Policy* (a copy of which is included in this manual as Exhibit 2) or consult with the CCO attorney to determine if the Secretary to the Commission must attest the contract. If not, or if no approval as to form is required, the unnecessary section or sections may be deleted from the Commission's execution block. Likewise, the other contracting party may not need the provisions for attestation or approval as to form in each instance.

Once the finalized contract is prepared, Department staff should forward unexecuted copies of the contract to the other parties for execution. The number of contracts to forward for execution is within the discretion of preparer, but sufficient numbers should be sent to ensure enough original copies of agreement may be distributed to interested parties. Unless otherwise approved by MHTC counsel, all other parties to a contract should sign the contract prior to execution by the Commission. In rare instance, primarily when dealing with Federal agencies, the Commission may sign the contract first. In such instances, counsel must give approval to the Commission executing the agreement first and the Department must forward a fully executed original contract to the Commission Secretary after the other party executes the agreement.

In order to reduce the likelihood of unapproved changes to the document, it is requested that Department staff forward paper copies to the other parties for execution and not send contracts through electronic mail for the other party to print and sign.

Faxed or photocopied signatures are not sufficient and copies with original signatures should be secured.

Generally, cities and other municipalities have broad powers under Missouri law. Subject to a few limitations, such broad power includes the authority to enter into binding contracts. However, the assent of the municipality's governing body, usually a city council, to entering a contract is required. Without some type of manifestation of the city's desire to enter into the contract, the contract is ultra vires and may not be enforceable against the city. Generally, no type of ordinance is needed when contracting with a county. However, some counties of the first class with charter forms of government (such as St. Charles, St. Louis, and Jefferson Counties) do pass ordinances for each contract.

Evidence of the city council's assent is reflected in an ordinance. Some larger cities have standing ordinances or bylaws that designate a certain individual to sign certain types of agreements on behalf of the city. Other cities pass an ordinance approving contracts on an individual basis. In some instances, some

smaller municipalities request assistance from MHTC in preparing an ordinance that would allow the city to enter into a contract with MHTC.

Once the signed contracts are received from the other party, if the *Execution of Documents Policy* authorizes immediate execution of the contract, the contracts should be submitted to the CCO for completion of the "Approval as to form" blank and for execution by the designated representatives of the Commission. If the *Execution of Documents Policy* does not provide for the execution of the contract, it must be presented to the Commission at one of its meetings for approval. The Department will have to comply with whatever division policies exist for placing items on the Commission meeting agenda.

When submitting the contract to CCO, Department staff should use the MHTC contract submittal form, a copy of which is included in Exhibit 4. The contract submittal form can also be found in WORD by selecting, "File", "New" and then select "MHTC Contr". Copies of the submittal form can also be found on the CCO intranet site under the "Miscellaneous Documents" file folder in the contract section.

When submitting a contract to the Chief Counsel's Office in which a city or other municipality (or some first class counties with charter forms of government) is a party to the contract, copies of the ordinance allowing the city to enter into the agreement should be submitted with the contract. Failure to include such an ordinance can lead to a delay in the execution of the contract and may result in the CCO's refusal to approve the contract

It should be noted and personnel should be warned that if employees execute contracts that they have not specifically been granted authority to sign in the *Execution of Documents Policy*, the agreement may not be enforceable and could result in that employee being personally liable for damages.

The contract execution may be acknowledged by the contracting parties, which may be an individual, corporation, city, or other public governmental entity and the Commission. Acknowledgment forms should be included in all property transactions, documents that will be filed in the County Recorder of Deeds office, controversial matters, and contracts as directed by counsel.

- (L) **MHTC Agenda Checklist Procedure:** MHTC adopted a procedure to provide for department-wide review of proposed MHTC meeting agenda items. One purpose of the checklist is to determine if MHTC commissioners have a conflict of interest in an action taken by the Commission at its monthly meeting. This procedure was adopted to ensure that the citizens of the state have confidence that the actions of the Commission are not motivated out of self-interest. A conflict of interest covers a broad range of activities and can include situations where property owned by a commissioner is being condemned by the Commission for highway purposes or when a commissioner has a financial interest in a company that MHTC is doing business with.

In addition, the checklist procedure also ensures that appropriate officials throughout MoDOT have reviewed and commented on how a proposed action may affect the various divisions/units.

Under this procedure, whenever an item is to be presented to the Commission at its monthly meeting, a checklist is completed and distributed as part of the MHTC agenda procedure. A copy of the MHTC conflict of interest checklist is included in this manual as Exhibit 5. The electronic computer form can be selected in Microsoft Word by selecting the MHTC Agenda Checklist form among the MoDOT forms when creating a new document and is also available on the CCO intranet site in the Miscellaneous Documents folder in the Contract section.

Of importance to this manual, Section B of the checklist relates to contracts. Whenever a contract is to be presented to the Commission at its monthly meeting, this checklist must be completed and distributed. As a reminder, as stated in this manual, if the Execution of Documents Policy does not provide for the execution of a contract, it must be presented to the Commission at its monthly meeting.

Compliance with the conflict of interest checklist procedure is mandatory. Failure to comply with the conflict of interest checklist procedure may result in a proposed agenda item being removed from the Commission's agenda, which could delay a proposed transaction for a month or longer.

- (M) **Automating the Contract Process:** In order to promote the accessibility of contracts, the Chief Counsel's Office has created a storage area for all contracts that are on the *Master Listing of Contract Forms*. The *Master Listing of Contract Forms* is a compilation of the all of the form agreements prepared for MHTC that have been approved for use by CCO. The *Master Listing of Contract Forms* can be found on the CCO intranet site in the Miscellaneous Documents file of the Contract section. A copy of the *Master Listing of Contract Forms* is also included in this manual as Exhibit 6. Any contract that is on the *Master Listing of Contract Forms* should be located in the computer system. If the business unit or district needs help locating the contract, the Chief Counsel's staff can assist.

For ease of access, the original contracts will all be stored on the CCO intranet site. By clicking on the Contract section on the home page of the CCO section of the MoDOT intranet site. After clicking on the drop down arrow, a folder with each division's abbreviated letter. By selecting a division, you can access the contracts that are assigned to that division.

The contracts will be stored as read-only to preserve the integrity of the documents and changes to the forms can only be made by authorized CCO staff. When the division/unit accesses a contract to work on, it should be saved to another name if any changes are made.

In addition to the contract forms, various MHTC policies and documents are also included in a folder called "Misc Docs". Sample acknowledgment forms can be found in the file entitled "Acknowled".

- (N) **Metadata and Scrubbing Electronic Contracts:** When preparing contracts on the computer, drafters often use revision marking mode to show edits from previous drafts of contracts. This innovation and others assist in the contract drafting process. E-mail and the ability to send draft contracts electronically to others have also greatly aided the contract drafting process. However, when sending contracts electronically, hidden electronic information embedded in the contract remains. This invisible electronic information is called metadata. For instance, if revision marking was used on a contract, the metadata of the prior revisions that appear deleted can be retrieved and viewed. The "comment" function can also be passed on through metadata, even though the comments have been deleted from the text.

If a draft contract is sensitive, counsel may want to consider cleaning the document with electronic scrubbing software before electronically forwarding the contract outside of MoDOT. This software will remove metadata from electronic drafts of contracts and prevent the disclosure of sensitive or confidential material.

- (O) **Contract Provisions Which Should Not be Approved Without Chief Counsel Authorization:**

1. Use of state road funds for:
  - A. Projects for roads not on the highway system.
  - B. Other purposes not related to the state highway system.
2. Construction or maintenance projects where:
  - A. MHTC will not have acquired all right of way (**R/W**) as of the date of the award;
  - B. Hazardous wastes or substances remain on the R/W;
  - C. Utilities in the way of construction will remain on the R/W as of the date of award;
  - D. Required federal, state or local permits or environmental approvals have not been obtained;
  - E. Necessary work from prior contracts, etc., which must be complete before this construction can begin, is not going to be complete by the notice to proceed date;
  - F. The project design (including any exemptions granted by FHWA) is not up to current, "state of the art" standards;
  - G. New Job Special Provisions regarding obstacles to or delays in the contractors free access to the job site exist; or
  - H. A bid bond or surety performance bond requirement, using the approved bond forms, is omitted or altered.
3. Assumption of duty to defend/indemnify without following MoDOT's assumption of liability policy. However, such clauses may be allowed in agreements between MHTC and the federal government or any of its administrative agencies if (1) MHTC receipt of federal funds is contingent on agreeing to such a clause and/or (2) inclusion of the clause in non-negotiable. The Business Unit/Division involved will properly document the file to include the above findings and forward it to the CCO.
4. Sale, lease and/or gift of airspace on a highway where any federal aid was received, which transfer is not concurred in by FHWA.
5. Retention of MoDOT retirees as consultants without following MoDOT personnel policies.
6. Contracts with cities/counties/etc that are ultra vires for such entities (i.e., contracts that encumber city/county funds for multiple years where there is no showing the city/county has budgeted such funds and has such funds available, or where a necessary ordinance of approval is not attached, etc.)

(P) **Agreements With Municipalities that Obligate the Municipality to Make Future Payments:** Of particular concern are agreements with municipalities (including cities, counties, transportation development districts, and transportation corporations and other political subdivisions as defined by law) that obligate future city councils or county commissions to spend money on projects. This concern often surfaces in agreements involving transportation corporations in which a municipality agrees to pay future interest on bonds for the transportation corporation. Under Article VI, Section 26(a) of the Missouri Constitution, municipalities may only spend such money that they currently have and are projected to have in the current taxable year. One city council cannot obligate a future city council to pay for debts that it contracted for without a vote of the city's residents. The current city council may obligate future councils to pay money if it obtains approval in a vote of the city's residents. However, in order to bind future councils, the ballot proposition has to be specifically designated as a reasonably identifiable project and debt limits have to be placed on the project. Otherwise, the proposition may be too indefinite to bind the city. If the municipality enters into an agreement that obligates the city to make future payments beyond the current budget and does not obtain approval through a popular vote, the agreement is unenforceable. This issue was raised in the case of *State Highway Commission v. City of St. Louis*, 575 SW2d 712 (Mo. App. 1978) and MHTC ultimately was required to refund \$17.9 million dollars to the City of St. Louis.

The risks associated with entering into such a contract with a city can be reduced in a number of ways: (1) the local government pays its full share up front to the local fund or State Road Fund with cash on hand; (2) the local government obtains voter approval of a ballot issue for a tax in a sufficient amount to secure the debt service of the principal and interest and the generated funds are dedicated to the payment of the debt and for no other purpose whatsoever; (3) the local government could issue its own bonds; (4) that in the event of a default, MoDOT and the local government agree that MoDOT may attached any federal monies designated for the local government administered by MoDOT and apply those funds to the local government's indebtedness; or (5) contractually require the local government to annually appropriate its contract obligations and to provide annual certification that current city revenues plus unexpended balances from prior years are sufficient to meet its contractual obligation to pay MHTC. Annual certification and appropriation by the local government must be monitored and enforced by MoDOT staff to be effective.



**(Q) Sales Tax Exemption Certificates and MHTC:** Another contract issue relating to local government entities is the issuance of sale tax exemption certificates.

Under Section 144.062 RSMo, the right to issue sales tax exemption certificates lies with cities, counties, school boards, and other political subdivisions, but not with the state or a state agency. As such, MHTC/MoDOT cannot issue a sales tax exemption certificate.

In MoDOT's experience, the only way such a certificate can be issued on an MHTC project is if the project is being done for the local entity and is being funded almost entirely (perhaps 90% or more) by the local entity. In order for such projects to obtain a sales tax exemption certificate, the Missouri Department of Revenue must issue a letter which recognizes and approves the right of the local entity to issue a sales tax exemption certificate for that project based upon the unusual and very exceptional circumstances of the project. It has been MoDOT's prior experience that if the project funding is based on the usual 25%-50% of the project costs, the Missouri Department of Revenue is not likely to issue the letter of recognition.

If the local entity is from another state, or if the project involves constructing a two-state bridge or similar project, then there may be additional sales tax exemptions involved with the project. However, that needs to be handled on a case-by-case basis.

If a project is planned where the issuance of a sales tax exemption is required, a clause should be placed in the contract between MHTC and the local entity which states that it is the obligation of the local entity to obtain the necessary approvals from the Missouri Department of Revenue.

In order to properly prepare necessary approvals, it is important that the State Design Engineer and CCO be contacted on the potential issue a number of months in advance.

- (R) **Record Retention:** An issue that often arises in relation to contracts and documents relating to contracts is how long to retain paper copies of the contracts. Presently, the MoDOT does not have a record retention policy that covers the entire department and each division largely retains its own record retention schedule. Some retention schedules allow for destruction of documents and other include provisions for microfilming or optical scanning of documents. The courts of Missouri have upheld the destruction of documents in accordance with a reasonable record retention schedule. It is possible that some documents are covered by a statutory retention schedule, but most are not and there is no general default provision in Missouri. On the federal level, there is a general default of 3 years after the last payment is made on a contract before a document can be disposed of as part of a record retention schedule.

With regard to contracts and contract documents, it is important to keep in mind *Hughes Development Co. vs. Omega Realty Co.*, 951 S.W.2d 615 (Mo. 1997). In *Hughes*, the Missouri Supreme Court looked at the confusing and contradictory statute of limitations period for lawsuits on contracts that require the payment of funds. Prior to *Hughes*, a five-year statute of limitations period was allowed for some types of agreements and ten-year statute of limitations period was allowed for others. In *Hughes*, the Supreme Court of Missouri held that the statute of limitations period for all contracts in which the agreement provided for the payment of money was ten years.

Therefore, in determining how long to retain contracts, in order to ensure that MHTC can fully defend (or prosecute) a breach of contract case, contracts providing for the payment of money and their supporting documents should be retained for at least 10 years in some format (such as paper, microfilm, or optical scan).